



International Crimes Evidence Project

ICEP Sri Lanka

ISLAND OF IMPUNITY?

Investigation into international crimes in
the final stages of the Sri Lankan civil war

February 2014

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TABLE OF CONTENTS

1 EXECUTIVE SUMMARY	i
ABBREVIATIONS AND ACRONYMS	x
MAPS OF SRI LANKA	xii
2 INTRODUCTION	1
A. International Crimes Evidence Project	1
B. Committee of Experts	1
C. Purpose of this report	2
D. Terms of reference	2
E. Methodology	3
3 BACKGROUND TO THE CONFLICT	5
4 PARTIES TO THE CONFLICT	7
5 LEGAL FRAMEWORK	8
A. The applicable rules of international law	8
B. Non-international armed conflicts	10
C. Contextual elements for crimes	12
6 ATTACKS IN AND AROUND CIVILIAN AREAS	20
A. Summary	20
B. Background to the No Fire Zones	21
C. International legal framework	27
D. Incidents	29
E. Legal analysis	76
7 RESTRICTION OF CIVILIAN MOVEMENT	87
A. Summary	87
B. Evidentiary material analysis	87
C. International legal framework	92
D. Legal analysis	93
E. Further investigation	97
8 DENIAL OF HUMANITARIAN ASSISTANCE	98
A. Summary	98
B. Evidentiary material analysis	99
C. International legal framework	107
D. Legal analysis	109
E. Further investigation	114
9 KILLINGS	115
A. Summary	115

B. International legal framework	115
C. Evidentiary material and legal analysis	116
D. Further investigation	137
10 USING, CONSCRIPTING OR ENLISTING CHILDREN	138
A. Summary	138
B. Evidentiary material analysis	139
C. International legal framework	144
D. Legal analysis	147
E. Further investigation	149
11 RAPE AND OTHER FORMS OF SEXUAL VIOLENCE	150
A. Summary	150
B. Evidentiary material analysis	150
C. International legal framework	157
D. Legal analysis	160
E. Further investigation	162
12 TORTURE AND OTHER FORMS OF CRUEL TREATMENT	163
A. Summary	163
B. Evidentiary material analysis	163
C. International legal framework	167
D. Legal analysis	169
E. Further investigation	173
13 ENFORCED DISAPPEARANCE OF PERSONS	175
A. Summary	175
B. Evidentiary material analysis	175
C. International legal framework	181
D. Legal analysis	183
E. Further investigation	185
14 POST CONFLICT VIOLATIONS	186
A. Summary	186
B. Evidentiary material analysis	186
C. Destruction of mass grave sites	190
D. Further investigation	190
15 ANNEX I BACKGROUND TO THE REPORT	191
A. Committee of Experts	191
B. Methodology	191
16 ANNEX II COMMAND AND CONTROL STRUCTURES	197
A. Sri Lankan Government Security Forces	197
B. The Liberation Tigers of Tamil Eelam	226
ACKNOWLEDGEMENTS	234

1 EXECUTIVE SUMMARY

Background

- 1.1 The International Crimes Evidence Project (**ICEP**), a project of the Public Interest Advocacy Centre (**PIAC**), was established to provide key decision-makers with independent and credible analysis of alleged violations of international law committed in the final stages of the Sri Lankan civil war (September 2008 to May 2009). ICEP's investigation is independent of all parties to the conflict, and has been guided solely by the evidentiary material uncovered with expert advice and assistance from ICEP's independent Committee of Experts.¹
- 1.2 This report is the product of ICEP's investigation, and gives a picture of grave violations of international law committed in the final stages of the Sri Lankan civil war. With no adequate form of accountability emerging from within Sri Lanka, this report also highlights the need for a full international investigation.
- 1.3 ICEP's investigation relies on two sources of information: open-source material and confidential information provided to ICEP by witnesses and others. Evidentiary material collected by ICEP includes: witness statements; documentary evidence such as correspondence, photographs and videos; and satellite imagery analysis. ICEP also relies on United Nations (**UN**), government, non-government organisation (**NGO**), and media reports – in particular, the Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka (UN Expert Panel Report) and the Sri Lankan Government's Lessons Learnt and Reconciliation Commission Report (**LLRC Report**).
- 1.4 ICEP has assessed the reliability and probative value of material to distil an account of key events in Sri Lanka during the investigation period. In addition to presenting new evidentiary material, the approach taken by ICEP is unique in that it has rigorously analysed the events under IHL, international human rights law and international criminal law. In respect of each event considered, ICEP's standard of proof is that there are 'reasonable grounds to suspect' that serious violations of international humanitarian law (**IHL**) and international human rights law took place. Where ICEP has determined that the reliability and probative value of evidentiary material are particularly strong, the report says that 'it is reasonable to conclude' that the event in question took place. The report also identifies priority areas for further investigation.

Key findings

- 1.5 This report presents an evidentiary platform for an international investigation into war crimes and crimes against humanity. Although violations were committed by both sides, the evidentiary material indicates that members of the Sri Lankan Security Forces (**SFs**) perpetrated the vast majority of alleged crimes during the investigation period.
- 1.6 It is reasonable to conclude that members of the SFs and the Liberation Tigers of Tamil Eelam (**LTTE**) are responsible for serious violations of international humanitarian law and

¹ The Committee of Experts comprises John Ralston (Chair); Professor Paola Gaeta; Professor William Schabas; Colonel (retired) Desmond Travers and Gordon Weiss. ICEP has also benefited from the input of advisors, all similarly respected for their expertise in international criminal justice.

international human rights law. Reasonable grounds exist to suspect that many of these violations amount to war crimes. These include:

- Violence to life and person (such as murder, cruel treatment and torture).
- Intentionally directing attacks against the civilian population (for example, through the indiscriminate use of artillery).
- Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions (for example, through the indiscriminate use of artillery).
- Intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance in accordance with the United Nations Charter (for example, through the indiscriminate use of artillery).
- Intentionally directing attacks against hospitals (for example, through the indiscriminate use of artillery).
- Rape and sexual violence.
- Taking of hostages.
- Use of human shields.
- Conscription of children into the LTTE.

1.7 There are also grounds to suspect that the alleged crimes include the following crimes against humanity:

- Murder.
- Extermination.
- Torture.
- Rape and other forms of sexual violence.
- Persecution.
- Enforced disappearance of persons.
- Other inhumane acts.

1.8 Certain alleged crimes committed during the final months of the war involved such flagrant and reckless disregard for the laws of war, which strongly suggests there was intent to commit those crimes. For example, with effective control of all land, sea, and air approaches, the disciplined, well-trained and well-armed Sri Lankan SFs conducted indiscriminate artillery bombardments of areas of known civilian concentrations, also striking hospitals and humanitarian sites.

1.9 This report illustrates violations perpetrated by both parties to the conflict and in particular, widespread torture, sexual violence and enforced disappearance, which continue in part today, perpetrated by the SFs on the civilian population. The Sri Lankan Government has not initiated an effective investigation or prosecution of such credible allegations. There are

also allegations of collusion and other acts by the Sri Lankan state, which inhibit accountability for wartime crimes and protect perpetrators.

- 1.10 This report describes command and control structures so well-established that criminal responsibility for certain crimes if proven at trial could lead to convictions of senior military commanders and Sri Lankan Government officials, as well as senior surviving members of the LTTE.
- 1.11 ICEP is in the process of collecting new evidentiary material. Early analysis suggests that the Sri Lankan Government may have sought systematically to exhume and destroy evidence of mass civilian deaths.

Perpetrators

- 1.12 ICEP has analysed the structure of the SFs and the LTTE (Annex II), and it has received some evidentiary material concerning perpetrators of specific crimes. Together this assists in identifying who may be responsible for the crimes allegedly committed. An independent international investigation would be the most effective mechanism for compiling a comprehensive list of persons for whom prosecution is, or may be, warranted.

Key issues covered in this report

Attacks in and around civilian areas (section 6)

- 1.13 Between January and May 2009, the Sri Lankan Army established three successive No Fire Zones (**NFZs**) in the north-east of Sri Lanka. The declaration of the NFZs marked a turning point in the SFs' military strategy: hundreds of thousands of Tamil civilians were displaced by the intensifying hostilities, and the conflict zone contracted sharply. The Army's 'guarantee' that the NFZs would be protected from attack encouraged civilians to concentrate in areas where the LTTE was already conducting operations, thereby substantially increasing the risk of heavy civilian casualties. The evidentiary material gathered by ICEP calls into question why the Sri Lankan Army selected these areas to be NFZs given their proximity to the LTTE's defensive lines and the existence of LTTE targets in those areas.
- 1.14 The large and dense civilian population in villages and internally displaced persons (**IDP**) camps within and in the vicinity of the NFZs would have been obvious to the SFs, even though the Government disputed estimates of their size. Notwithstanding its extensive surveillance of the Vanni, and the presence of the civilian population, the SFs used indirect fire weapons, such as artillery, mortars and multiple barrel rocket launchers (**MBRL**), in densely-populated areas. This is quite apart from the Army's repeated commitments not to use heavy weapons on the NFZs from 25 February 2009. Moreover, the engagement of the NFZs with indirect fire weapons, especially those with greater-than-usual dispersion capabilities such as MBRL, mortars and air-burst munitions, are indicative of a failure to program artillery fire control systems with the coordinates of these NFZ and therefore suggests an intention, or at least recklessness, regarding the actual target.
- 1.15 The Government and SFs have stated that any attacks were conducted on the basis of military imperatives. However, the attacks analysed in this report reveal an intensified

practice of indiscriminate artillery area bombardment. These attacks killed and wounded scores of civilians who were attempting to take shelter from the sustained shelling, or trying to perform basic activities like collecting food or accessing medical treatment. For example, a local NGO worker interviewed by ICEP described a shell attack on a line of people queuing to collect milk powder:

When I got there I could see that two artillery shells had fallen within 10 feet of the line. There were dead bodies everywhere. I remember seeing a pregnant woman lying on the ground with a fetus coming out of her. We registered approximately 78 people as dead on this occasion, including 38 children. I believed that more than 150 people were injured. Most of the dead and injured were women.²

- 1.16 The impact of the attacks on civilians suggests that the use of military force was manifestly disproportionate to any anticipated military advantage. Even if LTTE cadres were present in some villages, the SFs did not take adequate precautions to protect civilians from attack.
- 1.17 Some of these attacks, including, in particular, indiscriminate attacks on the villages of Karaiyamullivaikkal and Vellamullivaikkal, and the third NFZ generally, could be evidence of a direct attack on civilians and as such could amount to the war crime of attacking civilians. Such acts could also amount to the war crime of attacking a military objective that causes excessive incidental civilian losses.
- 1.18 Taking into account the SFs' ability to plan military operations, their capacity to execute plans with advanced technology, and statements made by the Sri Lankan Government and SFs that almost no errors occurred, there are reasonable grounds to suspect that the incidents and patterns of incidents considered in this report are the result of deliberate planning and policy decisions. As such, in addition to the commission of war crimes, the killing of persons, when committed as part of a widespread or systematic attack on a civilian population, pursuant to, or in furtherance of a State policy, amounts to the crime against humanity of murder. It may also amount to the crime against humanity of extermination, persecution or other inhumane acts.
- 1.19 It is reasonable to conclude that the LTTE are also responsible for serious violations of IHL (and also possibly international human rights law), which may amount to war crimes. The LTTE was obliged to protect civilians under their control from the effect of attacks and not to use civilians as human shields. LTTE members launched attacks from within the NFZs, at times close to the civilian population. Witness accounts state that the LTTE stopped wearing uniforms and mingled with the civilian population. Where the LTTE launched attacks from areas close to civilians or protected sites, or continued to fight in the conflict while dressed as civilians, LTTE members unnecessarily exposed the civilian population to danger and this could amount to the use of human shields and, thus, the war crime of cruel treatment.

Restriction of civilian movement (section 7)

- 1.20 In the final months of the conflict, the LTTE forcibly prevented civilians from leaving the conflict zone. Witnesses observed terrible scenes of civilians being shot as they tried to flee. For example, one witness stated:

² WS-1509, [125].

The LTTE opened up on them with [a] lot of AK-47s. People started falling while others ran with their baggage, some ran past [the compound]. Many were screaming. More than 6-7 were taken to the hospital with serious injuries who later died in the hospital. Five or six were dead on the spot. I know this because I saw the bodies on the ground and I went to the hospital and saw the dead in the hospital [...] In all, 12 were killed and more than fifty were wounded. This included men, women and children.³

- 1.21 Such conduct, if proven, is a gross violation of the LTTE's obligations to the population under its control, and substantially increased the risk of mass civilian deaths as a result of SFs' shelling. There are reasonable grounds to suspect that, by shooting civilians who were attempting to escape the conflict zone, LTTE members committed murder both as a war crime and crime against humanity, and may have also committed the war crime of cruel treatment and/or the crime against humanity of inhumane acts. In respect of one incident, where members of a humanitarian convoy were forcibly prevented from leaving the Vanni, there are reasonable grounds to suspect that the LTTE cadres and police committed the war crime of hostage-taking.

Denial of humanitarian assistance (section 8)

- 1.22 Reasonable grounds exist to suspect that as the conflict intensified, the Sri Lankan Government deliberately understated the number of civilians in the conflict zone and the need for food and basic medical supplies. As a result, the amount of food provided was grossly inadequate. ICEP has compelling evidentiary material suggesting that civilians starved to death.
- 1.23 During this time, in addition to the Sri Lankan Government's understatement of population figures, humanitarian convoys were restricted and impeded. Senior Government doctors highlighted the urgent need for additional drugs and medical supplies. In a letter obtained by ICEP, in mid February a senior Government official informed the Ministry of Health:

We were in total frustration when we had to re-amputate the limbs at higher levels in days after initial lifesaving amputations, just because of lack of IV penicillin and other antibiotics essential to prevent fatal sepsis.⁴

- 1.24 Humanitarian convoys eventually ceased due to the sustained shelling. Although the International Committee of the Red Cross (**ICRC**) continued to operate, it was given very limited access. Witness accounts also indicate that ICRC ships, which were trying to evacuate wounded civilians, were impeded by shelling that was directed either at or near them.
- 1.25 There are reasonable grounds to suspect that members of the Sri Lankan Government denied humanitarian assistance, in such a way as to amount to the war crime of cruel treatment and/or the crime against humanity of persecution or other inhumane acts. It should also be noted that attacks on persons, transports or objects lawfully using the distinctive ICRC emblem, such as ICRC personnel or vehicles, constitute war crimes.

³ WS-1403, [101].

⁴ Letter from [name and title omitted] to Secretary, Ministry of Health, 'Situation Report for the current week', dated 15 February 2009.

Killing (section 9)

- 1.26 By mid-May 2009, it became clear that the SFs had defeated the LTTE. As a result of this defeat, negotiations brokered by various Sri Lankan Government officials, international officials, and other neutral parties led to several senior LTTE leaders and members surrendering to the SFs, and other LTTE members being captured and held in SFs' custody. There are reasonable grounds to suspect that some of these surrendees and captured civilians were subsequently killed unlawfully by members of the SFs, thereby amounting to the war crime or crime against humanity of murder.
- 1.27 ICEP has documented five cases where civilians or persons *hors de combat* in SFs' custody were killed: the LTTE Political Wing leaders, Nadesan and Pulidevan; senior LTTE military commander, Colonel Ramesh; Tamil newsreader, Isaipriya; and the 12-year-old son of the LTTE's leader Prabhakaran, Balachandran.
- 1.28 ICEP's analysis reveals that senior Government officials, including the Sri Lankan President and Secretary to the Ministry of Defence, accepted the terms of surrender in respect of Nadesan and Pulidevan and guaranteed their safety. Moreover, multiple witnesses observed Nadesan and Pulidevan being personally taken into SFs' custody. Shortly after, another witness saw their dead bodies in Wadduvakal.
- 1.29 In respect of Colonel Ramesh's death, ICEP has relied on a series of photographs and videos of Colonel Ramesh in SFs' custody and of him being interrogated by members of the SFs. Photographs taken less than three hours later depict him dead in the same general location as the interrogation.
- 1.30 ICEP has relied primarily on a series of photographs, video footage and a witness account that locate the Tamil newsreader, Isaipriya, alive, unarmed and in SFs' custody on the same day as other photographs and footage show her lying dead on the ground, partially naked with blood on her face and left breast.
- 1.31 In the case of the 12 year old, Balachandaran, ICEP has relied on photographs and video footage that show Balachandaran in the custody of the SFs. The evidentiary material shows Balachandaran dead less than two hours after being taken into custody, having been killed by what appears to be five bullets shot at close range.

Using, conscripting and enlisting children (section 10)

- 1.32 At various stages of the conflict, UN representatives and bodies, as well as NGOs, reported a large number of cases of child recruitment by the LTTE. While some witnesses have attributed this to Colonel Karuna, the evidentiary material shows that after Colonel Karuna split from the LTTE in 2004, the LTTE continued to recruit people under the age of 18, and possibly even under the age of 15 despite making representations and commitments to the contrary. Colonel Karuna similarly continued to conscript and enlist children into the so-called Tamil Makkal Viduthalai Pulikal (**Karuna Group**). ICEP's report analyses an incident of forced recruitment at Valayanmadam Church in respect of which further investigation is required.

- 1.33 The age limit for enlisting or conscripting varies under the different sources of international law. Insofar as a non-state actor can be expected to comply with international human rights law, there are reasonable grounds to suspect the LTTE was in breach of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. However, further investigation is needed to determine whether members of the LTTE conscripted, enlisted or used children under the age of 15, in violation of customary international humanitarian law so as to constitute the war crime of enlistment or conscription of child soldiers.⁵

Rape and other forms of sexual violence (section 11)

- 1.34 The Sri Lankan Government has denied or ignored credible allegations of rape and sexual violence committed by SFs members in the final months of the conflict and the post-conflict period. Second-hand witness accounts obtained by ICEP are consistent with cases reported by Human Rights Watch (**HRW**) and the UN Expert Panel. These indicate that SFs members committed rape and sexual violence in the context of the Sri Lankan Army's screening process, in IDP camps and surrendee detention facilities, during interrogations and at Government hospitals. Such conduct could amount to war crimes and crimes against humanity.
- 1.35 It is likely that many cases have so far gone unreported due to the sensitivity and stigma associated with sexual and gender-based violence.

Torture and other forms of cruel treatment (section 12)

- 1.36 Throughout the conflict (as well as post-conflict), there have been allegations of torture and cruel treatment perpetrated by members of the SFs. There are reasonable grounds to suspect that suspected LTTE members, LTTE sympathisers and critics of the Sri Lankan Government were subjected to torture or cruel treatment by the SFs. One witness described his treatment as follows:

As soon as the bottle was in my mouth, I realised that it contained petrol and it was burning my mouth so I spat it out and it fell to the floor. [The soldier] was very angry and he screamed that if I did that again, he would make me drink the whole bottle... I was gagging and choking from the fuel and felt very sick. However, I did not spit the bottle out as I was fearful he would make me drink the petrol which I knew would kill me. I was made to stand there with the bottle in my mouth for about four hours.⁶

- 1.37 ICEP's evidentiary material points to the commission of war crimes during interrogations at IDP camps, screening sites and in Sri Lankan Police custody. Moreover, torture appears to have been a prevalent practice by the various branches of the SFs, at all levels of the SFs' hierarchy. Torture also may have been committed as a crime against humanity.
- 1.38 ICEP has analysed in detail the account of a civilian witness who reports being tortured while in the custody of the Sri Lankan Police's Terrorist Investigation Department (**TID**) in 2008. The witness reports being repeatedly beaten on the body and head, handcuffed and painfully suspended between two tables, deprived of sleep for up to 10 days, and forced to

⁵ See section C, International legal framework.
⁶ WS-1001, [391]–[392].

watch others being interrogated and tortured.⁷ There are reasonable grounds to suspect these acts constitute the war crime and crime against humanity of torture or cruel treatment.

Enforced disappearance of persons (section 13)

- 1.39 There have been numerous cases of enforced disappearances throughout the conflict in which the SFs, and paramilitary groups aligned to the Government, are implicated. Many of the people involved remain unaccounted for. In addition, there are specific allegations that LTTE members and civilians were targeted for enforced disappearances after surrendering to the SFs, at screening sites and IDP camps. The practice of enforced disappearance places the victim outside the protection of the law and often leads to other violations such as torture and other forms of cruel treatment, murder and extra-judicial executions.
- 1.40 ICEP has considered one case in particular, that of Father Francis Joseph who, according to multiple witnesses, surrendered to the SFs and has subsequently disappeared. In relation to this incident and others, there are reasonable grounds to suspect that these disappearances are a violation of international human rights law and IHL. If these allegations against members of the SFs and paramilitary groups are proven, they would constitute enforced disappearance as a crime against humanity. Such acts may also constitute the crime against humanity of persecution.

Post-conflict violations (section 14)

- 1.41 ICEP has received reports of post-conflict violations. These relate to the alleged perpetration by SFs members of rape and sexual violence, and torture and cruel treatment and also in relation to those who have disappeared and whose fate remains unknown.
- 1.42 A witness, who was detained by the Sri Lankan Police's Criminal Investigations Department (CID) as recently as April 2012, reports being subjected to torture, sexual violence and multiple rapes. On one occasion, the witness reports being physically assaulted by another officer while she was being raped. The witness also stated that while in CID detention she heard other men and women crying and screaming out in pain every day.
- 1.43 Increasingly, women and men are willing to come forward to discuss their experiences of sexual violence, and new cases continue to be reported to ICEP. Although ICEP's focus is on the final stages of the conflict, the reports of post-conflict violations highlight that when perpetrators are not held accountable for gross violations of human rights, this can foster a culture of impunity that enables such violations to continue.
- 1.44 As this report was nearing completion, ICEP obtained new witness testimony that members of the SFs in Sri Lanka had destroyed forensic evidence in the post-conflict period. The allegations are that human remains from mass burial sites in the conflict zone were exhumed and were covertly destroyed. This highlights the urgent need for an internationally-mandated investigation.

⁷ WS-1003, [59]–[76].

Conclusion

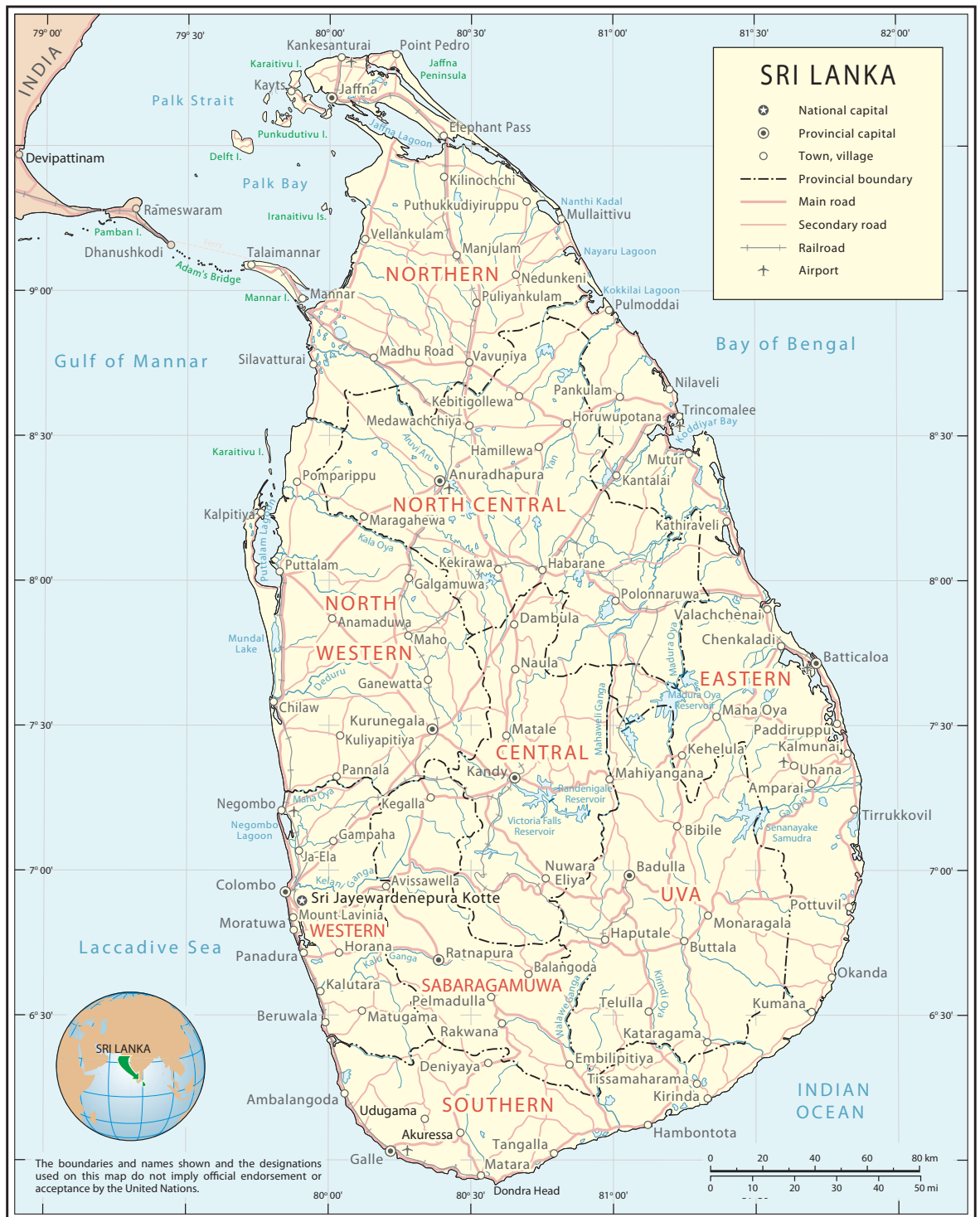
- 1.45 More than four years since the end of the Sri Lankan civil war, the Sri Lankan Government has failed to address serious and credible alleged violations of international law. The Sri Lankan Government has not complied with the UN Human Rights Council's March 2012 resolution on reconciliation and accountability. There is strong concern about the independence of Sri Lanka's judiciary and the inadequacy of other checks on executive and military power. Accordingly, there remains serious doubt that the Sri Lankan Government will establish a credible investigation into allegations of war crimes, crimes against humanity and breaches of international human rights law and IHL.
- 1.46 An independent and comprehensive international investigation is needed into these alleged violations of international law. Failure to do so can only damage the prospects of meaningful and enduring reconciliation in Sri Lanka. The absence of such an investigation will also ensure the ongoing impunity of those on both sides of the conflict who have committed violations of IHL and international human rights law, thereby emboldening those who may continue to abuse the civilian population.

ABBREVIATIONS AND ACRONYMS

AGA	Additional Government Agent
AP II	Additional Protocol II
APC	Armoured personnel carrier
Army Board Report	<i>The Full Report of the Army Board on Implementation of the Recommendations of the Lessons Learnt & Reconciliation Commission</i>
CAT	<i>UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>
CCD	Colombo Crime Division
CDF	Civil Defence Force
CDS	Chief of Defence Staff
CID	Criminal Investigations Department
CIHL Study	Study conducted by the International Committee of the Red Cross on customary International Humanitarian Law
Common Article 3	Article 3 common to the four <i>Geneva Conventions</i> of 1949
Convoy 11	UN 11th convoy to PTK
Crisis Group	International Crisis Group
CSZ	Civilian Safety Zone (No Fire Zone)
DMI	Directorate of Military Intelligence
EPDP	Eelam People's Democratic Party
GOC	General Officer Commanding
GoSL	Government of Sri Lanka
GPS	Global positioning systems
GTMS	Government Tamil Mixed School
Hostages Convention	International Convention against the Taking of Hostages
HRW	Human Rights Watch
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICEP	International Crimes Evidence Project
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally-displaced persons
IGP	Inspector-General of Police
IHL	International humanitarian law
IICI	Institute for International Criminal Investigations
INGO	International non government organisations
JOH	Joint Operations Headquarters
Karuna	Vinayagamoorthy Muralitharan (nom de guerre: Colonel Karuna Amman)
Karuna Group	Tamil Makkal Viduthalai Palikal
LLRC	Sri Lankan Government's Lessons Learnt and Reconciliation Commission
LLRC Report	Sri Lanka Government's Lessons Learnt and Reconciliation Commission Report
LTTE	Liberation Tigers of Tamil Eelam
LTTE Report	Report by the LTTE Peace Secretariat, <i>Children and Armed Conflict in the North Eastern Part of the Island of Sri Lanka</i>
MBRL	Multiple barrel rocket launchers

Ministry of Defence	Sri Lankan Ministry of Defence, Public Security and Law and Order
Mt	Metric Tons
NFZ	No Fire Zone
NGO	Non-government organisation
NIAC	Non-international armed conflict
OHCHR	Office of the High Commissioner for Human Rights
PGM	Precision Guided Munitions
PIAC	Public Interest Advocacy Centre
PTK	Puthukuddiyiruppu
RDHS	Regional Director of Health Services
RPGs	Rocket-propelled grenades
SFHQ	Security Forces Headquarters
SFs	Sri Lankan Government Security Forces
SIS	Sri Lankan Intelligence Service
SLA	Sri Lankan Army
SLAF	Sri Lankan Air Force
SLMM	Sri Lanka Monitoring Mission
STF	Special Task Force
Optional Protocol of CRC	<i>Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict</i>
TID	Terrorist Investigation Department
TRO	Tamils Rehabilitation Organisation
UAV	Unmanned aerial vehicles
UN	United Nations
UN Expert Panel Report	Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka
UN Internal Review Panel Report	Report of the internal review of the UN's actions during the final stages of the war in Sri Lanka and its aftermath
UNHCR	UN High Commissioner for Refugees
UNHRC	UN Human Rights Council
UNICEF	United Nations Children's Fund
UNITAR	United Nations Institute for Training and Research
UNR/HC	UN Office of the Resident/Humanitarian Coordinator
WFP	World Food Programme
Disappearances Working Group	Working Group on Enforced or Involuntary Disappearances
Working Group	Security Council Working Group on Children and Armed Conflict

MAPS OF SRI LANKA



Map of Sri Lanka's Northern Province



Based on UN map No. 4172 Rev. 3 (March 2008) and OCHA map of Sri Lanka's Northern Districts Administrative Map (2006).
The boundaries, names and the designations used on this map do not imply official endorsement or acceptance by the United Nations or Crisis Group.

Credit: Crisis Group

2 INTRODUCTION

A. International Crimes Evidence Project

- 2.1 The International Crimes Evidence Project (**ICEP**) is a project of the Public Interest Advocacy Centre (**PIAC**), an Australian-based law and policy organisation. PIAC is a non-profit organisation, independent of government and other interests. Its purpose is to pursue social justice and human rights. PIAC's primary sources of funding, and further information about its governance and operations, are available at www.piac.asn.au.
- 2.2 ICEP was established to conduct independent and impartial investigations into allegations of grave violations of international humanitarian law (**IHL**) and international human rights law. ICEP's mandate is to gather the best available evidentiary material of alleged violations of international law and provide that evidentiary material to relevant international and domestic institutions to assist those institutions in making informed and impartial decisions about the commission of, and accountability for, these alleged violations.
- 2.3 The focus of ICEP's current work is the final phases of the Sri Lankan civil war, with particular scrutiny on the period from September 2008 to May 2009, when serious and widespread violations of IHL and international human rights law are alleged to have been committed.

B. Committee of Experts

- 2.4 In June 2012, ICEP established a Committee of Experts to guide its investigation on Sri Lanka. The members of ICEP's Committee of Experts are the following:
- *John Ralston* (Chair), Executive Director of the Institute for International Criminal Investigations (**IICI**), former Chief of Investigations at the United Nations (**UN**) International Criminal Tribunal for the Former Yugoslavia (**ICTY**) and Chief Investigator at the UN Commission of Inquiry on Darfur.
 - *Professor Paola Gaeta*, Director of the Geneva Academy of International Humanitarian Law and Human Rights, Professor of International Criminal Law at the Law Faculty of the University of Geneva and Adjunct Professor of International Criminal Law at the Graduate Institute for International and Development Studies.
 - *Professor William Schabas*, Professor of International Law at Middlesex University in London, Professor of International Criminal Law and Human Rights at Leiden University, Emeritus Professor of Human Rights Law at the Irish Centre for Human Rights and member of the Sierra Leone Truth and Reconciliation Commission.
 - *Colonel (retired) Desmond Travers*, former Commandant of the Irish Defence Force's Military College, served numerous peacekeeping tours of duty mainly in the Middle East and The Balkans, Vice-President of IICI and member of the UN Fact-Finding Mission on the Gaza Conflict.
 - *Gordon Weiss*, former UN Spokesperson for Sri Lanka, Principal Senior Fellow at Griffith Asia Institute and author of *The Cage: The Fight for Sri Lanka and the Last Days of the Tamil Tigers*.

C. Purpose of this report

- 2.5 The original impetus for the establishment of ICEP's Committee of Experts and the preparation of this report was Resolution 19/2 of the UN Human Rights Council (**UNHRC**), passed at the nineteenth session of the UNHRC in March 2012. Resolution 19/2 requested that the Sri Lankan Government present a comprehensive action plan detailing the steps the Government has taken and will take to address, among other things, its alleged violations of IHL and international human rights law. In response, the Sri Lankan Government published a national plan of action in July 2012, seeking to implement Resolution 19/2.
- 2.6 In March 2013, at the twenty-second session of the UNHRC, Resolution 22/1 was passed, which gave further direction and focus to ICEP's work. Resolution 22/1 noted that the Sri Lankan Government's national plan of action and the report of the Sri Lankan Government's Lessons Learnt and Reconciliation Commission (**LLRC**) did not adequately 'address serious allegations of violations of international human rights law and international humanitarian law'. The UNHRC called on the Sri Lankan Government to conduct 'an independent and credible investigation into allegations of violations of international human rights and international humanitarian law'. Resolution 22/1 also asked the Office of the High Commissioner for Human Rights (**OHCHR**) to present a comprehensive report on Sri Lanka's implementation of the Resolution at the UNHRC's March 2014 meeting.
- 2.7 ICEP has compiled this report so that domestic and international decision-makers, whether in the context of the UN Human Rights Council (**UNHRC**) processes or otherwise, have further independent, credible and expertly-assessed information. This information should assist those decision-makers in making informed and impartial decisions about the commission of, and accountability for, alleged violations of international law in Sri Lanka during the final phase of the civil war.

D. Terms of reference

- 2.8 The terms of reference for ICEP concerning the preparation of this report are to:
- (a) analyse witness accounts and other information collected by ICEP relating to alleged serious violations of international humanitarian law and international human rights law committed in Sri Lanka in the period from September 2008 to May 2009. ICEP's analysis extends to information related to serious violations of international human rights law that occurred *after* May 2009 where these alleged violations appeared to form part of a continuing systematic pattern of criminal conduct that commenced before or during ICEP's investigation period; and
 - (b) produce an independent, impartial and credible report in relation to alleged serious violations of international humanitarian law and international human rights law committed in Sri Lanka in the period from September 2008 to May 2009.
- (i) **Standard of proof**
- 2.9 ICEP has adopted a standard of proof akin to those used by UN commissions of inquiry. When it has considered the individual elements of crimes, ICEP has used either the standard of reasonable grounds to suspect, or where the relevant evidentiary material allows a factual inference to be drawn with a greater level of certainty in respect of an

individual element of a crime, ICEP has used the balance of probabilities standard expressed as 'it is reasonable to conclude'.⁸ Accordingly, where ICEP draws an inference regarding the commission of a violation or crime, and this inference is drawn to the reasonable suspicion standard, this report adopts the wording that there are 'reasonable grounds to suspect' that a violation occurred or crime was committed.

E. Methodology

- 2.10 ICEP has collected and analysed information collected from a range of sources including witness accounts; photographs and videos; satellite imagery; confidential correspondence; UN and non-government organisation (**NGO**) reports; and other open-source material.
- 2.11 Witness statements (and other evidentiary material) 'collected by ICEP' refer to all evidentiary material in ICEP's possession. ICEP has considered that witness statements that were not taken directly by ICEP staff have been 'collected by ICEP' as they have been given to ICEP and entered into ICEP's database. Where ICEP has relied on witness statements (or other evidentiary material) that is new – that is, it has not been before other inquiries and in the case of witness statements, the statement has been taken by ICEP staff – the evidentiary material has been specifically identified as such. Unless specifically identified as new, or given directly to ICEP, or taken directly by ICEP, the reader should assume witness statements (and other evidentiary material) have been before other inquiries or have formed part of the public record.
- 2.12 In each section, ICEP has used unique codes for identifying witnesses. This allows the reader to know how many witnesses are relied upon in respect of each factual assertion. However, it also ensures that one witness' account cannot be traced across the report, thereby potentially revealing the witness' identity. In total, 31 witness statements have been relied on throughout this report – with almost half of those witness statements being new statements. To date, ICEP has taken or received close to 50 witness statements.
- 2.13 In relation to UN and NGO reports, ICEP has considered first and foremost the *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (UN Expert Panel Report)*, released in March 2011. This report is discussed in detail below. ICEP has also considered Sri Lanka's Lessons Learnt and Reconciliation Commission (**LLRC**) Report is significant as to date it has been the main domestic accountability response to the conduct of the conflict. ICEP also considered other major NGO reports and media reports published to date. The reports that were predominantly used by ICEP include: the Report of the internal review (**UN Internal Review Panel**) of the UN's actions during the final stages of the war in Sri Lanka and its aftermath, the OHCHR February 2013 report in response to UNHRC Resolution 19/2 of March 2012; Amnesty International, *Sri Lanka's Assault on Dissent*, 2013; Human Rights Watch, *We Will Teach You a Lesson – Sexual Violence against Tamils by Sri Lankan Security Forces*, 26 February 2013; International Crisis Group, *War Crimes in Sri Lanka*, Asia Report No. 191, 17 May 2010; and Human Rights Watch, *Complicit in Crime – State Collusion in Abductions and Child Recruitment by the Karuna Group*, January 2007.

⁸ For a discussion on different standards of proof used by international commissions of inquiry and international fact-finding missions, see: S. Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding Missions*, Geneva Academy of International Humanitarian Law and Human Rights, 2012, [5].

2.14 ICEP has undertaken a rigorous legal analysis of the evidentiary material before it. A significant amount of the existing information had not been fully examined and so has benefited from more in-depth factual and legal scrutiny. This, coupled with the new material obtained by ICEP, has been the foundation of the extensive analysis in this report. Together, the evidentiary material and the analysis highlight the likelihood that international crimes were committed in the period under consideration and the need for a formal investigation.

3 BACKGROUND TO THE CONFLICT

- 3.1 Since gaining independence from Britain in 1948, Sri Lanka has had a volatile social and political history dominated by conflict between the majority (predominantly Buddhist) Sinhalese population, and the minority (predominantly Hindu) Tamil population.
- 3.2 Since independence, Sri Lanka has effectively been governed as a majoritarian Sinhalese State.⁹ In 1956, the Government passed the *Sinhala Only Act*, which made Sinhalese the official language of Sri Lanka. Vehemently opposed by the Tamil population, the enactment of this legislation resulted in riots and the killing of hundreds of Tamils.¹⁰
- 3.3 In the 1970s, following numerous failed attempts by the Sri Lankan Government to reduce the impact of the *Sinhala Only Act*, several militant Tamil groups emerged, including the Liberation Tigers of Tamil Eelam (LTTE).¹¹ The LTTE sought the establishment of an independent Tamil State, Eelam, in the north of Sri Lanka.
- 3.4 During the 1970s, the LTTE carried out a number of guerrilla-style attacks,¹² which resulted in reprisal attacks by the Sinhalese against the Tamil population. The most violent of these reprisal attacks occurred in 1983, when the killing of 13 Government soldiers by the LTTE in the northern district of Jaffna resulted in large-scale violence and rioting, known as 'Black July'.¹³ Following the riots, hundreds of thousands of Tamils were internally displaced, while tens of thousands who could afford to, moved abroad.¹⁴ The Black July riots are widely considered the catalyst for converting Tamil militancy into civil war.¹⁵
- 3.5 From 1983, the LTTE set about eradicating rival Tamil groups, and soon dominated violent opposition to the Sri Lankan Government.¹⁶ The LTTE used guerrilla tactics, suicide bombings and assassinations, directed against a range of military, police, political and civilian targets, to achieve their goals.¹⁷ The LTTE targeted Sinhalese and those Tamils considered moderate or servants of the State. From the 1990s until May 2009 the LTTE controlled large parts of northern and eastern Sri Lanka, operating and projecting itself as a *de facto* State.¹⁸
- 3.6 On 22 February 2002, an interim ceasefire was mediated by the Norwegian Government, and Nordic countries sent military observers to oversee the peace process (Sri Lanka Monitoring Mission or **SLMM**).¹⁹ However, the peace did not last, with the SLMM recording

⁹ UN Expert Panel Report, [26].

¹⁰ See generally Gordon Weiss, *The Cage: The Fight for Sri Lanka and the Last Days of the Tamil Tigers* (Sydney: Picador, 2011) (hereafter '*The Cage*');³⁶; See generally the 'Sinhala Only Act', Encyclopedia Britannica, <http://www.britannica.com/EBchecked/topic/546059/Sinhala-Only-Bill>, 8 February 2013; See generally UN Expert Panel Report, 8.

¹¹ UN Expert Panel Report, [30].

¹² 'Tamil Tigers', Encyclopedia Britannica, <http://www.britannica.com/EBchecked/topic/581988/Tamil-Tigers>, 8 February 2013.

¹³ UN Expert Panel Report, [30]; G Weiss, *The Cage*, 51; 'Tamil Tigers', Encyclopedia Britannica, <http://www.britannica.com/EBchecked/topic/581988/Tamil-Tigers>, 8 February 2013.

¹⁴ *The Cage*, 54 - 55.

¹⁵ UN Expert Panel Report, [30]; *The Cage*, 55.

¹⁶ UN Expert Panel Report, [31]; 'Tamil Tigers', Encyclopedia Britannica, 11 February 2013, available at <http://www.britannica.com/EBchecked/topic/581988/Tamil-Tigers>.

¹⁷ See generally UN Expert Panel Report, [32]; 'Tamil Tigers', Encyclopedia Britannica, 11 February 2013, available at: <http://www.britannica.com/EBchecked/topic/581988/Tamil-Tigers>.

¹⁸ UN Expert Panel Report, [33]

¹⁹ UN Expert Panel Report, [41]; *The Cage*, 90.

thousands of infractions, the majority of them committed by the LTTE as they consolidated their position.²⁰ In April 2003, the LTTE unilaterally withdrew from peace talks.²¹

- 3.7 In December 2005, Mahinda Rajapaksa was elected President of Sri Lanka – a position he continues to hold.²² With his brother, Gotabaya Rajapaksa, as Secretary of Defence, the Rajapaksa regime began a large-scale training and recruitment drive and injected significant funds into the Sri Lankan Security Forces (**SFs**).²³ At the same time, the LTTE was also re-arming and recruiting.²⁴
- 3.8 In August 2006, the Sri Lankan Government launched a full-scale armed confrontation after the LTTE closed the sluice gates to the Mavil Oya reservoir, which provided irrigation water for farmers in the Government-controlled area of the Eastern Province.²⁵ By July 2007, the armed forces had reclaimed full control of the Eastern Province of Sri Lanka.²⁶
- 3.9 The SFs' victory in the Eastern Province, and subsequent victory in parts of the Northern Province, meant that by January 2008, the LTTE were only in control of parts of the north of Sri Lanka, including Kilinochchi, Mullaitivu, northern Vavuniya, north-western Mannar and small belts of the Jaffna peninsula.²⁷
- 3.10 By late 2008, the LTTE, together with hundreds of thousands of Tamil civilians, were encircled by the SFs in the north-east of the Vanni Region,²⁸ an area spanning approximately 15,000 square kilometres.²⁹ In January 2009, the Government captured and gained control over several significant and strategically important areas, including various major roads and an important LTTE base.³⁰ These victories marked a new stage in the armed conflict and the decline of the LTTE.³¹ On 19 May 2009, after almost 30 years of armed conflict, the Government declared victory over the LTTE.³² The conduct of the Sri Lankan Government and the LTTE in the final months of the civil war, from September 2008 to May 2009, is the focus of ICEP's investigation.

²⁰ UN Expert Panel Report, [41]; *The Cage*, 90.

²¹ *The Cage*, 90.

²² *The Cage*, 92.

²³ *The Cage*, 93.

²⁴ *The Cage*, 93-94.

²⁵ UN Expert Panel Report, [45]; and LLRC Report, [2.52].

²⁶ UN Expert Panel Report, [45].

²⁷ UN Expert Panel Report, [46].

²⁸ UN Expert Panel Report, [46].

²⁹ *The Cage*, 94-95.

³⁰ See generally, UN Expert Panel Report, [77].

³¹ UN Expert Panel Report, [77].

³² UN Expert Panel Report, [24].

4 PARTIES TO THE CONFLICT

- 4.1 The principal parties to the conflict were the Sri Lankan Government and the LTTE. The structure, organisation and capabilities of the parties are set out in detail in Annex II, and a brief summary has been included below. ICEP has drawn primarily on credible open-source information including, in particular, analysis conducted by military intelligence services and also witness accounts obtained by ICEP.
- 4.2 In addition to the SFs and LTTE, the Karuna Group, a politico-militant organisation, which played a role in supporting the SFs' military efforts during and post-conflict, is discussed later in the report in connection with specific incidents under investigation.

A. Sri Lankan Government Security Forces

- 4.3 At the time of the conflict, the structure of the SFs was as follows. The SFs comprised an Army, Air Force, Navy and the Police. The SFs were believed to be formally responsible for 249,000 personnel.³³ President Rajapaksa was the Commander-in-Chief of the SFs and chaired meetings of the National Security Council (**NSC**), which was tasked with formulating and executing defence policies.
- 4.4 The Joint Operations Headquarters (**JOH**), ostensibly under the command of the Chief of Defence Staff, had operational control of the SFs. However, the heads of the Army, Air Force and Navy exercised a high degree of autonomy in their deployments.
- 4.5 The SFs had well-established formal 'command and control' structures through which high-level policies were handed down from the NSC, and operational orders and directives were handed down by the respective heads of each branch of the SFs. Intelligence was collected and shared across these various branches, and actively involved senior Government officials.

B. Liberation Tigers of Tamil Eelam

- 4.6 The LTTE's armed forces comprised the Military Wing, Sea Tigers, Air Tigers and Black Tigers. At the start of 2008, the Sri Lankan Government estimated that the LTTE was responsible for 30,000 cadres,³⁴ although the LTTE's reserves were significantly diminished by January 2009.³⁵ Command of the LTTE was centralised in its Supreme Leader, Prabhakaran, who led the central governing committee. The current evidentiary material available indicates that the LTTE's Political Wing was subordinate to the Military Wing.
- 4.7 The LTTE had well-established formal 'command and control' structures, which remained intact until the final days of the conflict.³⁶

³³ 'Chapter Seven: Central and South Asia Caribbean and Latin America', 109 *The Military Balance* (2009) 329-362,356. ICEP notes that there is a discrepancy between the art's summary of 'Active' and 'Reserve' capabilities (totalling 249,000 personnel) and the sum of the figures provided for each armed service (239,500).

³⁴ Humanitarian Operation Factual Analysis, [44], [119].

³⁵ Sri Lankan Army PowerPoint presentation, 'Defence Briefing by Brigadier Udaya Perera, Director of Operations, Sri Lanka Army', January 2009,29.

³⁶ UN Expert Panel Report, [67].

5 LEGAL FRAMEWORK

A. The applicable rules of international law

- 5.1 When non-state actors resort to armed violence in the territory of a state, an important legal question arises as to whether this should be considered a matter of public order or a more serious situation amounting to a non-international armed conflict (**NIAC**). In the first case, international human rights law (both treaty and customary) applies and the question of public order does not justify, in any circumstances, the deprivation of certain rights (such as the right to life or the right not to be subjected to torture). In the second scenario, when recourse to armed violence amounts to an NIAC, IHL also applies alongside international human rights law (where certain rights still cannot be deprived; for example, the right not to be subjected to torture). When serious violations of IHL and grave violations of international human rights law occur, international criminal law will apply.
- 5.2 Sri Lanka is a party to the major international human rights law conventions, and so these apply and are discussed where relevant.³⁷ In addition to the Sri Lankan Government's obligations under various international human rights conventions to which it is a party, it is increasingly recognised that non-state actors, which exercise *de facto* control over a territory, must also respect the fundamental human rights of people in that territory.³⁸ As such, where ICEP has credible and reliable evidentiary material, this report also considers violations of international human rights law by the LTTE.
- 5.3 IHL binds all parties to an armed conflict. As the conflict in Sri Lanka was a NIAC, Article 3 common to the four *Geneva Conventions* of 1949 (known as common Article 3)³⁹ applies, both as treaty law⁴⁰ and as customary international law.⁴¹ Sri Lanka has not ratified Additional Protocol II (**AP II**). However, any rule in AP II which is considered customary international law, applies to the conflict. Many of the laws on international armed conflicts relating to the conduct of hostilities are considered to be customary international law for NIACs and are therefore applicable.⁴² The study conducted by the International Committee of the Red Cross on customary IHL (**CIHL Study**) will be used in this report as an important point of reference,⁴³ in addition to other sources including the jurisprudence of international courts and tribunals.
- 5.4 International criminal law is relevant as this report considers the possibility that international crimes were committed during the Sri Lankan conflict. The evidentiary material set out in this

³⁷ International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination and International Convention on the Elimination of All Forms of Discrimination against Women. Notably, Sri Lanka is also a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child and its Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict.

³⁸ UN Expert Panel Report, [188]; Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in Libya Arab Jamahiriya, UN Doc. A/HRC/17/44, 1 June 2011, [72].

³⁹ This Art sets out fundamental guarantees for the treatment of people taking no active part in hostilities.

⁴⁰ Sri Lanka has ratified the Geneva Conventions.

⁴¹ There is widespread agreement that common Article 3 has acquired customary status.

⁴² Jean-Marie Henckaerts & Louise Doswald-Beck with contributions by Carolin Al-vermann et al, Customary International Humanitarian Law, vol 1: Rules (Cambridge, UK: Cambridge University Press, 2005). The question then is raised whether the customary nature of the rules in AP II requires the conflict to possess the same legal requirements as AP II.

⁴³ Jean-Marie Henckaerts & Louise Doswald-Beck with contributions by Carolin Al-vermann et al, Customary International Humanitarian Law, vol 1: Rules (Cambridge, UK: Cambridge University Press, 2005).

report has been analysed primarily by reference to customary international law as well as the *Rome Statute of the International Criminal Court (ICC Statute)*, and the jurisprudence of the International Criminal Court (ICC) and other international criminal courts and tribunals where relevant.⁴⁴ Sri Lanka is not a party to the ICC Statute. However, Sri Lanka participated in the Rome Conference,⁴⁵ and although it abstained from the final vote, it did not at that time register any objection to the definitions of the crimes. During debates about the crimes, it expressed some hesitations but nothing to suggest it did not accept the general substance of the crimes.⁴⁶ Indeed, it argued for broader definitions than those in the Statute.⁴⁷ Among the points it raised, Sri Lanka wanted to make it clear that non-State groups could be found guilty of crimes against humanity as well as State bodies.⁴⁸

5.5 Therefore, although Sri Lanka is not a party to the ICC Statute, and although the Statute does not intend to codify customary international law,⁴⁹ this report uses the Statute as a primary basis of its analysis since ICEP considers that it provides a relatively comprehensive and useful articulation of international crimes.⁵⁰ Where the ICC Statute is generally considered by legal experts to differ from customary international law, these variances are identified.

5.6 As detailed in sections 6 to 14 of this report, the evidentiary material collected by ICEP indicates that there are reasonable grounds to suspect that the following crimes against humanity and war crimes under the ICC Statute were committed in Sri Lanka in the period from September 2008 to May 2009:

- Crime against humanity of murder (Article 7(1)(a)).
- Crime against humanity of extermination (Article 7(1)(b)).
- Crime against humanity of torture (Article 7(1)(f)).
- Crime against humanity of rape and other forms of sexual violence (Article 7(1)(g)).
- Crime against humanity of persecution (Article 7(1)(h)).
- Crime against humanity of enforced disappearance of persons (Article 7(1)(i)).

⁴⁴ Although Sri Lanka is not a party to the ICC Statute, and although the Statute does not intend to codify customary international law (see Art 10 of the ICC Statute), this report uses the Statute as the basis of its analysis since ICEP considers that it provides a relatively comprehensive and useful articulation of international crimes. See A Cassese, P Gaeta (et al), *Cassese's International Criminal Law*, Oxford University Press, 2013, 10 where the authors make clear that the ICC Statute is not a code of international criminal law, however the ICC Statute 'is the only international written instrument laying down international rules on both the 'general part' of ICL and a fairly comprehensive definition of crimes.' However, as the authors note, the 'ICC Statute embraces a set of rules only applicable by the ICC itself.

⁴⁵ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Done at Rome on 17 July 1998, U.N. Doc. A/CONF.183/10.

⁴⁶ Summary records of the plenary meetings and of the meetings of the Committee of the Whole of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Done at Rome on 17 July 1998, U.N. Doc. A/CONF.183/13, 123, 145, 153, 339.

⁴⁷ Ibid 176–7, 287–8, 339.

⁴⁸ 27th Meeting of the Committee of the Whole of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Done at Rome on 8 July 1998, U.N. Doc. A/CONF.183/C.1/SR.27 para. 74: 'it should also be made quite clear that the final words of paragraph 2 (a) under 'Crimes against humanity'...were also intended to cover the policy of non-governmental entities.'

⁴⁹ See Art 10 of the ICC Statute.

⁵⁰ A Cassese, P Gaeta (et al), *Cassese's International Criminal Law*, (Oxford University Press, 2013), 10 where the authors make clear that the ICC Statute is *not* a code of international criminal law, however the ICC Statute 'is the only international written instrument laying down international rules on both the 'general part' of ICL and a fairly comprehensive definition of crimes.' However, as the authors note, the 'ICC Statute embraces a set of rules only applicable by the ICC itself.

- Crime against humanity of other inhumane acts (Article 7(1)(k)).
- War crime of murder (Article 8(2)(c)(i)).
- War crime of cruel treatment (Article 8(2)(c)(i)).
- War crime of torture (Article 8(2)(c)(i)).
- War crime of execution without due process (Article 8(2)(c)(iv)).
- War crime of rape and other forms of sexual violence (Article 8(2)(c)(vi)).
- War crime of attacking civilians (Article 8(2)(e)(i)).
- War crime of attacking objects or persons using the distinctive emblems of the Geneva Conventions (Article 8(2)(e)(ii)).
- War crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission (Article 8(2)(e)(iii)).
- War crime of attacking protected objects including hospitals and religious buildings (Article 8(2)(e)(iv)).
- War crime of using, conscripting or enlisting children (Article 8(2)(e)(vii)).

5.7 This does not preclude the possibility that the same acts may constitute several or different crimes. For example, the acts constituting the war crime of using, conscripting or enlisting children may also constitute the war crime of cruel treatment. Similarly, the acts constituting the crime against humanity of persecution, could constitute genocidal acts if the additional requisite elements for this crime are found to be present through further investigation.

5.8 War crimes and crimes against humanity both consist of an underlying offence and contextual elements. While the contextual elements for these crimes differ, the underlying offence may be the same. For example, provided the different contextual elements are met, the crime of murder may constitute both a war crime and a crime against humanity. Where conduct may constitute either offence, this is stated in the report.

B. Non-international armed conflicts

(i) The definition of a non-international armed conflict

5.9 The characterisation of the armed conflict as international or non-international is relevant to determine the applicable rules of IHL and international criminal law in the matter of war crimes. Further to this, the different threshold requirements for the classification of an NIAC will affect which rules apply. Generally speaking, a low threshold of armed violence is required for common Article 3 to apply. At least the following elements must be present:

- the hostilities must be deemed an armed conflict (ie, distinct from riots or sporadic acts of violence);
- the armed conflict must not be of an international character;
- it must occur in the territory of a State party to the Conventions; and
- it must involve at least two parties.

- 5.10 Additional requirements are necessary for the rules contained in AP II to apply,⁵¹ including that one of the parties to the conflict be a State, and that the other party (the non-state actor) must be under responsible command, exercise some level of territorial control and have the capacity to comply with IHL.⁵²
- 5.11 A similar interpretation to the one in AP II has been given by the ICTY Appeals Chamber, which stated that for a NIAC to exist, there needs to be protracted armed violence and a minimum organisation of the parties.⁵³ In addition, the ICC Statute supports this interpretation, by distinguishing between two types of war crimes in NIACs: serious violations of common Article 3,⁵⁴ and other serious violations of IHL of NIACs, required to be committed 'in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups'.⁵⁵ While the ICC Statute seems to provide a lower threshold than the definition in AP II, for the purpose of this report, to ensure a comprehensive coverage of relevant war crimes, the standard required by AP II will be taken into account.⁵⁶
- 5.12 It is clear that the conflict in Sri Lanka between the State and the LTTE amounted to a NIAC and that it would be a NIAC within the scope of common Article 3⁵⁷ and AP II.⁵⁸

(ii) Non-international armed conflict in Sri Lanka

- 5.13 For war crimes, the characterisation of the armed conflict as international or non-international is relevant to determine the applicable rules of IHL and international criminal law. The conflict in Sri Lanka between the State and the LTTE would satisfy the requirements of a NIAC for the purposes of common Article 3⁵⁹ and AP II.⁶⁰

⁵¹ This conclusion is supported by a combined reading of common Article 3 and Art 1 of AP II. The latter says that it supplements common Article 3, and sets up additional requirements for the applicability of the provisions Art 1(2) of AP II also states that it does 'not apply to situations of internal disturbances and tensions'.
⁵² *Prosecutor v. Tadić*, Case No. IT-94-1 (ICTY Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), para. 70 and see Art 8(2)(f) of the ICC Statute of the International Criminal Court. 'Protracted' has been interpreted by the ICTY in a subsequent case as a minimum intensity of violence. See *Prosecutor v Ramush Haradinaj*, IT-04-84-T, Judgment (3 April 2008), [49], [60] (ICTY Trial Chamber).

⁵⁴ Art 8(2)(c) of the ICC Statute.
⁵⁵ Art 8(2)(f) of the ICC Statute.

⁵⁶ While the ICC Statute does appear to lower the AP II threshold for the purpose of war crimes, ICEP has adopted a stricter approach given Sri Lanka has not ratified AP II nor the ICC Statute. As such, the conflict will be analysed against the threshold required for the applicability for AP II.

⁵⁷ UN Expert Panel Report, [181]; comments made by the International Committee of the Red Cross, see for example 9 July 2009 address entitled, 'The Geneva Conventions Today' made by the Head of the ICRC Legal Division where he refers to the conflict in Sri Lanka as an NIAC; opinions of member states, for example, the United States in Department of State Report entitled 'Report to Congress on Incidents During the Recent Conflict in Sri Lanka', 2009 states at 6, '[i]n the context of a non-international armed conflict... such as the recently ended conflict in Sri Lanka...'.
⁵⁸ Although Sri Lanka is not a party to AP II, the definition of NIACs as per AP II may be relevant insofar as the rules of AP II are applied as customary rules. As demonstrated in Annex II, the LTTE certainly met the requisite level of organisation, command structure, and control over land enabling them to carry out sustained and concerted military operations as required by Art 1 of AP II.

⁵⁹ UN Expert Panel Report, [181]; comments made by the International Committee of the Red Cross, see for example 9 July 2009 address entitled, 'The Geneva Conventions Today' made by the Head of the ICRC Legal Division where he refers to the conflict in Sri Lanka as an NIAC; opinions of member states, for example, the United States in Department of State Report entitled 'Report to Congress on Incidents During the Recent Conflict in Sri Lanka', 2009 states at 6, '[i]n the context of a non-international armed conflict... such as the recently ended conflict in Sri Lanka...'.
⁶⁰ Although Sri Lanka is not a party to AP II, the definition of NIACs as per AP II may be relevant insofar as the rules of AP II are applied as customary rules. As demonstrated in Annex II, the LTTE certainly met the requisite level of organisation, command structure, and control over land enabling them to carry out sustained and concerted military operations as required by Art 1 of AP II.

- 5.14 In relation to the geographical scope of the application of IHL, IHL applies to the whole territory under the control of a party, 'whether or not actual combat takes place there'.⁶¹ Accordingly, IHL applied to the whole territory of Sri Lanka even though combat operations during the investigation period occurred in the north of the country.
- 5.15 The conflict in Sri Lanka is generally considered to have commenced with the Black July riots in July 1983 (see section 3). Once the threshold for a NIAC is met, even if the fighting goes below the level of that required threshold, the laws of armed conflict still apply. According to ICTY case law, IHL 'extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.'⁶²
- 5.16 Taking into account the totality of events and the history of the conflict, this report considers the conflict as a 27-year armed conflict that ended on or around 19 May 2009. While cease-fire agreements were entered into at various times, none lasted for any substantial period of time and the violence continued.⁶³ By 19 May 2009, most of the LTTE political and military leadership had been killed, and on this day, the Sri Lankan Government declared final victory. While the SFs continued to engage in limited operations, which it characterised as 'mop-up' operations,⁶⁴ it became unlikely that hostilities would resume. As such, for the purpose of this report, on or around 19 May 2009, IHL rules on the conduct of hostilities and the majority of rules on the protection of the victims of the armed conflict ceased to apply to Sri Lanka.⁶⁵

C. Contextual elements for crimes

(i) War crimes

- 5.17 War crimes are serious violations of IHL committed in the context of and associated with an armed conflict. It has generally been accepted that: a) war crimes must constitute a breach of an IHL rule; b) the rule breached must be customary law or of applicable treaty law; c) the violation must be serious; and d) the violation must entail individual criminal responsibility of the person breaching the rule.⁶⁶

Contextual elements for war crimes in Sri Lanka

- 5.18 For a criminal act to be considered a war crime, it must be committed in the context of an armed conflict and have a nexus with this armed conflict. The conflict in Sri Lanka was a

⁶¹ *Prosecutor v Tadić (Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995), [70].

⁶² Ibid. This point was upheld in the case of *Prosecutor v Haradinaj (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-04-84-T, 2008) when the ICTY stated, [100] that, 'since according to the Tadić test an internal armed conflict continues until a peaceful settlement is achieved, and since there is no evidence of such a settlement during the indictment period, there is no need for the Trial Chamber to explore the oscillating intensity of the armed conflict in the remainder of the indictment period'.

⁶³ UN Expert Panel Report, [40]–[42].

⁶⁴ 'Sri Lankan Army Claims Victory over LTTE', *The Economic Times*, 18 May 2009, available at http://arts.economictimes.indiatimes.com/2009-05-18/news/28488189_1_ltte-cadres-selvarasa-pathmanathan-lankan-army [accessed on 10 December 2013]; 'Sri Lanka Declares End to War with Tamil Tigers', *The Guardian*, 19 May 2009, available at: <http://www.theguardian.com/world/2009/may/18/tamil-tigers-killed-sri-lanka> [accessed on 10 December 2013].

⁶⁵ Some IHL provisions apply after the cessation of hostilities. Examples include those that relate to people deprived of their liberty during the armed conflict as well as those provisions relating to dissemination and implementation of IHL.

⁶⁶ *Prosecutor v Tadić (Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995), [94].

NIAC under all accepted definitions of NIACs, therefore all war crimes considered to be crimes in any NIAC will be considered.

- 5.19 When considering the nexus between the crime and the conflict, it is useful to consider the identities of the perpetrator(s) and victim(s); generally the victim must be a member of the opposing party (either a fighter or a civilian). It is also useful to consider whether the act pursues the aims of the party to the conflict, or somehow serves or is in unison with the ultimate goal of the military campaign.⁶⁷ This nexus requirement will necessarily be considered on a case-by-case basis for each alleged war crime throughout the report.
- 5.20 The duration of the conflict and the consequent applicability of IHL are relevant in order to establish a key contextual element of war crimes – that a rule of IHL was breached. For the purpose of this report, the conflict will be considered to have ended on or about 19 May 2009. As such, any unlawful acts occurring after this are more likely to be considered as crimes other than war crimes.

(ii) Crimes against humanity

- 5.21 Crimes against humanity are crimes that because of their scale or systematic nature offend the conscience of humankind. They do not require any connection, or nexus, with an armed conflict. The definition of ‘crimes against humanity’ under customary international law and the ICC Statute requires that the offence is part of a widespread or systematic attack directed against the civilian population. In addition, according to Article 7(2)(a) of the ICC Statute:

[a]ttack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack... [emphasis added]

- 5.22 As such, the wording ‘State or organizational policy’ in the ICC Statute requires proof of an element of planning or direction, even if not a discriminatory policy or an official state one. Therefore, this policy requirement means that if the attack is widespread, the acts still need to be related; and if the attack is systematic, some element of scale will need to be demonstrated.
- 5.23 For crimes against humanity under the ICC Statute, there is also a requirement that the accused has knowledge of the overall attack against the civilian population although the accused need not necessarily be responsible for it. Article 7 goes on to enumerate the acts that could occur in the context of crimes against humanity and the relevant conditions.

Contextual elements for crimes against humanity in Sri Lanka

- 5.24 This sub-section sets out the contextual elements for crimes against humanity and an overview of whether there are reasonable grounds to suspect these elements were met in the period covered by ICEP’s investigation. In the sections that follow in this report, the

⁶⁷ See *Prosecutor v Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No ICTY-96-23-T, 22 February 2001) [402]; *Nyiramasuhuko* (International Criminal Tribunal for Rwanda, Trial Chamber), [6153]–[6154]; A Cassese, P Gaeta (et al), *Cassese’s International Criminal Law*, (Oxford University Press, 2013), 78.

analyses of various crimes against humanity will only consider the relevant underlying offence, and reference will be made back to this section for the contextual elements.

I. Sri Lankan Government Security Forces

5.25 The UN Expert Panel found that there were ‘credible allegations’ pointing to a widespread or systematic attack against the civilian population of the Vanni before, during and after the final stages of the war,⁶⁸ pursuant to a Sri Lankan Government policy.⁶⁹ The evidentiary material relied on in this report is consistent with this conclusion.

‘Attack’

5.26 An ‘attack’ according to the ICC Statute, means ‘a course of conduct involving the multiple commission of acts’.⁷⁰ Such acts may be constituted by courses of conduct, which are referred to in Article 7(1) of the ICC Statute. There are reasonable grounds to suspect that the attack was constituted by the serious mistreatment of the civilian population in the final months of the conflict, particularly in the Vanni region. The attack was arguably constituted by the alleged serious mistreatment of the civilian population, particularly in the Vanni, in the final months of the conflict, which in some cases amounted to murder,⁷¹ torture,⁷² rape and sexual violence,⁷³ enforced disappearances,⁷⁴ other inhumane acts,⁷⁵ and possibly also persecution.⁷⁶

‘Directed against any civilian population’

5.27 The evidentiary material suggests that the civilian population was the primary, rather than an incidental, object of the attack,⁷⁷ even if the Sri Lankan Government and SFs had the ultimate objective of destroying the LTTE.⁷⁸ This conclusion is based on the means and methods of warfare used, the status and number of civilian victims, the discriminatory nature of the attack, the alleged consistent and sustained breaches by the Sri Lankan Government and SFs of the laws of war,⁷⁹ and the devastating impact that such attacks had on the civilian population.⁸⁰ Even though the Sri Lankan Government and SFs had the ultimate objective of destroying the LTTE, the evidentiary material suggests that the civilian population was the primary, rather than an incidental, object of the attack.⁸¹

5.28 Moreover, while some of the alleged mistreatment (eg, torture) was directed at the LTTE, a significant proportion was directed at the civilian population. During the final phase of the hostilities, there are reasonable grounds to suspect that the Sri Lankan Government and SFs persistently refused to allow adequate food and medical supplies into the Vanni despite

⁶⁸ UN Expert Panel Report, [251].

⁶⁹ UN Expert Panel Report, [251], footnote 127.

⁷⁰ Art 7(2)(a) of the ICC Statute.

⁷¹ Report, section 6 on attacks in and around civilian zones and 10 on Murder of people *hors de combat*.

⁷² Report, section 12 ‘Torture and Other Forms of Cruel Treatment’.

⁷³ Report, section 11 ‘Rape and Other Forms of Sexual Violence’.

⁷⁴ Report, section 13 ‘Enforced Disappearances’.

⁷⁵ See for instance Report, section 8 ‘Denial of Humanitarian Assistance’ and section 14 ‘Post Conflict Violations’.

⁷⁶ Report, section 8 ‘Denial of Humanitarian Assistance’.

⁷⁷ *Prosecutor v Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No ICTY-96-23-A, 12 June 2002), [92].

⁷⁸ *Fofana and Kondewa (CDF case)* (SCSL-04-14-A), Appeals Chamber, 28 May 2008, [299]–[300].

⁷⁹ See, for example, the lack of precautionary measures taken in the SF’s operations in section 15.

⁸⁰ For a list of relevant factors in assessing whether or not a civilian population was the primary object of the attack, see *Prosecutor v Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No ICTY-96-23-A, 12 June 2002), [91].

⁸¹ *Ibid* [92].

being aware of the devastating effect it would have on civilians, which could have amounted to inhumane acts or persecution, or both.⁸² Evidentiary material provided to ICEP indicates that, civilians were tortured⁸³ and subjected to rape and sexual violence⁸⁴ during interrogations, screenings and at IDP camps.

‘Widespread or systematic’

- 5.29 Compelling evidentiary material suggests that the attack was both widespread *and* systematic (ie, not merely widespread or systematic although it need not be both).
- 5.30 The widespread nature of the attack is evident from the geographical scale of the attack as well as the large number of victims. The violence and mistreatment comprising the ‘attack’ took place in a range of places across the Vanni and Government-controlled areas. Military action in areas such as Suthanthirapuram, PTK, Putumattalan, Ampalavanpokkanai, Valayanmadam and Mullivaikkal led to a vast number of civilian deaths.⁸⁵ At the same time, the Sri Lankan Government and SFs severely restricted food and medical supplies.⁸⁶ Further, evidentiary material referenced in this report shows there are reasonable grounds to suspect that disappearances, torture, rape and other forms of sexual violence against civilians occurred in police stations, IDP camps and rehabilitation and detention facilities in Sri Lanka, as well as against suspected LTTE members across Sri Lanka.⁸⁷
- 5.31 The systematic nature of the attack is apparent from the organised nature of the incidents discussed in this report and the improbability that they could have occurred randomly. In each of the shelling incidents discussed, there are regular patterns of alleged crimes, all of which involved substantial public resources. There are also allegations that the SFs and the Sri Lankan Government regularly understated civilian population figures, and restricted food and medical supplies. In addition, there is evidentiary material suggesting that civilians suspected of being LTTE members or sympathisers were tortured and may have been subjected to rape and sexual violence by people from various units within the SFs.

Policy element

- 5.32 The ICC Statute requires that there be a ‘state or organisational policy’ to commit such an attack.⁸⁸ However, the ICTY and the ICTR have asserted a policy element is not required under their respective statutes nor customary international law.⁸⁹
- 5.33 The term ‘organisation’ requires that the organisation be ‘a group [that] has the capability to perform acts which infringe on basic human values’;⁹⁰ or a group that has the ‘capability to commit a widespread or systematic attack against a civilian population’.⁹¹

⁸² UN Expert Panel Report, [128], [176], [209]. See also Report, section 8 ‘Denial of Humanitarian Assistance’.

⁸³ UN Expert Panel Report, [163]. See also Report, section 12 ‘Torture and Other Forms of Cruel Treatment’.

⁸⁴ UN Expert Panel Report, [148], [153]. See also Report, section 11 ‘Rape and Other Forms of Sexual Violence’.

⁸⁵ Report, section 6 ‘Attacks in and around Civilian Areas’.

⁸⁶ An exhibit to a witness statement, [205]. (Report, section 13 ‘Denial of Humanitarian Assistance’)

⁸⁷ Report, sections 12 and 11 ‘Torture and Other Forms of Cruel Treatment’ section and ‘Rape and Other Forms of Sexual Violence’. Report, section 13 on enforced disappearances.

⁸⁸ Art 7(2)(a), ICC Statute. As noted below, it is not required that an individual perpetrator have knowledge of such a policy (see *Kordić* (International Criminal Tribunal for the Former Yugoslavia, Appeal), [94] and *Katanga*, Decision on the Confirmation of the Charges, 30 September 2008, [401]).

⁸⁹ *Prosecutor v Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No ICTY-96-23-A, 12 June 2002), [98], [101] and *Nahimana* (International Criminal Tribunal for Rwanda, Appeal), [922].

⁹⁰ Kenya Authorisation, (Pre-Trial Chamber II) 31 March 2010 [90].

- 5.34 A 'policy to commit such an attack' requires that the State or organisation 'actively promote or encourage such an attack against a civilian population'.⁹² This will be satisfied if the attack is 'planned, directed or organised', as opposed to 'spontaneous or [consisting of] isolated acts'.⁹³ The policy need not be explicitly defined⁹⁴ or formalised⁹⁵ but must involve public or private resources.⁹⁶ A policy may 'in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack'.⁹⁷
- 5.35 The evidentiary material collected supports a reasonable suspicion that the attacks by the Sri Lankan Government and the SFs were perpetrated pursuant to a State policy to commit such an attack. In particular, it suggests that the military attacks were undertaken under the authority of the highest military and civilian command. The SFs were a sophisticated, well-structured military force under the ultimate command of the Commander-in-Chief (the President).⁹⁸ Further, the Army directly reported to the Secretary of Defence and there is some information to suggest that the Secretary of Defence sometimes conveyed orders directly to field commanders.⁹⁹
- 5.36 There are also suggestions that the Sri Lankan Government attempted to conceal the effect of its alleged attacks against the civilian population, thereby indicating its awareness of the criminal nature of its conduct. For example, the Sri Lankan Government prevented international observers from monitoring the conflict. On 8 September 2008, the Government announced that it could no longer ensure the safety of humanitarian workers in the Vanni and requested international staff of the UN and other NGOs leave the area.¹⁰⁰ This was despite the fact that the SFs offensive was the biggest threat to these workers.¹⁰¹ At the conclusion of the conflict, the Sri Lankan Government did not permit international oversight of initial screenings¹⁰² or LTTE detention and rehabilitation centres,¹⁰³ and severely restricted the role of international organisations at IDP camps.¹⁰⁴ Allegations of rape and torture have been dismissed despite evidentiary material suggesting that it was perpetrated by people at a range of levels within the SFs.¹⁰⁵

II. Liberation Tigers of Tamil Eelam

- 5.37 The UN Expert Panel found there were 'credible allegations' pointing to a widespread or systematic attack on the civilian population of the Vanni by the LTTE during the final stages

⁹¹ *Katanga*, Decision on the Confirmation of the Charges, 30 September 2008, [396]; *Bemba Gombo (Confirmation)* (ICC, Pre-Trial Chamber II), [94].

⁹² ICC Elements of Crimes, Art 7, Introduction, [3].

⁹³ *Katanga*, Decision on the Confirmation of the Charges, 30 September 2008, [396]; *Bemba Gombo (Confirmation)* (ICC, Pre-Trial Chamber II), [81].

⁹⁴ *Katanga*, Decision on the Confirmation of the Charges, 30 September 2008, [396]; *Ruto Confirmation (Decision)* (International Criminal Court), [210].

⁹⁵ *Bemba Gombo (Confirmation)*, (ICC, Pre-Trial Chamber II) [81]; *Kenya (Authorisation)*, (ICC, Pre-Trial Chamber II) [85] and *Tadic (Judgment)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II) 7 May 1997, [653].

⁹⁶ *Katanga*, Decision on the Confirmation of the Charges, 30 September 2008, [396].

⁹⁷ Elements of Crimes, art 7, Introduction, footnote 6 and *Kenya (Authorisation)*, (ICC, Pre-Trial Chamber II) [83].

⁹⁸ Constitution of the Democratic Socialist Republic of Sri Lanka 1978; UN Expert Panel Report, [35].

⁹⁹ CRISIS GROUP Report, 10; See Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary) No. 1423/4, 13 December 2005.

¹⁰⁰ See UN Expert Panel Report, [74].

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, 42, LLRC Report, 103, [4.217]. (Report, sections 11 and 12).

¹⁰³ UN Expert Panel Report, 46 [164]. (Report, sections 11 and 12).

¹⁰⁴ UN Expert Panel Report, 44 [156]. (Report, sections 11 and 12).

¹⁰⁵ Report sections 11 and 12.

of the war.¹⁰⁶ The UN's findings were made on the basis that there was a 'consistent and widespread practice of holding civilians against their will and killing some of those who tried to leave'.¹⁰⁷

- 5.38 Evidentiary material gathered by ICEP to date is consistent with these findings, and suggests that there are reasonable grounds to suspect that crimes were committed by the LTTE. However, further investigation is needed to determine whether or not such acts were sufficiently widespread or systematic to constitute crimes against humanity, and whether the policy element is satisfied.

'Attack'

- 5.39 The available evidentiary material suggests that the LTTE undertook a number of steps to prevent civilians in the Vanni from leaving, often through violence or coercion. The evidentiary material also suggests that the LTTE prevented civilians from fleeing the conflict, and that LTTE personnel sometimes shot civilians who attempted to leave.¹⁰⁸ There are reasonable grounds to suspect that such act constituted murder or other inhumane acts and, as such, a type of mistreatment constituting an 'attack'.¹⁰⁹ The evidentiary material further indicates circumstances where Tamil civilians were used as hostages or human shields.¹¹⁰

'Directed against any civilian population'

- 5.40 ICEP's evidentiary material suggests that the above acts were directed predominantly against civilians.
- 5.41 First, some witnesses have asserted that the victims of the above attack were selected for political reasons (namely, for their ability to be used as leverage for the LTTE's own political aims). The UN Expert Panel Report found that one such reason was to provide a buffer against the SFs offensive.¹¹¹ While further investigation is required to substantiate this allegation, one witness suggested that the LTTE wanted to keep civilians in the Vanni because it was thought that the international community would step in to prevent the Sri Lankan Government and SFs advancing on the civilians (and thus the LTTE).¹¹²
- 5.42 Secondly, information collected by ICEP suggests that this 'course of conduct involving the multiple commission of acts' such as murder and other inhumane acts was not directed against a limited and randomly selected number of individuals but were crimes 'collective' in nature. ICEP has not been able to determine precisely how many crimes occurred and further investigation is required to determine the precise scope of the attack. Nonetheless, even if only relatively few actual victims were subject to such an attack, the attack may still be directed at the population as a whole. In particular, witness accounts suggest the actions

¹⁰⁶ UN Expert Panel Report, [252].

¹⁰⁷ Ibid, [252].

¹⁰⁸ Report, section 7.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ UN Expert Panel Report, [70]. (Report, section 7).

¹¹² Witness statement, [29]. (Report, section 7).

of shooting civilians attempting to leave the conflict area was intended to instil in the general population the fear that the same would happen to them if they attempted to leave.¹¹³

'Widespread or systematic'

- 5.43 Information collected by ICEP suggests that the attack may have been widespread or systematic, but further investigation is required.
- 5.44 Information collected by ICEP suggests a range of acts performed by the LTTE may reach the 'widespread' threshold. The LTTE allegedly shot civilians who attempted to leave the conflict area;¹¹⁴ and used Tamil civilians as human shields.¹¹⁵ However, ICEP has not been able to ascertain the precise extent to which such actions occurred and therefore whether this threshold has been reached.
- 5.45 Information collected by ICEP suggests that such an attack may have been 'systematic' on the basis that it was arguably organised as opposed to being a series of random occurrences. Information collected by ICEP indicates that the incidents of civilians being shot at appeared to have common features: the perpetrators were LTTE cadres or people acting on their instruction; civilians were attempting to escape; and the fire was clearly directed at preventing them from leaving pursuant to an LTTE policy (discussed further below).¹¹⁶

Policy element

- 5.46 Further investigation is required in order to assess whether or not the attack was committed pursuant to an 'organisational policy'.
- 5.47 First, information collected by ICEP suggests that the LTTE are likely to have constituted an 'organisation' for the purpose of the ICC policy element. The LTTE were one of the most advanced insurgent movements in the world, possessing an army, a special task force (the 'black tigers'), a navy, an air-force, and a political wing.¹¹⁷ Even though the size of the LTTE was reduced in the closing months of the war, the evidentiary material suggests that their basic command structure remained intact.¹¹⁸ Further, the LTTE accessed weapons and military equipment throughout the conflict via an extensive foreign international network.¹¹⁹ It is therefore reasonable to conclude that they were an 'organisation'.
- 5.48 Secondly, evidentiary material collected by ICEP suggests that there may have been a policy to commit the relevant attack. There is compelling information that there was a policy to prevent civilians from leaving the Vanni.¹²⁰ Whether as part of the LTTE pass system or otherwise, evidentiary material suggests that civilians were forced to stay in the conflict zone, which put civilians' lives in grave danger. The consistency with which this policy was

¹¹³ See, for example, one incident where it was alleged that LTTE cadres fired shots into a group of around 2,000 men, women and children to prevent them from escaping in Udayaarkaddu, wounding 12 people and killing one: witness statement, [63]. (Report, section 7).

¹¹⁴ Report, section 7.

¹¹⁵ Ibid.

¹¹⁶ See, for example, the incident in March 2009, when a group attempting to enter the Nathikadal Lagoon was shot by a group of LTTE cadres, killing 12 people and wounding more than 50 people: WS-701, [101]. (Report, section 14). Report, Annex II.

¹¹⁷ UN Expert Panel Report, [67]. (Report, Annex II).

¹¹⁸ 'Liberation Tigers of Tamil Eelam (LTTE)', *Jane's World Insurgency and Terrorism*, 6 June 2012, 11.

¹¹⁹ WS-702, [30].

applied and the consequences that followed from it suggests that there may have been a policy to commit an attack that comprised murder and other inhumane acts.

- 5.49 It is also arguable that there was a policy to shoot civilians trying to flee. The UN Expert Panel found that in the final months of the conflict, 'the LTTE instituted a policy of shooting civilians who attempted to escape the conflict zone.'¹²¹ While some witnesses have provided counter information to ICEP, given that the LTTE command structure remained intact throughout the conflict, if such acts of shooting civilians who were fleeing were widespread or systematic, there are reasonable grounds to suspect that such actions were pursuant to LTTE policy.

¹²¹

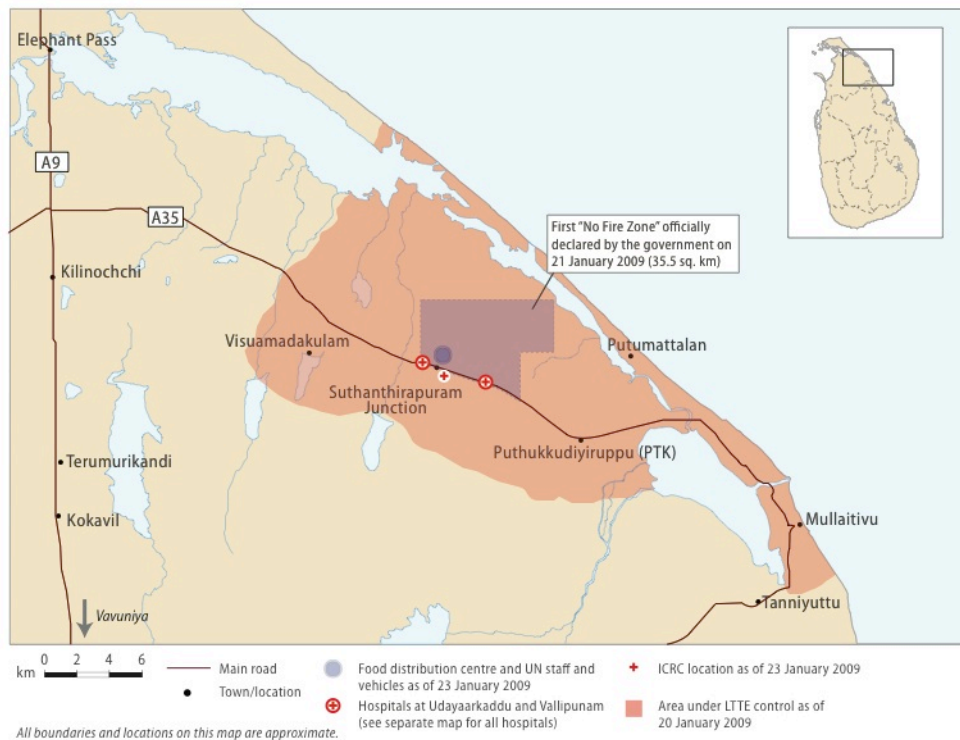
UN Expert Panel, [177(b)].

6 ATTACKS IN AND AROUND CIVILIAN AREAS

A. Summary

- 6.1 This section focuses on five geographical areas where shelling incidents took place in and around areas declared by the Sri Lankan Government as NFZs. These incidents concern attacks on areas with high concentrations of civilians, hospitals and humanitarian sites (eg, a UN Hub) in the villages of Suthanthirapuram, Puthukudiyiruppu (**PTK**), Putumattalan, Ampalavanpokkanai, and Karaiyamullivaikkal and Vellamullivaikkal.
- 6.2 Directing attacks on civilians, civilian objects or other protected objects is prohibited under IHL and international criminal law and may amount to war crimes, crimes against humanity, or both.
- 6.3 In an armed conflict, IHL permits military objectives to be attacked. However, attacks must be proportionate, must not be indiscriminate, and precautionary measures must be taken. An attack on a military objective that causes excessive incidental damage, when compared with the anticipated military advantage, is a violation of IHL and may constitute a war crime in NIACs.¹²²
- 6.4 There are reasonable grounds to suspect that the attacks on the NFZs which are analysed in this section, constituted violations of IHL that would amount to war crimes and crimes against humanity and violations of international human rights law.¹²³

Map of No Fire Zone 1

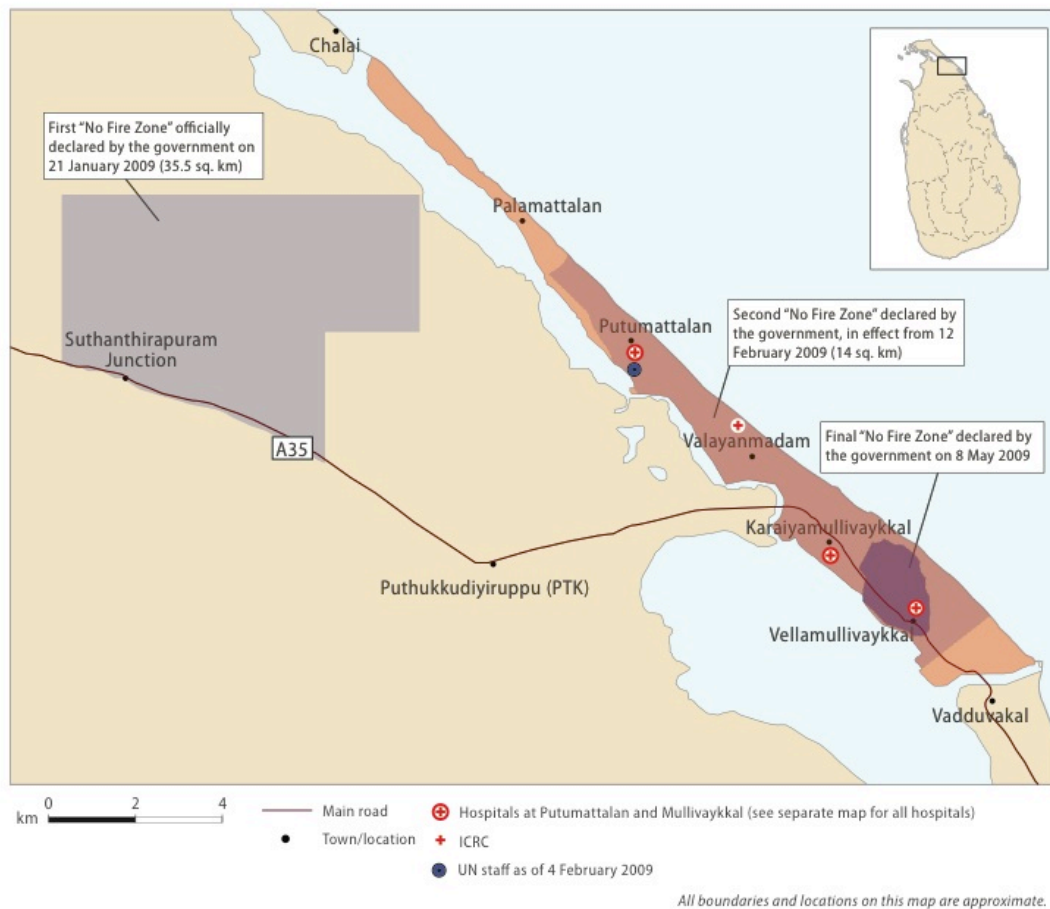


Credit: Crisis Group

¹²² See, for example, *Prosecutor v. Blaskić*; *Prosecutor v. Strugar* and *Prosecutor v. Galić* (available at the ICTY website).

¹²³ For a more detailed overview of the international legal framework, see paragraphs 6.35–6.36.

Map of No Fire Zones 2 and 3



Credit: Crisis Group

B. Background to the No Fire Zones

(i) Capture of Kilinochchi and withdrawal of UN and international non government organisations (INGOs)

6.5 Kilinochchi was the LTTE's *de facto* capital. In April 2008, after the SFs captured Madhu to the west of Kilinochchi, the 57th and 58th Divisions moved towards Kilinochchi itself.¹²⁴ The SFs began their final military offensive against Kilinochchi at the beginning of September 2008.¹²⁵

6.6 On 8 September 2008, the Sri Lankan Government announced that it could no longer 'ensure the safety of humanitarian workers in the Vanni',¹²⁶ and asked the UN and INGOs to leave Kilinochchi by the end of the month.¹²⁷ However, the UN Expert Panel found that the biggest threat to the UN and INGOs at that time was the SFs' own military offensive, which undermined the credibility of the Government's statement that it could not guarantee their

¹²⁴ LLRC Report, [3.14]; UN Expert Panel Report, [73].
¹²⁵ UN Expert Panel Report, [47].
¹²⁶ Ibid, [74].
¹²⁷ Ibid.

safety.¹²⁸ According to the UN Expert Panel, the UN and INGOs decided to leave the Vanni and move their operations elsewhere.¹²⁹

- 6.7 The UN Expert Panel acknowledged that the removal of UN and INGO staff from the Vanni marked a pivotal juncture in the war, because ‘from that moment on, there were virtually no international observers able to report to the wider world what was happening in the Vanni’.¹³⁰
- 6.8 On 2 January 2009, the 57th and 58th Divisions of the SFs captured Kilinochchi.¹³¹ According to the UN Expert Panel, the SFs captured Elephant Pass on 9 January 2009 and assumed control of the A9 Highway¹³² which ran from Jaffna in the north to Colombo in the south, and passed through, in particular, the Kilinochchi and Mullaitivu Districts.
- 6.9 Thereafter, as the defence analyst Major General Ashok Mehta (retired) noted:

Eight columns consisting of 120,000 soldiers of 53, 55 and 58 Infantry Divisions and Task Force 8 closed in on Mullaithivu from the west along A 35 and A 34 roads as well as from the north and south along the coast.¹³³

(ii) Declaration of No Fire Zones

- 6.10 In the process of capturing LTTE-controlled territory and pushing the civilians and the LTTE defence lines further towards Sri Lanka’s eastern coast, the Sri Lankan Army declared three successive NFZs as safe areas for civilians on the following dates:
- NFZ-1 – 20 January 2009.¹³⁴
 - NFZ-2 – 12 February 2009.¹³⁵
 - NFZ-3 – 8 May 2009.¹³⁶
- 6.11 The LLRC, citing the testimony of the Secretary of Defence, Gotabaya Rajapaksa, stated that the NFZs were established ‘after discussion with the [National] Security Council’.¹³⁷ These areas were earmarked ‘so that civilians could come into those safe areas and to enable the Security Forces to conduct their operations, respecting such Zones’.¹³⁸
- 6.12 At least in respect of NFZ-1 and NFZ-2, the Sri Lankan Army Headquarters indicated that the NFZs ‘would not only keep the IDPs / civilians away from the fighting, [but] it would also reduce greatly the number of potential civilian casualties.’¹³⁹ Army Headquarters ‘suggested that necessary steps be taken to relocate the IDPs / civilians in the said area’, ‘where the

¹²⁸

Ibid.

¹²⁹

Ibid, [75].

¹³⁰

Ibid, [76].

¹³¹

Ibid, [77]; and LLRC Report, [4.43].

¹³²

UN Expert Panel Report, [77].

¹³³

Ashok Mehta, ‘The War Against the LTTE’ in Harjeet Singh, *Pentagon’s South Asia Defence and Strategic Year Book 2010*, 123.

¹³⁴

UN Expert Panel Report, [80].

¹³⁵

Ibid, [96].

¹³⁶

Ibid, [114]. The Sri Lankan Government reportedly called the third NFZ the ‘New Safety Zone’: ‘It’s Now New Safety Zone: Colombo’, *The Hindu*, 9 May 2009, available at: <http://www.thehindu.com/todays-paper/tp-international/its-now-new-safety-zone-colombo/art279039.ece> [accessed 1 December 2013].

¹³⁷

Ibid.

¹³⁸

LLRC Report, [4.42] (Gotabaya Rajapaksa before the LLRC on 17 August 2010).

¹³⁹

See correspondence from the Sri Lankan Army Headquarters (Brigadier KADA Karunasekara for Commander of the Army) to the ICRC Head of Delegation dated 19 January 2009 and 11 February 2009: LLRC Report, Annex, 66, 68.

safety of the IDPs / civilians in those areas from direct and indirect fire, including taking of targets by air, could be guaranteed during offensives.¹⁴⁰

6.13 In correspondence to the ICRC's Head of Delegation in respect of the location of the NFZs proposed by the Army, the Army Headquarters annexed:

- maps¹⁴¹ of NFZ-1 and NFZ-2 'for IDPs and civilians in uncleared areas of WANNI [i.e. Vanni]'; and
- a 'Compact Dis[c] containing shape files of the safe area for IDPs and civilians in WANNI [i.e. Vanni].'

6.14 The Army Headquarters' correspondence notifying the ICRC of the declaration of NFZ-1 was also sent to the SFs' Joint Operations Headquarters (**JOH**).¹⁴² Correspondence notifying the ICRC of the declaration of NFZ-2 was copied to the JOH, Security Forces Headquarters – Vanni (**SFHQ-Vanni**) and the Army's Directorate of Operations.¹⁴³

6.15 In respect of NFZ-3, correspondence from the Army's Directorate of Military Intelligence to the JOH dated 8 May 2009 stated that the 'previously defined 'no fire zone / safe area' [NFZ-2] be modified to match with the present situation.'¹⁴⁴ In addition, this correspondence noted:

The Army announced the area marked in Annex 'A' with immediate effect as the updated 'no fire zone / safe area' for IDPs / civilians where the safety of the IDPs / civilians in those areas could be guaranteed during humanitarian / rescue operations. It is requested that relevant authorities are informed accordingly.¹⁴⁵

6.16 A map of NFZ-3 which included the NFZ's coordinates, and a compact disc containing 'shape files of the updated safe area', were annexed to this correspondence which was also sent to the Army's Directorate of Operations.¹⁴⁶

6.17 On 8 May 2009, the Directorate of Operations distributed the Directorate of Military Intelligence's correspondence of the same date, including the annexed map of NFZ-3 to the following SFs' regional commands and Army divisions:

- SFHQ-Jaffna.
- SFHQ-Vanni.
- 53rd Division.
- 55th Division.
- 58th Division.
- 59th Division.¹⁴⁷

¹⁴⁰

Ibid.

¹⁴¹

Ibid, 66: The map of NFZ-1 (Annex A) includes the coordinates of the NFZ.

¹⁴²

Ibid.

¹⁴³

Ibid, 68.

¹⁴⁴

See correspondence from the Military Intelligence Directorate (Major MGIN Meddegoda for Director Military Intelligence) to JOH dated 8 May 2009: LLRC Report, Annex, 70.

¹⁴⁵

Ibid, 70.

¹⁴⁶

Ibid, 70.

¹⁴⁷

See correspondence from the Sri Lankan Army Directorate of Operations (Major GS Fonseka for Director Operations) to various SFs regional commands and Army divisions dated 8 May 2009: LLRC Report, Annex, 71.

- 6.18 On 9 May 2009, the SFHQ-Vanni notified the ICRC in Vavuniya of the 'new No Fire Zone designated by Joint Operational Headquarters'.¹⁴⁸
- 6.19 The SFs informed civilians of the NFZs through a variety of means, including loudspeaker and radio announcements, by dropping leaflets from the air, and by disseminating maps and coordinates of the NFZs to civilians through Government Agents in the Vanni.¹⁴⁹
- 6.20 According to one witness account, despite having senior Government officials on the ground, the Government did not consult with these officials prior to the declaration of the NFZs.¹⁵⁰ In addition, the Sri Lankan Government did not consult with the LTTE on the establishment of the NFZs.¹⁵¹ The LLRC acknowledged that no formal agreement regarding the establishment of the NFZs was entered into between the Government and LTTE.¹⁵²

(iii) Co-location of military objectives and civilians in the NFZs and its effect

- 6.21 The UN Expert Panel, LLRC and witness accounts provided to ICEP indicate that LTTE military assets and emplacements were located within the NFZs. Furthermore, at least in respect of NFZ-1 and NFZ-2, witness accounts indicate that some LTTE military assets were positioned in these NFZs prior to their designation as such.
- 6.22 In relation to NFZ-1, one witness stated:
- [I]t was common knowledge amongst the population, the UN and presumably by the SFs, that the LTTE had artillery pieces placed within the area covered by NFZ 1 at the time of the declaration [of the area as NFZ-1] and would use them against the SFs. I believed [on the basis of my personal experience], the SFs were unlikely to refrain from counter-bombardment of those emplacements should they come under fire from them. Accordingly, it seemed a strange choice of location for any no fire zone.¹⁵³
- 6.23 The SFs conducted extensive aerial surveillance of the Vanni throughout the final months of the conflict (see Annex II). Having regard to the incidents discussed below,¹⁵⁴ it is reasonable to conclude that the SFs could have identified such military targets prior and subsequent to the Sri Lankan Government's declaration of each NFZ. This conclusion is supported by expert artillery analysis of the SFs' observation capabilities.¹⁵⁵
- 6.24 The UN Expert Panel Report found that the area demarcated as NFZ-1 encompassed both the LTTE's western and southern defensive lines.¹⁵⁶ According to an eye-witness account, this meant that

¹⁴⁸ See correspondence from SFHQ-Vanni (Captain PK Heenatigala for SFHQ-Vanni Commander) to ICRC-Vavuniya dated 9 May 2009: LLRC Report, Annex, 73.

¹⁴⁹ UN Expert Panel Report, [71], [80]; and LLRC Report, [4.43], [4.45], 53, fn. 45.

¹⁵⁰ WS-1501, [98].

¹⁵¹ WS-1502, [123]. ICEP notes that, from a military operational perspective, it would have been tactically inadvisable to give the LTTE prior notification of the NFZs as it could reveal the manoeuvre plan of the SFs however from an IHL perspective, such areas are usually designated based on agreement between the parties to the conflict.

¹⁵² LLRC Report, [4.267].

¹⁵³ WS-1502, [126].

¹⁵⁴ Report, section 6 'Attacks in and around Civilian Areas'.

¹⁵⁵ Expert artillery report commissioned by ICEP, [7.4].

¹⁵⁶ UN Expert Panel Report, [80].

any engagement occurring along those lines between the LTTE and the SFs would likely spill-over into the safe civilian areas which would be densely packed with civilians who were confronted with an increasingly reduced living space.¹⁵⁷

6.25 Similarly, a different eye-witness stated that he ‘totally disagreed with the location’ of NFZ-1: ‘From my [m]ilitary training and experience the decision to place civilians right in the middle of an advancing army, where the defending front lines were basically on the zone’s southern border made no sense.’¹⁵⁸

6.26 Another witness alleged that senior Sri Lankan Government officials had many serious reservations about the area that was declared to be NFZ-1. The witness stated that another senior official he knew was concerned about the location of NFZ-1 for reasons including:

- ‘The NFZ was not close to any means for the civilians to escape, such as the ocean; in fact, they had placed the civilians in an area that was completely surrounded by the LTTE’¹⁵⁹
- ‘[NFZ-1] was not large enough to hold the hundreds of thousands of civilians in the Vanni i.e. they could not fit into the declared No Fire Zone’.
- ‘The area was 7kms from PTK, it did not have access to Vavuniya, it meant moving all of the patients from PTK Hospital which by this time was the sole remaining [p]ermanent [h]ospital inside the Vanni, which meant that all of the patients would have to be move[d] to temporary accommodation in schools, tents etc which was totally unsuitable for the injuries these people had sustained.’¹⁶⁰

6.27 The witness referred to in paragraph 6.24 stated that he also had serious reservations about the location of NFZ-1:

I felt from the outset that NFZ 1 would be very problematic. From looking at the map provided by the GA [Government Agent] and from the maps that we in the [organisation] had, I was very concerned, as it appeared that the entire NFZ 1 fell within the safety templates of all the weaponry currently being used by the SFs [meaning that the SFs were capable of firing their weapons into NFZ-1].¹⁶¹

[...]

The other concern I had, not only for the IDP [internally displaced persons] civilian population, but also for us as well, was that the NFZ1 location was dangerous as there was no exit from it. The beach was to the rear and the SFs could take the other three sides, thereby trapping the people and [the organisation’s staff] inside the NFZ 1 with no way of being able to exit except through the battle lines.¹⁶²

6.28 The evidentiary material calls into question the purported humanitarian purpose of establishing NFZs in these locations. As could have been expected, civilians moved into the NFZs based on the Sri Lankan Government and Army’s assurances that they would be protected from attack. In spite of the Sri Lankan Government encouraging civilians to concentrate in the NFZs, and repeatedly stating that the SFs had ceased using heavy

¹⁵⁷ WS-1502, [125].

¹⁵⁸ Summary of statement of WS-1505, [122].

¹⁵⁹ WS-1501, [98].

¹⁶⁰ Ibid [98].

¹⁶¹ WS-1502, [124].

¹⁶² Ibid [155].

weapons, the UN Expert Panel found that the Government engaged in large-scale shelling of each of the three NFZs.¹⁶³ The UN Expert Panel concluded that the Sri Lankan Army ‘shelled in spite of its knowledge of the impact, provided through SLA [Sri Lankan Army] intelligence systems, including unmanned aerial vehicles (**UAVs**), and through notifications by various external actors, including the United Nations and the ICRC.’¹⁶⁴ Moreover, the UN Expert Panel found that ‘most civilian casualties in the final phases of the war were caused by Government shelling’.¹⁶⁵

6.29 ICEP’s independent artillery expert noted ‘the SLA practice of indiscriminate area bombardment’¹⁶⁶ and characterised the SFs’ military operations as ‘based around persistent and widespread use of indirect fire weapons with what appeared to be increasing deployment of artillery assets from February to May 2009.’¹⁶⁷

6.30 Additionally, as a consequence of moving into NFZ-1 and subsequent NFZs, civilians concentrated in close proximity to LTTE military assets and the LTTE’s defensive lines. In relation to the LTTE’s conduct, the UN Expert Panel found that, despite the grave dangers faced by the civilian population in the NFZs, the LTTE used civilians as hostages by refusing to allow them to leave and at times shooting point-blank at civilians who tried to leave the NFZs.¹⁶⁸ These allegations are analysed in detail in section 7 of this report.

6.31 Irrespective of why the Sri Lankan Government and SFs established the NFZs in these particular locations and irrespective of any violations by the SFs, the LTTE were obliged under international law to protect civilians under its control from effects of attacks and not to use civilians as hostages or human shields.

6.32 The UN Expert Panel found that the LTTE ‘us[ed civilians] as hostages and at times us[ed] their presence as a strategic human buffer between themselves and the advancing SLA’, such that

[c]ivilians were increasingly sacrificed as dispensable ‘cannon fodder’ while the LTTE fought to protect its senior leadership. The LTTE’s refusal to allow civilians to leave the area added significantly to the total death toll in the conflict.¹⁶⁹

6.33 The Sri Lankan Government has alleged that the LTTE used civilians as human shields between July 2006 and May 2009.¹⁷⁰ Specifically, the Army Board established to look into particular LLRC findings alleged that the LTTE had ‘deliberately and systematically exploited Tamil civilians in [the Vanni] as human shields to cover their military targets’, for example, by storing ‘explosives and weapons in and around populated areas, NFZs and even hospitals. [The LTTE] used medical facilities and ambulances for military purposes’ and ‘repeatedly fired [a]rtillery and other weapons from locations adjacent to NFZs and medical facilities.’¹⁷¹

¹⁶³ UN Expert Panel Report, ii.

¹⁶⁴ Ibid [176].

¹⁶⁵ Ibid ii.

¹⁶⁶ Expert artillery report commissioned by ICEP, [6.6].

¹⁶⁷ Ibid [6.2].

¹⁶⁸ UN Expert Panel Report, iii.

¹⁶⁹ Ibid [177(a)].

¹⁷⁰ Humanitarian Operation Factual Analysis, [10], [167], [173], [187], [209]; Sri Lankan Army Board, *Full Report of the Army Board on LLRC Observations Released, January 2013* (hereafter ‘**SLA Report**’), [10], [11], [15], [18], [57]; ‘Transcript of Jagath Jayasuriya’s testimony before the LLRC’, 8 September 2010, 2; Malinda Seneviratne, ‘Man Behind the Country’s Defence Strategy’, *Business Today*, November 2008, available at:

http://businesstoday.lk/cover_page.php?art=537&hl=man%20behind.

¹⁷¹ SLA Report, [11].

According to the Sri Lankan Ministry of Defence, 'the LTTE compelled civilians to move to points behind their rear lines to use them when the occasion arose.'¹⁷² The former SFHQ-Vanni Commander, Major General Jagath Jayasuriya, claimed that the LTTE policy was 'to take control of the population. [...] They mustered the population and kept them [in the conflict zone] to be used as a human shield.'¹⁷³

- 6.34 According to the Sri Lankan Ministry of Defence, 'The LTTE built their bunkers and fortifications close to areas where the civilians were and also moved some of their heavy weapons to civilian locations.'¹⁷⁴ According to the Ministry of Defence, during the final stages of the conflict, LTTE cadres, some of whom were wearing civilian clothing, 'intermingled' with the civilian population, 'fired from amongst civilians' and 'launched attacks from areas supposed to be free of combat, such as hospitals'.¹⁷⁵ ICEP has been unable to locate any official response from the LTTE on these allegations.

C. International legal framework

(i) *Violations of international humanitarian law*

- 6.35 Customary IHL mandates that parties to the conflict must at all times distinguish between civilians and combatants,¹⁷⁶ and between civilian objects and military objectives.¹⁷⁷ Military objectives are defined as those objects that, by their nature, location, purpose or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.¹⁷⁸ Moreover, under IHL it is prohibited to launch indiscriminate attacks.¹⁷⁹ Precautionary measures should also be taken to minimise the effects of attacks.¹⁸⁰
- 6.36 To direct an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited under customary IHL applicable in NIACs.¹⁸¹ In addition, deliberately using civilians to shield military operations is contrary to the IHL principle of distinction and violates the obligation under IHL to take reasonable precautions to separate civilians and military objectives.¹⁸² According to customary IHL principles that apply in NIACs, parties to the conflict must also remove civilians and civilian objects from the vicinity of military objectives.¹⁸³ Furthermore, parties are obliged to protect the civilian population under their control.¹⁸⁴ This includes protecting civilians from the effects of an attack, thereby extending to an obligation not to prevent civilians from leaving the conflict zone if they choose to do so, and not using civilians as human shields or 'cannon fodder'.¹⁸⁵

¹⁷² Humanitarian Operation – Factual Analysis, [167]. See also 'Transcript of Jagath Jayasuriya's testimony before the LLRC', 8 September 2010, 2; Malinda Seneviratne, 'Man Behind the Country's Defence Strategy', *Business Today*, November 2008, available at: http://businesstoday.lk/cover_page.php?art=537&hl=man%20behind

¹⁷³ 'Transcript of Jagath Jayasuriya's testimony before the LLRC', 8 September 2010, 2.

¹⁷⁴ See Humanitarian Operation Factual Analysis, [207].

¹⁷⁵ Humanitarian Operation Factual Analysis, [179], [205].

¹⁷⁶ Rule 1, ICRC Customary International Law Study (hereafter '**CIHL Study**').

¹⁷⁷ Rule 7, CIHL Study.

¹⁷⁸ Rule 8, CIHL Study.

¹⁷⁹ Rules 11–13, 18, 19, CIHL Study. In relation to Rule 13, which sets out a customary rule of IHL prohibiting 'attacks by bombardment', it has been argued that 'area bombardment' is a type of indiscriminate attack: see discussion of Rule 13, CIHL Study.

¹⁸⁰ The related rules of customary IHL include Rules 15–22 of CIHL Study.

¹⁸¹ Rule 35, CIHL Study.

¹⁸² Rules 23–24, CIHL Study.

¹⁸³ Rule 24, CIHL Study.

¹⁸⁴ Rule 22, CIHL Study.

¹⁸⁵ The term 'cannon fodder' was used in the UN Expert Panel Report, [177(a)].

(ii) War crimes and crimes against humanity

- 6.37 The incidents discussed in this section relate to attacks on and around the NFZs and point to violations of IHL and the possible commission of war crimes, crimes against humanity, or both. The detailed analysis in respect of the final area addressed, the villages of Karaiyamullivaikkal and Vellamullivaikkal, can be applied to other incidents discussed in this section.
- 6.38 It is a war crime intentionally to direct attacks against the civilian population¹⁸⁶ and civilian objects,¹⁸⁷ hospitals and buildings dedicated to the collection and protection of wounded and sick,¹⁸⁸ or installations aimed at humanitarian assistance.¹⁸⁹
- 6.39 Under the law of international armed conflicts, intentionally launching an attack that causes excessive civilian casualties as compared with the anticipated military advantage, is a war crime.¹⁹⁰ The ICC Statute does not list this as a war crime if committed during a NIAC. Nonetheless, such an attack will amount to a violation of customary IHL in a NIAC¹⁹¹ and may constitute a war crime under customary international law. Based on the current evidentiary material available, this report assesses whether this customary IHL rule was breached.
- 6.40 As stated above, the use of human shields is a violation of customary IHL.¹⁹² According to ICTY jurisprudence,¹⁹³ the use of human shields is also a war crime, on the basis that it amounts to cruel and inhuman treatment pursuant to Articles 2 and 3 of the ICTY Statute.¹⁹⁴
- 6.41 According to the ICC Statute, it is a war crime in international armed conflicts to use human shields.¹⁹⁵ Specifically, the ICC Statute prohibits using ‘the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations’.¹⁹⁶ While the ICC Statute does not specifically proscribe this war crime in NIACs, the use of human shields may fall within the ambit of other war crimes listed in the ICC Statute, such as the war crime of cruel treatment.¹⁹⁷
- 6.42 In addition to war crimes, there are reasonable grounds to suspect that the attacks outlined in this section also amount to crimes against humanity under the ICC Statute, in particular, murder, extermination, persecution, or other inhumane acts. As discussed in section 5, these underlying offences must have been committed as part of a widespread or systematic attack on the civilian population pursuant to a State policy.

¹⁸⁶ ICC Statute, art 8(2)(e)(i).

¹⁸⁷ Ibid, art 8(2)(e)(ii)-(iv).

¹⁸⁸ Ibid, art 8(2)(e)(iv).

¹⁸⁹ Ibid, art 8(2)(e)(iii).

¹⁹⁰ Ibid, art 8(2)(b)(iv); Rule 7 of CIHL Study, discussion section.

¹⁹¹ Rules 7–10 of CIHL Study.

¹⁹² Rule 97 of CIHL Study.

¹⁹³ *Blaskic Trial Judgment* 2000, [713], [716], [742]–[743]; *Kordic Trial Judgment*, [256], [800], [823]

¹⁹⁴ Article 2 of the ICTY Statute concerns Grave Breaches of the Geneva Conventions of 1949 and Article 3 concerns violations of the laws or customs of war.

¹⁹⁵ ICC Statute, art 8(2)(b)(xxiii).

¹⁹⁶ Ibid, art 8(2)(b)(xxiii), which is applicable only in international armed conflicts. This provision draws on: the Third Geneva Convention, art 23(1); Fourth Geneva Convention, art 28; and First Additional Protocol, arts 51(7) and 58.

¹⁹⁷ Art 8(2)(c)(i), ICC Statute.

D. Incidents

(i) *Suthanthirapuram*¹⁹⁸

- 6.43 On 20 January 2009, the Sri Lankan Army declared NFZ-1 in an area that encompassed Suthanthirapuram, Udaayarkaddu North, Vallipunam and Thevipuram.¹⁹⁹ That day, the Commander of the SFHQ-Vanni announced that 'the Army Headquarters has demarcated this safe zone, as the Security Forces are fully committed to provide maximum safety for civilians trapped or forcibly kept by the LTTE in the un-cleared areas of Mullaitivu'.²⁰⁰
- 6.44 The UN Expert Panel detailed events that took place in NFZ-1, including specifically in Suthanthirapuram, between 20 and 25 January 2009.²⁰¹ In particular, the UN Expert Panel detailed the shelling by the SFs of a site in Suthanthirapuram referred to as the 'UN Hub'.²⁰²
- 6.45 The UN Expert Panel explained that after the UN withdrew from Kilinochchi in September 2008, it secured an arrangement with the Sri Lankan Government whereby the UN was allowed to run weekly convoys into the Vanni to deliver humanitarian assistance.²⁰³ The UN deployed its 11th convoy to PTK on 16 January 2009 (**Convoy 11**). However, upon delivering its supplies, Convoy 11 was not given permission to leave PTK immediately, due to heavy fighting along a planned road of return.²⁰⁴
- 6.46 On 23 January 2009, three days after NFZ-1 was declared, the UN staff members of Convoy 11 relocated from PTK to NFZ-1, having received information indicating that a SFs offensive on PTK seemed imminent.²⁰⁵ According to a witness, the UN confirmed with the Government the time when it would move its operations to NFZ-1.²⁰⁶ On this day, the same witness observed that 'the inside of the perimeter [of NFZ-1] was completely full and overcrowded with IDPs'.²⁰⁷
- 6.47 The UN Expert Panel found that the UN established a hub near Suthanthirapuram Junction, the UN Hub.²⁰⁸ The UN erected a large UN flag in the sports field and parked its large white UN lorries nearby.²⁰⁹ The UN Expert Panel also found that large numbers of civilians erected their shelters around the UN Hub and that the Government's Additional Government Agent (**AGA**) set up a food distribution centre near the UN Hub.²¹⁰ One witness recalled that large numbers of civilians lined up in the field to receive food and long queues developed,²¹¹ which is consistent with satellite imagery analysis.²¹²

¹⁹⁸ ICEP's analysis of the evidentiary material currently available with respect to Suthanthirapuram, including open source information, relies in particular on three witness accounts that were all likely to have been before other inquiries. However, ICEP has examined these accounts in more detail in order to conduct a legal appraisal of the available evidentiary material.

¹⁹⁹ Crisis Group Report, 12.

²⁰⁰ UN Expert Panel Report, [80].

²⁰¹ Ibid, [80]–[89].

²⁰² Ibid, [84]–[87].

²⁰³ Ibid, [78].

²⁰⁴ Ibid, [79].

²⁰⁵ Ibid, [83].

²⁰⁶ WS-1502, [171].

²⁰⁷ WS-1502, [178].

²⁰⁸ UN Expert Panel Report, [83].

²⁰⁹ Exhibits to WS-1506, [48] which was likely to have been before other inquiries.

²¹⁰ UN Expert Panel Report, [83].

²¹¹ Exhibits to WS-1506, [48] which was likely to have been before the UN Expert Panel.

²¹² Satellite imagery analysis relating to imagery recorded on the morning of 21 January 2009 identified the presence of tent clusters and a probable line of several hundred IDPs waiting in line for food aid: UNITAR Report, 22.

- 6.48 The global positioning systems (**GPS**) coordinates of the distribution centre were taken, reportedly factoring in a 200-metre safety buffer.²¹³ These coordinates were provided directly to UN officials, and were confirmed to have also been provided to the Government.²¹⁴ The UN Expert Panel found that UN staff relayed the UN Hub's coordinates specifically to the SFHQ-Vanni Commander.²¹⁵
- 6.49 One eye-witness, who was a senior local official of an international agency, observed what he believed to be surveillance aircraft flying overhead on 23 January 2009,²¹⁶ indicating that, in addition to having received the GPS coordinates, the SFs would have been able to visually verify the location of the UN Hub and AGA's food distribution centre.²¹⁷
- 6.50 In the early afternoon of 23 January 2009, one of the three eye-witnesses whose statements ICEP has primarily relied on, described what he suspected to be an LTTE artillery round being fired from within NFZ-1, approximately 300 metres north of the UN Hub.²¹⁸ The eye-witness recalled that within the next hour, shells were fired directly into NFZ-1, 'striking right into the civilians who were crowded in and around the whole of NFZ-1.'²¹⁹ Shells reportedly landed in two locations well within the area of the UN Hub, killing 19 civilians and wounding 32 others.²²⁰ While the eye-witness acknowledged that '[t]he LTTE were also firing out from [NFZ-1]',²²¹ in respect of the shells landing in NFZ-1, the witness stated:

I knew these were SFs artillery and mortar shells as I could hear their release from the SFs side of the front lines which from my observations were still about one to two kilometres south of A35 [Highway] and I could hear the direction the shells were coming from.²²²

- 6.51 According to the UN Expert Panel, on the evening of 23 January 2009, shells from the SFs fell on the AGA's food distribution centre near the UN Hub, killing and wounding large numbers of civilians.²²³ The same eye-witness stated again that he knew the SFs had fired the artillery because he could 'hear the release of the artillery mainly from the south and some from the west of [the UN Hub] from areas that were held by the SFs' (underline original).²²⁴
- 6.52 This account is consistent with that of another eye-witness who stated that, based on the launch sound of shells that exploded in the NFZ-1, he believed the shells came from SFs territory in the Iranamadu area,²²⁵ located south-west of NFZ-1. He observed:

[The shells] exploded within 50 metres from the [international agency] lorr[y] we were sleeping under and about two shells hit within about 10 metres from the [international

²¹³ WS-1502, [185]–[186]. See also WS-1506, [48].

²¹⁴ WS-1502, [188]; WS-1506, [48], [64]; and WS-1501, [122].

²¹⁵ UN Expert Panel Report, [83].

²¹⁶ WS-1506, [48].

²¹⁷ ICEP has obtained a second-hand witness account which has likely been before other inquiries indicating that the SFs were able to see UN positions in NFZ-1 through their rangefinders: WS-1502, [212].

²¹⁸ WS-1502, [190]. WS-1502 noted, [185]–[186] that the UN Hub's perimeter allowed for a 200 metre safety buffer zone, which suggests that the suspected LTTE artillery round was fired 100 metres beyond the 200 metre buffer zone. However, ICEP acknowledges that there is some uncertainty in relation to the witness's assertion.

²¹⁹ WS-1502, [191].

²²⁰ Ibid, [191].

²²¹ Ibid, [193].

²²² Ibid. At least in respect of mortars, ICEP notes that in *Galic*, the Trial Chamber referred to expert evidence 'that the noise made by the firing of a mortar can be used to determine the approximate direction of fire': Judgement, [454]. UN Expert Panel Report, [83].

²²³ WS-1502, [200].

²²⁴ WS-1502, [200].

²²⁵ WS-1506, [52].

agency] bunker ... we could not come out from under the lorries as more artillery shells kept coming and exploding.²²⁶

6.53 This eye-witness stated:

[T]here were no LTTE near us when this shelling occurred close to us this night [23 January 2009]. Even the LTTE, which was a few kilometres from us, was not firing their artillery so there was no reason for the SFs to fire at all, especially at civilians.²²⁷

6.54 However, another eye-witness stated that, between 1600 and 2200 hours, 'The LTTE also continued with sporadic fire towards the SFs positions to the south'.²²⁸ It is unclear from the witness statement how close these LTTE positions were to the UN Hub.

6.55 Early on 24 January 2009, according to the UN Expert Panel, hundreds more shells hit NFZ-1 and shells continued to fall overnight.²²⁹ The UN Expert Panel found that the UN Hub and AGA's food distribution centre were hit by shells and civilians were killed.²³⁰ An eye-witness recounted that shells were launched from the SFs positions in the south-east, and continued to land within the area of the UN Hub.²³¹ This witness reported that shells landed on or near the distribution centre, tearing through half a dozen IDP shelters and sending debris and body parts into the air.²³² In addition, one shell reportedly landed metres away from the makeshift UN bunker.²³³

6.56 According to this eye-witness, from 0300 to 0400 hours on 24 January 2009, 'There had not been any outgoing fire from the LTTE and there were no LTTE positions in our area firing out' at the time of this attack.²³⁴ Another eye-witness, a senior local official of an international agency, counted 11 dead civilians very close to the UN bunker.²³⁵ Information was received from INGO and international agency officials indicating that there were dead and wounded civilians in the surrounding areas.²³⁶ In addition to the deaths and injuries reported, the UN vehicles parked near the UN bunker sustained damage as a result of the attacks.²³⁷

6.57 According to one witness account, the SFs blamed the LTTE for shelling the area around the UN Hub.²³⁸ The witness believed this to be incorrect because, among other reasons, although '[t]he LTTE were continuing to fire from their positions in NFZ 1... they were clearly going in the direction of the front lines across the A35 [Highway]'.²³⁹

6.58 This witness also described that, throughout the day on 24 January 2009, shells continued to fall directly on and around the food distribution centre, killing and injuring civilians including those who had lined up to receive food.²⁴⁰ According to him, most of the

226

Ibid, [53].

227

Ibid, [55].

228

WS-1502, [195].

229

UN Expert Panel Report, [84].

230

Ibid, [84].

231

WS-1502, [201].

232

Ibid, [201].

233

Ibid, [200]–[202]; WS-1506, [52], [53], [55]; and WS-1501, [128], [129].

234

WS-1502, [201].

235

WS-1506, [55].

236

WS-1502, [208].

237

Crisis Group Report, 13.

238

WS-1502, [204].

239

Ibid, [204].

240

WS-1502, [212]–[213].

bombardment appeared to be concentrated in the area around the distribution centre,²⁴¹ and the shells were coming from SFs positions in the south and south-east where the front lines were located.²⁴²

6.59 According to the UN Expert Panel, during these attacks on 24 January 2009:

The UN 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.²⁴³

6.60 Possibly based on the accounts summarised above, and other evidentiary material, in relation to the location of the LTTE at the time of the shelling of the UN Hub, the UN Expert Panel found that, although LTTE cadres were present in NFZ-1, there was no LTTE presence inside the UN Hub.²⁴⁴ LTTE artillery was fired from positions approximately 500 metres away from the UN Hub, and from further back in the NFZ, but not from the UN Hub.²⁴⁵

6.61 During the night of 25 January 2009, the NFZ-1 and the area around the UN Hub 'continued to be pounded with shells.'²⁴⁶ One eye-witness reported that, on 25 January 2009, 'there was sporadic outgoing artillery and mortar fire from the LTTE within 2000 metres of [the UN Hub].'²⁴⁷

6.62 The three eye-witness accounts on which ICEP has primarily relied noted that, despite the high level of communication with senior SFs personnel, and the short abatements in shelling on the previous day, the bombardment of the area recommenced at this time with renewed intensity.²⁴⁸ One eye-witness recounted that, throughout the evening, heavy shelling continued about 50 metres from the UN bunkers, and on the distribution centre and surrounding areas.²⁴⁹ According to this witness,

From [m]idnight on 25 January to 0600 hours, there was a sustained and virtually uninterrupted SFs barrage of incoming heavy 130mm artillery from the south and southeast into our location at an average rate of over three shells per minute... The LTTE were still shooting towards the frontlines as well during this continuous barrage. Although their artillery was about 500m to 2000m away at this point.²⁵⁰

6.63 This same witness went on to say, 'Tragically, most of the civilian population was caught out in the open, without bunkers in which to hide, resulting in devastating wounds and death to them.'²⁵¹ The witness described the scene on the morning of 25 January 2009 as follows:

The situation was so dire now that it was no longer possible for any of us to leave the relative safety of the bunkers as, in addition to SFs mortars, artillery and small arms,

²⁴¹ Ibid, [214].

²⁴² Ibid, [212].

²⁴³ UN Expert Panel Report, [84].

²⁴⁴ Ibid, [86].

²⁴⁵ Ibid, [86].

²⁴⁶ Ibid, [87].

²⁴⁷ WS-1502, [218].

²⁴⁸ WS-1501, [140]; WS-1502, [219], [224]; and WS-1506, [59].

²⁴⁹ WS-1502, [224]–[225].

²⁵⁰ Ibid, [227].

²⁵¹ Ibid, [228].

increasing amounts of MBRL shells began landing along and immediately south of the A35 [Highway] throughout the morning. During this time the LTTE were firing out at SFs positions. It seemed the LTTE did not stay in one position very long; they would fire and move so that counter-battery fire would not hit them. At one point they fired from about 500 metres from our position and another time from about 800 metres. It appeared that the SFs were just trying to fill the whole area with shells in the hope that they would eventually hit the LTTE, regardless of the impact on the tens of thousands of civilians.²⁵²

- 6.64 On 25 January 2009, international agency staff decided to leave NFZ-1 as it was no longer safe.²⁵³ This decision was reportedly a result of information received from INGO staff in PTK at this time indicating that, in the preceding days, PTK was much safer and there had been fewer attacks than those observed in Suthanthirapuram.²⁵⁴ The UN Expert Panel noted that fewer attacks had occurred in PTK despite there being fewer civilians in PTK and a larger number of LTTE cadres.²⁵⁵
- 6.65 As noted by the UN Expert Panel, the Sri Lankan Government's military spokesperson, Brigadier Udaya Nanayakkara, repeatedly denied in public that the Government was shelling NFZ-1.²⁵⁶ In the section of the LLRC Report entitled 'The First No Fire Zone and Surrounding Areas', the LLRC only deals indirectly with allegations concerning shelling of the UN Hub, by stating that the UN's Chief Security Advisor in Colombo had brought to the attention of Sri Lanka's Chief of Defence Staff a number of security concerns including that, on 25 January 2009, the SFs Security Headquarters had ordered UN staff out of NFZ-1 as it had become unsafe in the NFZ, mainly due to indirect fire.²⁵⁷
- 6.66 Consistent with the witness accounts detailed above, satellite imagery analysis, which would have been available to the UN Expert Panel, indicates that, between 21 January and the morning of 5 February 2009, 'the distribution center was likely subject to direct artillery fire'.²⁵⁸ Further to this, '[o]ver 240 additional likely artillery impact sites were identified within 1km of the UN center... indicating that the UN center was exposed to a much larger and generalized event of artillery fire within this section of the NFZ-1.'²⁵⁹ On the basis of an analysis of the spatial and temporal context of potential damage to the site and immediate surrounding buildings, the United Nations Institute for Training and Research (**UNITAR**) concluded that the evidence

strongly indicated that they [the potential instances of damage] were not the result of isolated or misdirected artillery fire but part of a much larger bombardment event spread along the southern edge of the NFZ-1 and route A35; the identified damages within and near the UN distribution center occurred during the same period as those identified damages to the UDK [Udayaarkaddu] and Vallipunam Hospitals and thus form part of this larger shelling event.²⁶⁰

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WS-1502, [231].
Ibid, [234]–[236].
WS-1502, [216]; and WS-1506, [63]–[64].
UN Expert Panel Report, [89], 25, fn 42.
Ibid, [84] and fn. 38.
LLRC Report, [4.59].
UNITAR Report, 22.
Ibid.
Ibid.

Conclusion

6.67 It is reasonable to conclude that the UN Hub, food distribution centre and civilian areas in NFZ-1 were civilian objects and therefore protected from attack. While LTTE military assets existed in the NFZ at the time of the SFs' attacks on and around the UN Hub, it is reasonable to conclude that there were no such assets within the UN Hub or food distribution centre. Consequently, it is reasonable to conclude that given the presence of a large and densely packed civilian population in NFZ-1 and, more specifically, around the UN Hub and food distribution centre, and given the minor LTTE targets that may have been identified in the general area of these sites, the SFs' attacks were indiscriminate or disproportionate or both and the SFs did not take adequate precautionary measures.

6.68 An indiscriminate attack can be evidence of a direct attack on civilians or civilian objects.²⁶¹ There are therefore reasonable grounds to suspect that the civilian population, civilian objects and UN Hub in Suthanthirapuram became the object of attack as a result of the SFs' indiscriminate attack. Accordingly, there are reasonable grounds to suspect that these SF attacks would constitute attacks against civilians as war crimes.

(ii) Puthukuddiyiruppu (PTK)²⁶²

6.69 The UN Expert Panel found that, after the capture of the LTTE stronghold of Kilinochchi on 2 January 2009 by the 57th and 58th Divisions,²⁶³ LTTE cadres concentrated in PTK to the south-east of Kilinochchi.²⁶⁴

6.70 PTK Hospital was located along the southern side of the A35 Highway between PTK Junction (one kilometre to the west) and the Sivankovilady Junction (one kilometre to the east).²⁶⁵ PTK was a well-established, Government-administered hospital that was equipped, funded and staffed by Government medical personnel who reported to the Ministry of Health in Colombo.²⁶⁶

6.71 Satellite imagery analysis indicates that PTK Hospital comprised at least 10 building units clearly marked with the Red Cross emblem, and approximately 20 other buildings immediately to the east, all of which were likely associated with the hospital.²⁶⁷ A senior local official of an international agency stated that PTK Hospital was identified as a hospital by its Red Cross markings.²⁶⁸ According to UNITAR, the Red Cross emblems were clearly visible from the air and within available satellite imagery.²⁶⁹

²⁶¹ Galic, (Trial Judgement), [57].

²⁶² ICEP's analysis of the evidentiary material currently available with respect to PTK, including open source information, relies in particular on witness accounts that were all likely to have been before other inquiries. However, ICEP has examined these accounts in more detail in order to conduct a legal appraisal of the available evidentiary material.

²⁶³ UN Expert Panel Report, [77].

²⁶⁴ Ibid, [94]; see also LLRC Report, [3.18].

²⁶⁵ UNITAR Report, 12.

²⁶⁶ Crisis Group Report, 16, which appears to rely on the witness statements of WS-1507, [46]; and WS-1508, [10]. See also LLRC Report, [4.181].

²⁶⁷ UNITAR Report, 12. The UN Expert Panel found that PTK Hospital was clearly marked with emblems easily visible to UAVs: UN Expert Panel Report, [92].

²⁶⁸ WS-1506, [72].

²⁶⁹ UNITAR Report, 12, fn 19; and UN Expert Panel Report, [92].

- 6.72 In February 2009, a senior local official of an international agency and a senior local official of an NGO observed what they believed to be jets, UAVs, drones or Beechcraft regularly flying over their locations in the Vanni.²⁷⁰
- 6.73 The UN Expert Panel found that the GPS coordinates of PTK Hospital were well-known to the SFs.²⁷¹ Not only did international agency and INGO staff provide the hospital's coordinates to the SFs,²⁷² the hospital was also reported to be marked on official maps.²⁷³ Correspondence from SFHQ-Vanni to the UN on 1 February 2009 indicates that the SFs knew the precise bounds of the hospital, and in relation to locations outside of the hospital premises, the SFs stated, 'no guaranty [sic] can be given'.²⁷⁴
- 6.74 The UN Expert Panel found that PTK Hospital's neutrality was recognised by both the Government and the LTTE.²⁷⁵ Witness accounts indicate that the ICRC believed that the Government had communicated to them that PTK Hospital, while not within NFZ-1, was a designated 'safe area'.²⁷⁶ Indeed, the LLRC confirmed that PTK Hospital was placed in a 'safe zone' on 23 January 2009.²⁷⁷
- 6.75 According to the UN Expert Panel, by early 2009, PTK Hospital was the only remaining permanent hospital in the Vanni.²⁷⁸ The witness account of a senior local official of an international agency indicates that the Government was informed by sources on the ground that the other major hospitals had closed.²⁷⁹
- 6.76 The UN Expert Panel found that the LTTE 'maintained a separate ward for wounded cadres in PTK Hospital, but they were not armed'.²⁸⁰
- 6.77 The witness account of a senior Government official indicates that, from around the time NFZ-1 was declared on 20 January, the Government had been requesting that PTK Hospital be closed.²⁸¹ On or around 3 February 2009, according to this official, the Army told a senior Government doctor through the Ministry of Health that PTK Hospital should close down, and all staff and patients should be brought into Government-held territory.²⁸² This doctor reportedly informed the Ministry that he was unable to comply with its instructions for reasons of civilian welfare.²⁸³ The doctor allegedly did not receive a response from the Government.²⁸⁴ It is evident from the findings of the UN Expert Panel and an ICRC media

²⁷⁰ WS-1506, [78]; WS-1509, [88].

²⁷¹ UN Expert Panel Report, [92].

²⁷² WS-1508, [10]; WS-1507, [47]; WS-1506, [64], [71].

²⁷³ WS-1508, [10].

²⁷⁴ Confidential correspondence from Captain K. Heenatigala for the Commander of the Security Forces Headquarters (Wanni) to the UN, 'Security for UN Humanitarian Mission in the Wanni', 1 February 2009, 1; see also Crisis Group Report, 16.

²⁷⁵ UN Expert Panel Report, [90].

²⁷⁶ WS-1507, [12], [67]; WS-1508, [14].

²⁷⁷ LLRC Report, 77, fn 149. ICEP notes that SFs attacks on PTK Hospital, in spite of the safe area being declared to encompass the hospital, may be further evidence of a failure of the SFs' artillery units to program the coordinates of the hospital into artillery fire management systems.

²⁷⁸ UN Expert Panel Report, [90].

²⁷⁹ WS-1507, [46].

²⁸⁰ UN Expert Panel Report, [94].

²⁸¹ WS-1501, [151].

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

release that PTK Hospital functioned as a hospital up to the point of its evacuation in early February 2009.²⁸⁵

- 6.78 The UN Expert Panel found that the medical staff of PTK Hospital were stretched beyond their capacity and medical supplies were very limited, as large numbers of injured civilians flowed into the hospital from NFZ-1.²⁸⁶

Overview of SFs' military operations south of PTK from 10 to 20 January 2009

- 6.79 On the basis of Ministry of Defence reports, troops of the 59th Division were operating south of PTK from about 10 January 2009.²⁸⁷ Task Force 2 and Task Force 4 reportedly took control of the Mannakandal area of Pirappuvedduvan between 15 and 20 January.²⁸⁸
- 6.80 Two witness accounts state that, from at least 16 January 2009, fighting was taking place approximately four kilometres south of PTK, although the precise location of the frontline was believed by one of those witnesses to have been relatively fluid around this time.²⁸⁹
- 6.81 On 17 January, news reports place the 59th Division, commanded by Brigadier Udawatta, in jungle areas south of PTK.²⁹⁰ Around 18 January, the 59-3 Brigade, commanded by Lieutenant Colonel Jayantha Gunaratne, was reported as being approximately three kilometres east of PTK.²⁹¹ Task Force 2, Task Force 3 and Task Force 4 were reportedly nearing the southern area of PTK.²⁹²
- 6.82 According to a news report, the Army Commander, Lieutenant General Sarath Fonseka, reportedly stated that the SFs had completely surrounded Mullaitivu District and hoped to overrun the area in coming weeks.²⁹³ A witness has stated that by 24 January, the fighting was concentrated about one kilometre south of PTK.²⁹⁴
- 6.83 Consistent with Sri Lankan Ministry of Defence media releases and in addition to witness accounts, satellite imagery analysis by UNITAR has revealed the location of two SFs artillery batteries south of PTK in Mannakandal.²⁹⁵ Although UNITAR was unable to determine precisely when the batteries were established, it is likely to have been before 18 or 19 February 2009.²⁹⁶ UNOCHA maps produced on 2 and 3 February 2009 appear to indicate six Army artillery positions approximately eight to 10 kilometres south of PTK.²⁹⁷ Further investigation is warranted in order to ascertain the date on which Army batteries were established in this area and whether or not they were involved in the targeted shelling of PTK.

²⁸⁵ UN Expert Panel Report, [90]–[91], [94]; ICRC News Release, 'Sri Lanka: Vanni Hospital Evacuated – Parties Must Do Utmost to Protect Medical Services and the Wounded and Sick', 4 February 2009.

²⁸⁶ UN Expert Panel Report, [90].

²⁸⁷ Sri Lankan Ministry of Defence Media Release, 'Situation Report', 11 January 2009; Tissa Ravindra Perera, 'Army completes capture of Jaffna', *The Nation*, 11 January 2009.

²⁸⁸ UNITAR Report, 44, fn 44.

²⁸⁹ WS-1502, [90]; exhibit to witness statement of WS-1505, [16].

²⁹⁰ 'Army 59 Division Captures LTTE Camp and a Boat Manufacturing Factory – South of Puthukkudiyiruppu', *Colombo Times*, 18 January 2009, 1.

²⁹¹ 'Do or Die Battle for LTTE', *The Nation*, 18 January 2009.

²⁹² Ibid.

²⁹³ Amal Jayasinghe, 'Tamil Tigers Surrounded, Says Sri Lanka', *Mail & Guardian*, 18 January 2009.

²⁹⁴ Summary of witness statement of WS-1505, [152]–[153].

²⁹⁵ UNITAR Report, 44–5.

²⁹⁶ Ibid.

²⁹⁷ UN Office for the Coordination of Humanitarian Affairs (UNOCHA) maps, 'Access to and Location of IDP Concentration Points along A35 Road – Restricted', produced on 2 February 2009 and 3 February 2009.

Shelling of PTK Hospital on 13 January 2009

6.84 The UN Expert Panel stated that PTK Hospital was shelled on 12 January 2009,²⁹⁸ but gave no details on the attack. The account of a senior Government official indicates that the hospital was shelled again on 13 January, at around 10 or 11am.²⁹⁹ The official, who was located approximately one kilometre west of PTK Hospital and north of the A35 Highway at this time,³⁰⁰ heard the sound of incoming artillery shells which exploded to the south of his position.³⁰¹ He recalled:

A member of the PTK Hospital staff came to [location omitted] and they told me that they had been sent by the [title omitted], [name omitted] to inform the [title omitted] that the Hospital had been shelled... A short time later I went to the Hospital... When I arrived there, the people were very upset and confused... I was shown the damage to the Hospital which included a building which I believe was close to the Mortuary... I met and spoke to [name omitted], and he told me that without warning they had received a number of artillery shells which landed on the Mortuary side of the Hospital coming from the direction of the [front defence line], he told me that from the direction that they came from he believed they were from the SLA. I recall that [name omitted] told me that one person had been killed and several others were wounded.³⁰²

6.85 Other open-source and confidential correspondence provided to ICEP corroborates this account that on 13 January 2009, PTK Hospital was struck by artillery. First, on 13 January 2009, the UN Office of the Resident/Humanitarian Coordinator (**UNR/HC**) informed the Ministry of Foreign Affairs that it had received reports on that date that artillery shells landed near PTK Hospital, killing one woman, injuring six persons and causing substantial damage to the hospital.³⁰³ The UNR/HC urged the Government 'to desist from attacks into areas which are populated by civilians.'³⁰⁴ Secondly, according to the LLRC, on 14 January the ICRC reportedly informed the Army Commander that a shell had exploded in the PTK Hospital compound on 13 January, injuring two persons.³⁰⁵ Thirdly, HRW (relying on interviews with aid agencies and eye-witnesses) also reported that the hospital was attacked by the SFs on 13 January, killing one person and wounding others.³⁰⁶ However, the US Department of State noted that, according to satellite imagery taken on 28 January 2009, PTK Hospital 'did not appear to show visible damage and appeared to be functioning.'³⁰⁷ It remains to be determined whether, given the nature and scope of damage caused to the hospital, such damage would be likely to be visible in satellite imagery, and whether the damage had been repaired to some degree between 13 and 28 January 2009.³⁰⁸

298 UN Expert Panel Report, [25], n 42.

299 WS-1501, [87]–[89].

300 Ibid, [87]; WS-1506, [34].

301 WS-1501, [87].

302 Ibid, [87]–[89].

303 Confidential correspondence from the UN Office of the Resident/Humanitarian Coordinator to the Chief of Protocol, Ministry of Foreign Affairs, 13 January 2009.

304 Ibid.

305 LLRC Report, [4.130].

306 See, for example, HRW, War on the Displaced: Sri Lankan Army and LTTE Abuses against Civilians in the Vanni, February 2009, 18; and Report to Congress 2009, 16.

307 Report to Congress 2009, 18 and Appendix B, image 1.

308 See explanation of limitations of satellite imagery analysis in detecting damages caused by 'oblique angle fire' typically from tanks, RPGs and MBRLs: UNITAR Report, 6.

Shelling near PTK Hospital in the days leading up to 29 January 2009

- 6.86 An eye-witness stated that the PTK area was again subjected to artillery fire, and in addition, what he believed to have been MBRL fire, in the days leading up to 29 January 2009.³⁰⁹
- 6.87 This witness reported that most of the artillery landing in PTK on 27 and 28 January was coming from the south and east.³¹⁰ The witness specifically referred to incoming fire on 27 January as being SFs fire.³¹¹ He estimated that shells were landing between 500 metres and one kilometre from PTK Hospital, and specifically on 27 January, also on PTK Junction.³¹² Over the course of the morning on 27 January, the shelling intensified.³¹³ The witness reported that from late evening on 28 January to the morning of 29 January, what he believed to be heavy artillery and MBRL fire was coming from the south, which landed within 200 metres of the hospital complex.³¹⁴ A Sri Lankan Ministry of Defence 'situation report' noted that troops of the 59th Division were located south and south-east of PTK from 10 January 2009.³¹⁵

Repeated shelling of PTK Hospital from 29 January to 4 February 2009

- 6.88 The UN Expert Panel found that, immediately following the departure of the two remaining UN international staff from PTK, and after an ICRC convoy evacuated about 200 wounded patients, PTK Hospital was hit by artillery, including MBRLs, every day between 29 January and 4 February 2009.³¹⁶ According to the UN Expert Panel, during this time, PTK Hospital sustained at least nine direct hits, resulting in the deaths of patients and hospital staff.³¹⁷ The UN Expert Panel concluded that the shelling was coming from Sri Lankan Army positions.³¹⁸
- 6.89 One senior local official of an international agency stated:
- I can say clearly without a single doubt the artillery and MBRL shells that were hitting the hospital on all occasions I was there [between 29 January and 4 February 2009] were coming from the SFs. I can say that because of the direction and the distance that the shells came in from.³¹⁹
- 6.90 UN satellite imagery analysis indicates that PTK Hospital was likely subject to direct artillery fire between 21 January and 5 February 2009, 'causing significant artillery damages' at a time when the hospital was operational.³²⁰ The analysis revealed extensive damage to two of the primary hospital building units, the partial collapse of an auxiliary building on hospital grounds, and destruction to five additional buildings and severe damage to one additional building all situated within 500 metres of the hospital.³²¹ However, UNITAR notes that satellite-based damage assessments are generally unable to detect 'damages to building

³⁰⁹ WS-1502, [276]–[277], [292].

³¹⁰ Ibid, [277], [292].

³¹¹ Ibid, [277].

³¹² Ibid.

³¹³ Ibid.

³¹⁴ Ibid, [292].

³¹⁵ Sri Lankan Ministry of Defence, 'Situation Report' (media release), 11 January 2009; Tissa Ravindra Perera, 'Army Completes Capture of Jaffna', *The Nation*, 11 January 2009.

³¹⁶ UN Expert Panel Report, [91].

³¹⁷ Ibid, [91].

³¹⁸ Ibid, [91].

³¹⁹ WS-1506, [73].

³²⁰ UNITAR Report, 12.

³²¹ Ibid, 12.

walls resulting from oblique angle fire, typically caused by tanks, RPGs [i.e. rocket-propelled grenades] and sometimes MBRLs'.³²² As numerous witnesses refer specifically to the use of MBRLs, satellite analysis must be carefully considered alongside other information, including, in particular, eye-witness accounts.

- 6.91 There are various estimates on the number of patients at the hospital at the time. According to one witness and one report, approximately 800 patients were in the hospital grounds around this time,³²³ although the exact figure cannot be ascertained as the hospital was reportedly severely overcrowded.³²⁴
- 6.92 As a result of these attacks on and around PTK Hospital, many civilians were injured and killed, including patients and staff members.³²⁵ According to a senior local official and a local employee of an international agency, shelling also destroyed the pharmacy across the road from PTK Hospital,³²⁶ injuring the pharmacist, killing his wife and at least three other civilians.³²⁷
- 6.93 Specifically, two eye-witness accounts, including one from the senior local official of an international agency referred to above, provide detail on the shelling of PTK Hospital on 1 February 2009.³²⁸ According to these witnesses, shells hit the maternity ward or the women's general ward, killing several female patients and wounding others.³²⁹ An ICRC news release, 'Sri Lanka: Vanni hospital shelled', confirms that PTK Hospital was shelled on 1 February 2009. The news release noted that, at a time when the hospital had over 500 in-patients, and more wounded people continued to arrive at the facility, PTK Hospital was shelled on the afternoon of 1 February, killing at least two people and injuring at least five others. The hospital compound sustained two direct hits.³³⁰ In respect of this news release, a witness stated, 'I know that the information contained in this report is a true and accurate depiction of what occurred, as I was there at the time of the events reported.'³³¹
- 6.94 On 2 February 2009, the ICRC reported that, on 1 February, PTK Hospital 'sustained direct hits [by shelling] three times in less than eight hours: twice between 3 and 4 p.m. local time, then again at 10.20 p.m. local time.'³³² The ICRC reported that 'the hospital's kitchen was hit first, then its church and later a ward with women and children.'³³³ When the hospital sustained the third direct hit, 'more than 800 people, including 500 in-patients, were sheltering in the hospital',³³⁴ causing the deaths of at least nine people and injury to at least 20 others.³³⁵

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Ibid,6.

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WS-1510, [54], consistent with Report to Congress 2009, 21.

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WS-1507, [63]; WS-1502, [257]; WS-1503, [86]–[89]; WS-1511, [13]. See also Report to Congress 2009, 24.

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See, for example, WS-1508, [20], [22]–[24]; WS-1506, [70]–[71], [74].

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WS-1507, [68]; WS-1508, [23].

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WS-1508, [23].

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See, for example, WS-1507, [79]–[84]; WS-1508, [21].

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Exhibits to WS-1507, [79]; WS-1508, [21]–[22].

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ICRC News Release, 'Sri Lanka: Vanni Hospital Shelled', No. 09/26, 1 February 2009, <http://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/sri-lanka-news-010209.htm>. The head of the ICRC's Colombo delegation is quoted as stating: 'We're shocked that the [Puthukuddiyiruppu] hospital was hit, and this for the second time in recent weeks'.

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WS-1507, [82] in respect of ICRC News Release, 'Sri Lanka: Vanni hospital shelled', No. 09/26, 1 February 2009.

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ICRC News Release, 'Sri Lanka: ICRC maintains support for hospital hit by shelling', 2 February 2009, available at <http://www.icrc.org/eng/resources/documents/interview/sri-lanka-interview-020209.htm>.

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Ibid.

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Ibid.

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Ibid.

- 6.95 According to the LLRC report, the ICRC also confirmed in a letter to the Army Commander that this attack took place.³³⁶ Consistent with other information, the US Department of State received a report that at least nine hospital patients were killed as a result of an attack on PTK Hospital on this date.³³⁷
- 6.96 According to the US Department of State, numerous media outlets reported that PTK Hospital was shelled just before midnight on 1 February 2009 after LTTE cadres fired their weapons into the sky from near the hospital.³³⁸ There is no indication provided as to how close the LTTE who allegedly fired their weapons were to the hospital.
- 6.97 The eye-witness account of a senior Sri Lankan Government official indicates that shelling of PTK Hospital and the PTK area intensified between 1 February and 4 February 2009, the day commemorating Sri Lanka's independence.³³⁹ The official observed that the most intense shelling occurred on the day and night of 4 February, when
- [m]ore than 50 shells fell in the actual hospital grounds, which caused many deaths and injuries, and extensive damage in the following buildings; operating theatre; children's ward; women's ward; surgical wards; male wards; kitchen; mortuary; and shrapnel struck the staff quarters and administration building.³⁴⁰
- 6.98 This Government official's account is consistent with an article in *The Guardian* which reported that, on 4 February 2009, a dozen patients at PTK Hospital were killed as a result of sustained shelling that lasted for 16 hours.³⁴¹ According to the International Crisis Group (**Crisis Group**), 'The UN and others repeatedly advised the government and military of this shelling.'³⁴² *The Guardian* reported that both the Government and the LTTE denied responsibility for shelling the hospital on this date.³⁴³

Government response to allegations of repeated shelling

- 6.99 On 2 February 2009, the Sri Lankan Ministry of Defence released a statement noting that the SFs would not assure the safety of civilians outside NFZ-1, and 'as civilians who do not heed this call will be among LTTE cadres, the Security Forces will not be able to accept responsibility for their safety.'³⁴⁴
- 6.100 In an interview with Sky News on 2 February 2009, the Secretary of Defence, Gotabaya Rajapaksa, was asked questions about PTK Hospital. The interview transcript reads:

Gotabaya: If they [reports] are referring to the [PTK] hospital, now there shouldn't be a [PTK] hospital or anything because we withdrew that. We got all the patients to Vavuniya, out of there. So nothing should exist beyond the no fire zone...

Interviewer: So just to be clear, if this hospital is operating...

³³⁶ LLRC Report, [4.130].

³³⁷ Report to Congress 2009, 20.

³³⁸ Ibid, 20.

³³⁹ WS-1501, [152].

³⁴⁰ Ibid, [152].

³⁴¹ Randeep Ramesh, 'Patients killed in cluster bomb attack on Sri Lankan hospital', 4 February 2009, available at <http://www.guardian.co.uk/weather/2009/feb/04/srilanka-terrorism>.

³⁴² Crisis Group Report, 17.

³⁴³ Randeep Ramesh, 'Patients killed in cluster bomb attack on Sri Lankan hospital', 4 February 2009, available at: <http://www.guardian.co.uk/weather/2009/feb/04/srilanka-terrorism>.

³⁴⁴ Sri Lankan Ministry of Defence, 'Come to Security of Safety Zone – Govt. Urges All Civilians' (media release), 3 February 2009.

Gotabaya: No hospital should, no hospital should operate now...

Interviewer: If it's outside of the safe zone [NFZ-1], it's a legitimate target.

Gotabaya: Yes. No hospital should operate in the area, nothing should operate. That is why we clearly gave these no fire zones.³⁴⁵

- 6.101 On 3 February 2009, according to the *New York Times*, the Sri Lankan Foreign Secretary blamed the LTTE for attacks on PTK Hospital.³⁴⁶ On 6 February, the Sri Lankan Air Force released aerial video footage of PTK Hospital dated 5 February, claiming it 'clearly shows the buildings of the former Puthukudduyiruppu hospital with no damages caused due to artillery fire or aerial bombardment'.³⁴⁷ However, Crisis Group noted:

The video display shows that certain segments have been edited out, and the video does not provide close-up shots of all buildings. It does however demonstrate that the security forces had access to aerial surveillance images that could provide detailed information about the nature and location of objects and people in the Vanni.³⁴⁸

- 6.102 On 15 January 2009, the Ministry of Foreign Affairs denied 'categorically' any involvement in a shelling near the PTK Hospital reported to the UN Office of the Resident Co-ordinator on 13 January 2009.³⁴⁹

- 6.103 The LLRC noted, 'There was a substantial volume of material relating to the damage caused to the Puthukudiyiruppu Hospital and this is a matter of particular concern to the Commission'.³⁵⁰ However, the LLRC found, in relation to the evidence concerning the shelling of hospitals generally, that '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'.³⁵¹

Conclusion

- 6.104 It is reasonable to conclude that despite statements to the contrary made by the Sri Lankan Government, PTK was a functioning hospital. It was also a protected object, the location of which was known to the Sri Lankan Government. Accordingly, the hospital was not a lawful object of attack. The legal prohibition against attacking the hospital remains despite the evidentiary material stating that LTTE military assets existed in the general PTK area around the time of SFs' attacks on and around PTK Hospital, and that the LTTE fired weapons (including mobile artillery) from near the hospital on occasion. It is also reasonable to conclude that the shelling of PTK occurred in the context of the SFs' widespread and consistent practice of area bombardment on the NFZs. Therefore, given the high density of civilians in PTK Hospital and the hospital compound, and the minor LTTE targets that may have been identified in the vicinity of PTK Hospital, it is reasonable to conclude that the SFs'

³⁴⁵ Crisis Group Report, 17, fn 84. For a shorter extract of the interview transcript, see UN Expert Panel Report, [93].
³⁴⁶ Somini Sengupta, 'Wounded Flee Shelling of a Hospital in Sri Lanka', *The New York Times*, 4 February 2009.
³⁴⁷ Sri Lankan Ministry of Defence Media Release, 'Former Puthukudduyiruppu Hospital Unharmd', 6 February 2009; UN Expert Panel Report, 26, fn 45.
³⁴⁸ Crisis Group Report, 17–8.
³⁴⁹ Confidential correspondence from the Ministry of Foreign Affairs to the UN Resident/Humanitarian Coordinator, 15 January 2009, 1; see also See UN Expert Panel Report, [93].
³⁵⁰ LLRC Report, [4.289].
³⁵¹ *Ibid.*, [4.288].

attacks were indiscriminate or disproportionate or both and the SFs did not take adequate precautionary measures.

- 6.105 An indiscriminate attack can be evidence of a direct attack on civilians or civilian objects.³⁵² There are therefore reasonable grounds to suspect that the civilian population, civilian objects and other protected objects became the object of attack as a result of the SFs' indiscriminate attack. Accordingly, there are reasonable grounds to suspect that the SFs' attacks on PTK Hospital constitute attacks against civilians as war crimes.

(iii) Putumattalan³⁵³

- 6.106 The UN Expert Panel found that, from early February 2009, 'large numbers of civilians trying to escape fierce fighting in Anandapuram, Iranapalai and Thevipuram fled towards the coast'.³⁵⁴ The UN Expert Panel described the coast at this stage in the conflict as 'the last remaining haven'.³⁵⁵ As noted in paragraphs 6.84 - 6.97, there was 'incessant shelling' of PTK Hospital and its surrounding areas, and so the Regional Director of Health Services (**RDHS**), UN, Additional Government Agent (**AGA**) and the ICRC evacuated approximately 300 wounded patients from PTK Hospital to a makeshift hospital at Putumattalan.³⁵⁶
- 6.107 After PTK Hospital was relocated to Putumattalan in early February 2009, the Sri Lankan Government declared, 'there are now no hospitals functioning in uncleared areas in the Vanni'.³⁵⁷
- 6.108 With effect from 12 February 2009, the Sri Lankan Army declared NFZ-2, a 12-kilometre long coastal strip that included the villages of Putumattalan, Ampalavanpokkanai, Valayanmadam, Karaiyamullivaikkal and Vellamullivaikkal.³⁵⁸
- 6.109 However, the UN Expert Panel found:
- From as early as 6 February 2009, the SLA continuously shelled within the area that became the second NFZ, from all directions, including land, air and sea. It is estimated that there were between 300,000 and 330,000 civilians in that small area. The SLA assault employed aerial bombardment, long-range artillery, howitzers and MBRLs as well as small mortars, RPGs [i.e. rocket-propelled grenades] and small arms fire, some of it fired from a close range.³⁵⁹
- 6.110 According to the UN Expert Panel, the Sri Lankan Army in fact intensified its artillery bombardment of the NFZs from February to April 2009,³⁶⁰ 'even though [t]he LTTE had fewer heavy weapons left and less space to fire them from'.³⁶¹ The UN Expert Panel noted:

³⁵² Galic, Trial Judgement, [57].

³⁵³ ICEP's analysis of the evidentiary material currently available with respect to Putumattalan, including open-source information, relies in particular on witness accounts provided by a senior Government official, senior local official of an international agency and senior local official of an NGO. While two of these accounts were likely to have been before other preliminary investigations, ICEP has examined these, as well as statements unique to ICEP, in more detail in order to conduct a legal appraisal of the evidentiary material available.

³⁵⁴ UN Expert Panel Report, [96].

³⁵⁵ Ibid, [96].

³⁵⁶ Ibid, [94], [103].

³⁵⁷ Sri Lanka Government website, 'All patients transferred to safer locations', <http://www.priu.gov.lk/>, (Archives), 5 February 2009.

³⁵⁸ UN Expert Panel Report, [96].

³⁵⁹ Ibid, [100].

³⁶⁰ Ibid, [100]-[101], [109].

³⁶¹ Ibid, [101].

Intensive artillery fire had been a core tactic in the SLA's military campaign from the outset. As victory neared, this tactic was not abandoned, but rather its use was intensified, even though the LTTE was now immobilized and surrounded in an area of high civilian density. The intensive shelling also caused many civilians to attempt to flee the area, meeting another of the Government's objectives, to put pressure on civilians to get out of the way.³⁶²

- 6.111 The makeshift hospital in Putumattalan, known as Putumattalan or Mathalan Hospital, was one of three makeshift hospitals in NFZ-2.³⁶³ Witness accounts of a senior Government official and of a senior local official of an NGO indicate that the hospital was established at the Putumattalan Junior School³⁶⁴ and staffed by Sri Lankan Government doctors,³⁶⁵ many of whom had relocated from PTK Hospital.³⁶⁶
- 6.112 Putumattalan Hospital was located at the northern end of NFZ-2, adjacent to a primary road leading west to the centre of PTK.³⁶⁷ According to a senior local official of an NGO, the hospital was located 'about 100 metres from Putumattalan Junction'.³⁶⁸ Other witnesses explained, the hospital complex was on raised ground such that the hospital was visible from the western shore of the Nanthikadal Lagoon.³⁶⁹ The lagoon was between 200 and 800 metres wide at various points in Putumattalan.
- 6.113 The accounts of several witnesses, including senior local officials of international agencies and of an NGO, indicate that Putumattalan Hospital, and its associated ambulances, would have been visible to the naked eye from SFs positions opposite the lagoon.³⁷⁰ One of these international agency officials stated, 'The [h]ospital was so close to the SFs that they were able to see it. From my location in front of the hospital I could see the SFs soldiers moving.'³⁷¹ Another witness could see SFs soldiers across the lagoon filling sand bags and constructing bunkers which is supported by photographs annexed to the witness' statement.³⁷²
- 6.114 The UN Expert Panel found that, like other makeshift hospitals in NFZ-2, Putumattalan Hospital was clearly marked with emblems.³⁷³ The senior local official of an NGO whose statement was taken directly by ICEP, reported that a banner with a Red Cross and 'HOSPITAL' written on it, was erected at the front entrance of Putumattalan Hospital, which 'faced out to the lagoon in the direction of the SFs.'³⁷⁴ Other eye-witnesses also observed what they believed to be surveillance aircraft and UAVs regularly over the Vanni Region, and in particular, over Putumattalan and other locations to the south of Putumattalan in

362

Ibid, [101].

363

Ibid, [103].

364

WS-1501, [161]; WS-159, [99].

365

WS-1509, [99]. This statement was taken directly by ICEP.

366

Ibid, [99].

367

UNITAR Report, 16.

368

WS-1509, [96].

369

WS-1501, [161]; exhibit to WS-1506, [81]. See also Crisis Group Report, 18.

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See, for example, WS-1507, [129]; WS-1510, [92]; exhibit to WS-1506, [77]–[81]; WS-1509, [86]–[87].

371

WS-1506, [113].

372

WS-1510, [92].

373

UN Expert Panel Report, [103], which appears to rely on witness statements of WS-1501, [162]; WS-1507, [92]; and WS-1506, [76]. See also Crisis Group Report, 18.

374

WS-1509, [96].

NFZ-2, from early February to April 2009.³⁷⁵ The Ministry of Defence has confirmed the frequent use of UAVs around this time.³⁷⁶

- 6.115 Moreover, the UN Expert Panel found that the GPS coordinates of Putumattalan Hospital were known to the Government.³⁷⁷ Further detail has been obtained from witness accounts, including of senior local officials of international agencies that were likely before other inquiries, which indicate that the ICRC and UN HQ in Sri Lanka, the Sri Lankan Ministry of Defence, the Ministry of Health and the SFs, were made aware of the hospital's precise location.³⁷⁸ In addition, a senior Government official stated that the ICRC informed the Army that PTK Hospital was to be moved to Putumattalan, and according to this official, the Army 'gave the green light' for the hospital convoy to travel to Putumattalan.³⁷⁹ Crisis Group reported that UN staff advised the SFHQ-Vanni Commander, Jagath Jayasuriya, and the LTTE, of the convoy's route and location.³⁸⁰ Consistent with these accounts, in his testimony before the LLRC, the former General Officer Commanding the 58th Division noted the location of Putumattalan Hospital.³⁸¹
- 6.116 From the time Putumattalan Hospital was established in early February 2009, the UN Expert Panel found 'it was severely overcrowded with hundreds of newly injured civilians'.³⁸² A senior local official of an international agency estimated, on the basis of his observations in February and March 2009, that 'there were at least 500 civilian casualties there at any moment on any day' during this period.³⁸³
- 6.117 Correspondence from a senior Government doctor provides an account of the numbers of casualties received by Putumattalan Hospital between 1 March 2009 and 8 April 2009.³⁸⁴ Between 1 and 10 March 2009, Putumattalan Hospital reportedly received 964 wounded civilians, almost all of whom were reportedly 'victims of intense shelling' according to contemporaneous reports by the senior Government doctor.³⁸⁵ According to the senior Government doctor 'more than 95% of these victims came from the safe area'.³⁸⁶ From 22 to 24 March, the hospital received 250 wounded civilians, of whom 21 subsequently died.³⁸⁷ On 30 March, Putumattalan Hospital received 156 injured civilians.³⁸⁸ On 31 March, the hospital received 126 civilian casualties,³⁸⁹ and according to the senior Government doctor, 'most of them were injured at Pokkanai (inside the no fire zone) due to shell attack'.³⁹⁰ On 8 April 2009, described by the senior Government doctor as 'a worse day in the no fire

³⁷⁵ WS-1507, [126]; WS-1506, [78]; WS-1512, [14]; WS-1510, [88]; WS-1509, [72]; WS-1503, [185].

³⁷⁶ Humanitarian Analysis Factual Analysis, [191], [195]–[196], [205]–[207].

³⁷⁷ UN Expert Panel Report, [103].

³⁷⁸ See, for example, WS-1507, [92]; WS-1506, [76].

³⁷⁹ WS-1501, [160].

³⁸⁰ ICG Report, 17.

³⁸¹ LLRC Report, [4.69].

³⁸² UN Expert Panel Report, [103].

³⁸³ WS-1506, [88].

³⁸⁴ Exhibit to a witness statement, contemporaneous correspondence from a senior Government doctor.

³⁸⁵ Exhibit to a witness statement, contemporaneous correspondence from a senior Government doctor entitled 'Civilians Affected by War'.

³⁸⁶ Exhibit to a witness statement; contemporaneous correspondence from a senior Government doctor.

³⁸⁷ Exhibit to a witness statement, contemporaneous correspondence from a senior Government doctor entitled 'Vanni Situation'.

³⁸⁸ Exhibit to a witness statement, contemporaneous correspondence from a senior Government doctor entitled 'Vanni Disaster'.

³⁸⁹ Ibid.

³⁹⁰ Exhibit to a witness statement, contemporaneous correspondence from a senior Government doctor entitled 'Vanni Situation'.

zone',³⁹¹ Putumattalan Hospital received another 294 civilian casualties.³⁹² Based on these figures, Putumattalan Hospital received at least 1,790 wounded civilians between 1 March and 8 April 2009.

- 6.118 The UN Expert Panel found that, although a small number of LTTE cadres were treated at Putumattalan Hospital, they were kept in a separate ward.³⁹³ Crisis Group reported that the LTTE area of Putumattalan Hospital was used for medical purposes.³⁹⁴ As was the case at other hospitals and makeshift hospitals in the Vanni, doctors enforced the same strict rules about the conditions of LTTE entry and conduct in the hospital.³⁹⁵ For example, LTTE cadres were prohibited from carrying arms or communications equipment into hospitals.
- 6.119 The UN Expert Panel found that as a result of insufficient access to adequate medical care, 'scores of dead bodies were deposited in front of the [Putumattalan] hospital each day'.³⁹⁶ A senior local official of an NGO noted that more than 2,500 dead bodies were taken from the hospital around this time, and buried by a local NGO.
- 6.120 Witness accounts indicate that, on 4 February 2009, the remaining UN officials in the Vanni established a compound in Putumattalan,³⁹⁷ about 30 metres from the hospital (**UN Compound**).³⁹⁸ Five witnesses, including senior local officials of international agencies and of an NGO, stated that the UN Compound could be identified by the presence of white 'UN' marked vehicles and a raised UN flag.³⁹⁹ Its GPS coordinates, which included a 400 metre buffer zone, were allegedly sent through UN HQ in Colombo to the SFs.⁴⁰⁰ On 4 February 2009, one of these senior local officials observed what he believed to be UAVs above the UN Compound in Putumattalan.⁴⁰¹ At least four other witnesses, including a senior Government official and a senior local official of an NGO, also reported that they saw what they believed to be surveillance aircraft between February to April 2009.⁴⁰²
- 6.121 From 5 February 2009, thousands of civilians reportedly arrived in Putumattalan from NFZ-1 and set up shelters around the UN Compound and Putumattalan Hospital.⁴⁰³ One of the senior local officials of an international agency mentioned above estimated that at the time more than 5,000 families were located in the immediate vicinity of the UN Compound.⁴⁰⁴ Satellite imagery analysis identified more than 800 IDP tent shelters erected between 6 and 19 February 2009, within a 250 metre radius of the hospital.⁴⁰⁵ According to UNITAR, the absolute number of IDP shelters remained relatively constant from 19 February to 6 March 2009, although

³⁹¹ Exhibit to a witness statement, contemporaneous correspondence from a senior Government doctor entitled 'Vanni Disaster'.

³⁹² Ibid.

³⁹³ UN Expert Panel Report, [104].

³⁹⁴ ICG Report, 16.

³⁹⁵ WS-1507, [13]; WS-1508, [11].

³⁹⁶ UN Expert Panel Report, [103].

³⁹⁷ Exhibit to WS-1506, [76]–[78]; WS-1507, [136]; WS-1501, [161]; WS-1509, [97].

³⁹⁸ Ibid.

³⁹⁹ Exhibit to WS-1506, [77]–[78]; WS-1507, [136]; WS-1501, [161]; WS-1509, [97]; WS-1503, [223].

⁴⁰⁰ WS-1506, [78].

⁴⁰¹ WS-1506, [76], [78].

⁴⁰² WS-1501, [161], [222]; WS-1510, [88]; WS-1509, [72]; WS-1503, [185].

⁴⁰³ Exhibit to WS-1506, [79].

⁴⁰⁴ WS-1506, [79].

⁴⁰⁵ UNITAR Report, 16.

there was a marked eastern shift away from the [Nanthikadal] lagoon, where one probable large artillery impact crater was identified within the NFZ-2 approximately 375 meters west of the Putumattalan hospital facility.⁴⁰⁶

Overview of SFs military operations and positions from February to mid-April 2009

6.122 ICEP has reviewed Sri Lankan Ministry of Defence statements and maps relating to SFs military operations, which provide an approximate location of SFs manoeuvre formations. In addition to these official sources, ICEP has examined satellite imagery analysis that indicates that the SFs established artillery batteries in or near locations that were reported by the Ministry of Defence to have come under SFs' control. The available evidentiary material indicates that these SFs batteries were capable of firing artillery projectiles on locations in Putumattalan at relevant times detailed below. Official statements, maps and satellite imagery analysis can be summarised as follows:

- After Chalai (a village located north of NFZ-2) was recaptured by the 55th Division on 5 February 2009,⁴⁰⁷ three SFs artillery batteries were emplaced near Chalai.⁴⁰⁸ According to satellite analysis, these batteries were capable of firing mortars and howitzers into the northern half of NFZ-2 which encompassed Putumattalan Hospital.⁴⁰⁹
- A SFs artillery battery that comprised nine howitzers was established in Mannakandal, located south of PTK.⁴¹⁰ According to satellite imagery analysis, from 18 February to 23 March 2009, the average fire bearing of these howitzers covered the area east of PTK, and the northern section of NFZ-2, which included Putumattalan and Putumattalan Hospital.⁴¹¹
- After the 58th Division reportedly captured Thevipuram on 23 February 2009,⁴¹² between 18 February and 6 March 2009, a SFs artillery battery was established near Thevipuram with a projected fire bearing and range capability covering the northern section of NFZ-2, including Putumattalan and the area south of Putumattalan.⁴¹³
- Consistent with Government reports and other open-source information, which locate SFs troops of the 58th Division, 53rd Division and Task Force 8 near the western bank of Nanthikadal Lagoon,⁴¹⁴ satellite imagery analysis indicates that the SFs emplaced at least six separate mortar batteries on the western shore of the Nanthikadal Lagoon between March and May 2009.⁴¹⁵ UNITAR stated:

406

Ibid,16.

407

UN Expert Panel Report, [95]; Sri Lankan Ministry of Defence, 'The Final Countdown' (media release), 26 May 2011, http://www.defence.lk/new.asp?fname=20090117_03.

408

UNITAR Report, Annex, 4–6.

409

Ibid.

410

Ibid, 45.

411

Ibid,45.

412

'Troops Capture Devipuram', *The Island*, 26 February 2009, <http://www.island.lk/2009/02/26/news.html>; and Sri Lankan Ministry of Defence, 'Fierce Confrontations in Puthukudiyirippu' (media release), 25 February 2009, available at http://www.defence.lk/new.asp?fname=20090225_02.

413

UNITAR Report, Annex,4.

414

See, for example, Sri Lankan Government, 'Security Forces Bag Puthukudiyirippu Town' (media release), 3 March 2009; Sri Lankan Ministry of Defence, 'Situation Report' (media release), 4 March 2009; Sri Lankan Ministry of Defence, 'LTTE's Last Battle' (media release), 13 March 2009; Sri Lankan Ministry of Defence, 'Situation Report' (media release), 16 March 2009; ICG Report, 19; Tissa Ravindra Perera, 'Army Plans 'No Fire Zone' Capture', *The Nation*, 5 April 2009; and 'How Top Secret Visit Went Through', *The Nation*, 19 April 2009.

415

UNITAR Report, 45.

A review of the estimated fire bearings of the batteries indicated that they were exclusively targeting areas within the NFZ-2, and later NFZ-3, based on the lack of available intermediate targets over the lagoon.⁴¹⁶

- According to UNITAR, between 15 and 23 March 2009, construction commenced on a large earthen berm between Putumattalan Hospital and Nanthikadal Lagoon.⁴¹⁷ UNITAR suggested that a berm to the south-west may have been constructed by the LTTE.
- The Sri Lankan Ministry of Defence reported that the 55th Division, commanded by Brigadier De Silva, breached the LTTE's defensive earthen bund north of Palamattalan on or around 28 March 2009.⁴¹⁸ Satellite imagery analysis reveals that between 29 March and 19 April 2009, the SFs emplaced two additional artillery batteries in the area north-west of NFZ-2, between Chalai and Palamattalan.⁴¹⁹ The estimated fire bearing of these batteries covered the northern half of NFZ-2, which encompassed Putumattalan and Ampalavanpokkanai.⁴²⁰

Shelling of Putumattalan Hospital and UN Compound in February and March 2009

- 6.123 The UN Expert Panel found that Putumattalan Hospital was shelled on several occasions in February and March 2009.⁴²¹ The US Department of State and CRISIS GROUP refer to reports of attacks on the hospital or its immediate surroundings during February 2009.⁴²²
- 6.124 On or around 6 February 2009, a senior local official of an international agency observed what he believed to be MBRL shells land in an area in Putumattalan densely populated with civilians.⁴²³ He said the impact site was approximately 100 metres from UN vehicles parked in the middle of the UN Compound.⁴²⁴ This official heard the sound of the shells, which he believed were likely fired from Chalai, a village under the SFs' control at the time.⁴²⁵ He visited the impact site where the MBRL shells exploded and saw eight or nine dead men, women and children.⁴²⁶ The number of casualties and wounded was recorded and forwarded to the UN.⁴²⁷
- 6.125 According to the UN Expert Panel, on 9 February 2009, shells fired from Army bases in Chalai,⁴²⁸ north of NFZ-2, fell on Putumattalan Hospital, killing at least 16 patients.⁴²⁹ Shells were also fired from Army positions across the lagoon 'even though the hospital was clearly visible to the SLA based there'.⁴³⁰ Putumattalan Hospital was also shelled on other occasions in February and March 2009.⁴³¹

416

Ibid, 45.

417

UNITAR Report, 16 and Annex, 1

418

Sri Lankan Ministry of Defence, 'Situation Report' (media release), 29 March 2009, 1; UNITAR Report, Annex, 1, which depicts the earthen bund or 'berm'.

419

UNITAR Report, Annex, 8.

420

Ibid.

421

UN Expert Panel Report, [104].

422

Report to Congress 2009, 22; and ICG Report, 18–9.

423

WS-1506, [82].

424

Ibid.

425

Ibid.

426

Ibid.

427

Ibid.

428

UN Expert Panel Report, [104].

429

Ibid.

430

Ibid, [94], [104].

431

Ibid, [104].

- 6.126 A report by Crisis Group stated that, after capturing PTK on 5 March 2009, SFs troops moved up to the Nanthikadal Lagoon across from Putumattalan Hospital.⁴³² This report is consistent with the General Officer Commanding (GOC) the 58th Division who testified before the LLRC that ‘we went up to the [Nanthikadal] lagoon from the Puthukudiyiruppu side and we were at the edge of the lagoon, on the other side of the lagoon was Puthumatthalan’.⁴³³ According to this senior SFs commander, the 58th Division with Commando and Special Forces troops were tasked to conduct an operation into Putumattalan, and spent three weeks identifying LTTE targets from SFs positions across the lagoon and about one kilometre from Putumattalan itself.⁴³⁴
- 6.127 Consistent with Sri Lankan Government reports that locate SFs troops of the 58th Division on the western bank of Nanthikadal Lagoon, two witness accounts that were taken directly by ICEP indicate that the SFs commenced constructing a fence of woven coconut tree leaves along the Nanthikadal Lagoon in March 2009.⁴³⁵
- 6.128 According to the LLRC, as civilians moved into NFZ-2, the SFs’ Rules of Engagement were changed to take into account the fact that civilians were located in close proximity to the fighting.⁴³⁶ Relying on the Ministry of Defence, the LLRC found that ‘orders were that operations were to be conducted only with the use of small arms.’⁴³⁷ Consistent with this information, at least eight witnesses refer to small arms fire on or around Putumattalan Hospital and the UN Compound, from SFs’ positions directly across the Nanthikadal Lagoon or from the north.⁴³⁸
- 6.129 According to an NGO worker, around early March 2009, a senior Government doctor reportedly arranged for a wall of sandbags to be constructed between the Putumattalan Hospital’s administrative office and the Nanthikadal Lagoon where the SFs were positioned.⁴³⁹ The NGO worker stated that, in his view, this measure was taken ‘to protect the staff from the continual gunfire being fired into the hospital from across the lagoon.’⁴⁴⁰
- 6.130 Moreover, eye-witness and second-hand witness accounts indicate that Putumattalan Hospital was shelled on multiple occasions in March 2009.⁴⁴¹ These accounts also provide further detail in respect of specific incidents occurring from early to mid-March, and are generally consistent with satellite imagery analysis, which indicates that

[t]he majority of likely artillery-related building damages and impact craters identified within 400m of the hospital compound occurred between 6 and 29 March 2009. The most significant of these identified sites was a loose cluster of seven likely impact craters located across the road from the [Putumattalan] hospital approximately 50-150m to the west.⁴⁴²

⁴³² ICG Report, 19.

⁴³³ Shavendra Silva quoted in LLRC Report, [4.69].

⁴³⁴ ‘Transcript of Shavendra Silva’s testimony before the LLRC’, 1.

⁴³⁵ WS-1509, [87]–[88]; WS-1513, [163].

⁴³⁶ LLRC Report, [3.18].

⁴³⁷ Ibid, [3.18].

⁴³⁸ See, eg, WS-1506, [94]; WS-1503, [191], [209]; WS-1504, [120]; WS-1509, [88]; WS-1501, [265]; WS-1514, [19].

⁴³⁹ WS-1512, [72]–[73].

⁴⁴⁰ WS-1512, [72]–[73].

⁴⁴¹ See, eg, WS-1501, [209]; WS-1504, [65]–[68].

⁴⁴² UNITAR Report, 16.

- 6.131 Throughout early to mid-March 2009, a senior local official of an international agency based at the UN Compound in Putumattalan contemporaneously sent reports of frequent shelling in and around the compound to his superiors.⁴⁴³ These contemporaneous reports stated that there were in excess of nine incidents of artillery attacks and/or heavy shelling of the area between 2 and 13 March 2009, all of which resulted in shells exploding between approximately 10 metres and 500 metres from the UN Compound.⁴⁴⁴ The reports of these incidents also refer to a number of civilians being wounded and one child being killed in the alleged attacks.⁴⁴⁵ In particular within these reports, there is reference to an unexploded shell allegedly falling 10 metres from the UN Compound on the afternoon of 2 March 2009, and another shell landing within 50 metres of Putumattalan Hospital on the evening of 13 March 2009.⁴⁴⁶ On at least two occasions, the shells were reported to have come from the west (where SFs were located at the time).⁴⁴⁷
- 6.132 The US Department of State reported on 13 March 2009, 'Two artillery shells, which witnesses believed were from the SLA, hit Mattalan. The shelling reportedly killed a child and seven other civilians. Shelling was heavier later in the day.'⁴⁴⁸
- 6.133 The eye-witness account of a senior Government official detailed the aftermath of an alleged rocket-propelled grenade (**RPG**) attack on Putumattalan Hospital on 16 March 2009.⁴⁴⁹ The official spoke to a senior Government doctor at the hospital, and personally observed damage to the hospital roof where he believed it had been struck by an RPG.⁴⁵⁰ The doctor reported to the official that two people had been killed in the RPG attack.⁴⁵¹ HRW also reported that a source who was in the area reported that a shell, which was possibly an RPG, hit the Mattalan hospital on 16 March 2009 and killed 2 people.⁴⁵²
- 6.134 A senior local official of an international agency visited the UN Compound in March 2009. At this time, he saw shrapnel damage to UN bunkers, UN vehicles and an area nearby which contained a civilian house and many IDP tents surrounding the house.⁴⁵³ The official noted that the UN Compound had been attacked on at least two occasions, a few days apart, and that he visited the scene shortly after these attacks.⁴⁵⁴ These accounts are further supported by a series of photographs taken on 13 March 2009, which depict shrapnel damage to UN lorries.⁴⁵⁵

⁴⁴³ Exhibit to WS-1506, [127].

⁴⁴⁴ Exhibits (nine) to WS-1506, [127].

⁴⁴⁵ Exhibits (three) to WS-1506, [127].

⁴⁴⁶ Exhibits (two) to WS-1506, [127].

⁴⁴⁷ Exhibits (two) to WS-1506, [127].

⁴⁴⁸ Report to Congress, 29.

⁴⁴⁹ WS-1501, [209].

⁴⁵⁰ Ibid.

⁴⁵¹ Ibid.

⁴⁵² HRW report cited in Report to Congress 2009, 29.

⁴⁵³ Exhibit to WS-1507, [136] entitled 'SFs Artillery Attack on UN Compound Putamattalan', which includes a series of photographs of shrapnel damage to UN lorries located within the compound.

⁴⁵⁴ Exhibit to WS-1507, [136].

⁴⁵⁵ Exhibit to WS-1507, [136].

RPG attacks on Putumattalan Hospital and the UN Compound from on or around 24 March to early April 2009

- 6.135 Witness accounts indicate that Putumattalan Hospital or its immediate surroundings were attacked with RPGs on or around 24 March 2009.⁴⁵⁶
- 6.136 For example, a senior Government doctor reported on 24 March 2009 that the area surrounding Putumattalan Hospital was being attacked with shells, RPG-type shells and gunfire.⁴⁵⁷ On the morning of 24 March, a senior local official of an international agency contemporaneously reported to his superiors that an RPG had hit one of the Putumattalan Hospital entrances, causing casualties.⁴⁵⁸ At around 10am, colleagues had reported to him that the SFs had launched one RPG from across the Nanthikadal Lagoon.⁴⁵⁹ The shell reportedly exploded on the hospital's main building at the roofline on the north-west corner.⁴⁶⁰ The witness stated that 'at least three people were killed outside [the hospital] and more than 10 were wounded'.⁴⁶¹ About two hours later, the official attended the hospital and observed 'damage to the hospital building and the dead bodies laid out beside the hospital'.⁴⁶²
- 6.137 Later that afternoon, at around 4pm, the same senior local official contemporaneously reported to his superiors that an RPG landed 50 metres east of the UN Compound, in front of Putumattalan Hospital, killing one child.⁴⁶³ In his witness statement, the official provided the following additional details:
- I heard another SFs RPG launched from across the [Nanthikadal] lagoon. It struck a civilian bus that was parked in fro[nt] of the Hospital entrance right where a six year old boy was playing. The shrapnel hit the boy and the mother who was in a hut next to the bus ran out, grabbed the little boy and ran into the hospital. I followed her and found that the little boy was dead.⁴⁶⁴
- 6.138 This witness account is similar to the eye-witness account of an NGO worker who was based in Putumattalan from late March to early April 2009.⁴⁶⁵
- When I was near the gate of the [Putumattalan] hospital, a RPG shell fired from the SFs from across the [Nanthikadal] lagoon where I could now see the SFs frontlines... The round struck a tree at the gate of the hospital just after I had passed through. I turned around and saw one person wounded on the ground and there were about 5 other people who crawled towards the hospital who were also wounded... When things quieted down... I went back to about where the RPG hit the ground near the hospital.⁴⁶⁶
- 6.139 Consistent with reports that RPGs were fired on or near Putumattalan Hospital and the UN Compound in Putumattalan on or around 24 March 2009, ICEP has also collected photographic material showing RPGs in or near the UN Compound and Putumattalan

⁴⁵⁶ WS-1506, [93]; WS-151, [215]; WS-1503, [226].

⁴⁵⁷ Exhibit to witness statement, contemporaneous correspondence from a senior Government doctor entitled 'Vanni Situation'.

⁴⁵⁸ Exhibits (two) to WS-1506, [93], [127].

⁴⁵⁹ WS-1506, [93].

⁴⁶⁰ Ibid.

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Exhibits (two) to WS-1506, [93], [127].

⁴⁶⁴ WS-1506, [93].

⁴⁶⁵ WS-1510, [82], [96]–[97].

⁴⁶⁶ Ibid, [92].

Hospital.⁴⁶⁷ Photographs taken on 24 March show the remnants of an exploded RPG located close to UN lorries inside the UN Compound.⁴⁶⁸ Other photographs, likely taken in Putumattalan or Putumattalan Hospital on or around 24 March 2009, show unexploded RPGs, including an unexploded RPG embedded in a woman's legs.⁴⁶⁹

- 6.140 An international agency official sent contemporaneous reports that six additional artillery attacks took place on 25 and 26 March 2009.⁴⁷⁰ The witness reported that around 4:30am on 26 March, an RPG hit the emergency treatment unit of Putumattalan Hospital.⁴⁷¹ In this attack, according to this witness, one patient was killed and five persons, including one staff member, were wounded. The hospital building was also said to have sustained major damage to the roof and wall.⁴⁷²
- 6.141 The UN Expert Panel found that, on around 27 March 2009, RPGs were fired at Putumattalan Hospital, killing several civilians.⁴⁷³ Apart from the civilian casualties, the operating theatre, roof and a makeshift ward at the hospital were damaged.⁴⁷⁴
- 6.142 Individual incidents of shelling occurred on a daily basis, and the shelling of Putumattalan Hospital caused civilian casualties in addition to damage to the hospital's operating theatre, makeshift ward and roof.⁴⁷⁵ Also, satellite imagery analysis reveals that, from 29 March to 19 April 2009, three permanent buildings in Putumattalan were destroyed, and there were potentially large amounts of moderate to severe damage to the remaining permanent buildings in the area.⁴⁷⁶
- 6.143 These contemporaneous eye-witness reports are consistent with other witness accounts that detail shelling on and near Putumattalan Hospital and the UN Compound in around late-March⁴⁷⁷ or April 2009.⁴⁷⁸ One of these witnesses, a senior Government official, also stated that heavy machine gun fire, coming from across the Nanthikadal Lagoon where the SFs were located, killed many civilians.⁴⁷⁹
- 6.144 In addition, a senior local official of an NGO who was working inside Putumattalan Hospital in early April 2009, observed a continuous artillery attack on the rear of the hospital (at its eastern side), which he believed included MBRL fire, and lasted for about two hours, and killed around 20 people and injured at least 50 people.⁴⁸⁰ The attack caused considerable damage to one hospital building.⁴⁸¹ The witness also noted:

There were no LTTE cadres located at the back of the Putumattalan Hospital or immediately near the hospital at that time. At the back of Putumattalan Hospital there

⁴⁶⁷ Exhibit to WS-1507, [136] entitled 'SFs RPG Attack on UN Putumattalan Compound'; exhibit to WS-1506.
⁴⁶⁸ Ibid.
⁴⁶⁹ Exhibit to WS-1503, [213]–[215]; Exhibit to witness statement, contemporaneous correspondence from a senior Government doctor entitled 'Vanni Situation', 3–4. Witnesses refer to seeing this seriously wounded woman in Putumattalan Hospital around this time.
⁴⁷⁰ Exhibits (seven) WS-1506, [127].
⁴⁷¹ Exhibits (two) to WS-1506, [127].
⁴⁷² Ibid.
⁴⁷³ UN Expert Panel Report, [104].
⁴⁷⁴ Ibid, [104].
⁴⁷⁵ Ibid, [104]–[105].
⁴⁷⁶ UNITAR, 'Updated Analysis Report (19 April 2009) Satellite-Detected Damages and IDP Shelter Movement in CSZ', Mulattivu District, Sri Lanka, Update 6, 26 April 2009, 2.
⁴⁷⁷ WS-1501, [215].
⁴⁷⁸ WS-1509, [101]–[102].
⁴⁷⁹ WS-1501, [215], [218].
⁴⁸⁰ WS-1509, [101]–[102].
⁴⁸¹ Ibid, [101]–[102].

were only civilians, coconut trees and tents which had been erected by the civilians.⁴⁸²

- 6.145 On 5 April 2009, the SFs stated that ‘aerial attacks had been stopped and orders were that operations were to be conducted only with the use of small arms.’⁴⁸³

Shelling of Putumattalan Hospital from about 15 to 20 April 2009

- 6.146 According to the witness account of a senior local official of an NGO who was working at Putumattalan Hospital, by 15 April 2009 most civilians had fled from Putumattalan.⁴⁸⁴ On 15 April 2009, a senior NGO official observed that what he believed to be Sri Lankan Air Force Kfir fighter jets bombed the Putumattalan area on 22 occasions that day, killing at least 90 people.⁴⁸⁵
- 6.147 By 19 April 2009, the earthen bund in the area between Putumattalan Hospital and Nanthikadal Lagoon ‘was extended north to a final length of over one kilometre, approaching within 100 metres of the hospital compound’.⁴⁸⁶ From the evening of 19 April 2009, a senior Government official observed that the shelling intensified in NFZ-2, ‘particularly between Putumattalan and Ampalavanpokkanai area’.⁴⁸⁷
- 6.148 The UN Expert Panel found that on 19 April 2009, ‘the area between Putumattalan and Ampalavanpokkanai was shelled intensively’ and the 58th Division entered the coastal strip for the first time during the conflict, effectively dividing NFZ-2 into two parts, ‘inflicting heavy civilian casualties at the same time’.⁴⁸⁸ The splitting of NFZ-2 ‘enabled a group of around 100,000 civilians to escape to Government-controlled territory’.⁴⁸⁹ The UN Expert Panel found ‘[a]t least another 130,000 civilians remained trapped further south’.⁴⁹⁰
- 6.149 On this same day, the US Department of State recorded a report of ‘many shells’ hitting ‘the civilian area and the [Putumattalan] hospital compound’ and small arms fire hitting the roof of Putumattalan hospital. It noted that on 19 to 20 April 2009, ‘sources reported a heavy offensive in which the government took Mattalan junction and at least briefly reached the hospital in Putumattalan.’⁴⁹¹
- 6.150 A Government doctor at Putumattalan Hospital told a senior Government official that on the morning of 20 April 2009, the fighting was taking place in front of the hospital.⁴⁹² This is consistent with the witness account of a senior local official of an NGO who noted that by 20 April 2009, LTTE forces were concentrated around the A35 Highway which ran from PTK to Vellamullivaikkal.⁴⁹³
- 6.151 According to the UN Expert Panel, Putumattalan Hospital was shelled again by the Army on the morning of 20 April 2009.⁴⁹⁴ A senior Government official stated that Putumattalan

⁴⁸² Ibid, [102].

⁴⁸³ Sri Lankan Ministry of Defence Media Release, ‘Situation Report’, 27 April 2009; LLRC Report, [3.18].

⁴⁸⁴ WS-1509, [103].

⁴⁸⁵ WS-1509, [103].

⁴⁸⁶ UNITAR Report, 16 and Annex, 1.

⁴⁸⁷ WS-1501, [235].

⁴⁸⁸ UN Expert Panel Report, [109].

⁴⁸⁹ Ibid, [109].

⁴⁹⁰ Ibid, [109].

⁴⁹¹ Report to Congress, 36.

⁴⁹² WS-1501, [236].

⁴⁹³ WS-1509, [135].

⁴⁹⁴ UN Expert Panel Report, 33, fn 63.

Hospital and its immediate surroundings were intensively shelled on 20 April 2009. An eye-witness, who was another Government doctor, told a senior Government official that the hospital was badly damaged by shelling, shelters near the hospital were badly damaged, and many casualties and wounded patients were observed in and around the hospital.⁴⁹⁵ Around this time, and in anticipation of a SFs assault across the Nanthikadal Lagoon, patients who could be moved out of the hospital were transported south to Karaiyamullivaikkal.⁴⁹⁶

- 6.152 Another Government doctor told a senior Government official that he believed hundreds of civilians were killed and thousands were injured during the attack on 20 April 2009, though the senior Government official noted that ‘we will not know the true number [of deceased and injured] as those who [were] injured who did not come to the hospital would never be recorded, and those who died in situ were never recorded’.⁴⁹⁷
- 6.153 The UN Expert Panel, Crisis Group, the US Department of State and the BBC all reported that Putumattalan Hospital or the area near the hospital was shelled on 20 April 2009.⁴⁹⁸ Crisis Group noted that, ‘The hospital [ie. Putumattalan hospital] was shelled and badly damaged the morning of 20 April, and the security forces and LTTE were fighting in front of it.’⁴⁹⁹ The US State Department stated, ‘A foreign government with representation in Colombo reported an eyewitness account of shelling at the Mattalan hospital [on 20 April 2009]. Another witness reported that her husband, her nine-year-old daughter, and six others were killed during the attack.’⁵⁰⁰ The BBC reported the account of an eye-witness who described the area near Putumattalan Hospital being subjected to heavy shelling from around midnight on 20 April 2009 through to the early morning.⁵⁰¹ The ICRC also issued a news release on 20 April 2009 that stated, ‘The few remaining medical facilities in the area, all makeshift, have been directly affected by the fighting, with both staff and patients killed and wounded in recent days.’⁵⁰²
- 6.154 Responding to allegations that Putumattalan Hospital was bombed, Major General Shavendra Silva (former GOC of the 58th Division) stated that, after the 58th Division captured Putumattalan, ‘nothing of that nature happened there... also what we saw when we entered the hospital there were no civilians treated there it was only the LTTE that were treated there.’⁵⁰³

Conclusion

- 6.155 It is reasonable to conclude that Putumattalan Hospital and the UN Compound in Putumattalan were protected objects, the locations of which were known to the Sri Lankan Government. Accordingly, these protected sites were not legitimate targets of attack even though the evidentiary material shows that LTTE assets existed in NFZ-2 and the LTTE may

⁴⁹⁵ WS-1501, [236]–[237].

⁴⁹⁶ Ibid, [238].

⁴⁹⁷ Ibid, [237].

⁴⁹⁸ UN Expert Panel Report, 33, fn 63; ICG Report, 19; BBC, ‘Eyewitness: “I Thought, I Won’t Survive”’, 22 April 2009, available at http://news.bbc.co.uk/2/hi/south_asia/8013016.stm; Report to Congress, 36.

⁴⁹⁹ ICG Report, 19.

⁵⁰⁰ Report to Congress, 36.

⁵⁰¹ BBC, ‘Eyewitness: “I Thought, I Won’t Survive”’, 22 April 2009, available at http://news.bbc.co.uk/2/hi/south_asia/8013016.stm

⁵⁰² Exhibit to WS-157, [113]–[114]; ICRC, ‘Sri Lanka: Over 10,000 Evacuated from Conflict Zone since February’ (media release), No. 09/80, 20 April 2009.

⁵⁰³ ‘Transcript of Shavendra Silva’s testimony before the LLRC’, 3.

have fired weapons from near the hospital on some occasions. Despite the protected status of the hospital and the UN compound, it is reasonable to conclude that the SFs used direct and indirect fire weapons to launch attacks on Putumattalan, which repeatedly hit Putumattalan Hospital, the UN Compound and the civilian population in the vicinity of these sites. This appears to have occurred in the context of the SFs' widespread and consistent practice of area bombardment of the NFZs. It is therefore reasonable to conclude that due to the presence of a large and densely packed civilian population in Putumattalan, the density of civilians in and around Putumattalan Hospital and the UN Compound, and that any possible LTTE targets that might have existed in Putumattalan would have been minor, the SFs' heavy and repeated use of direct and indirect fire weapons on Putumattalan constitute indiscriminate or disproportionate attacks or both.

- 6.156 An indiscriminate attack can be evidence of a direct attack on civilians or civilian objects.⁵⁰⁴ There are therefore reasonable grounds to suspect that the UN Compound in Putumattalan and Putumattalan Hospital might have become the object of attack as a result of the SFs' indiscriminate attack. Accordingly, there are reasonable grounds to suspect that these attacks constitute attacks against civilians as war crimes.

(iv) Ampalavanpokkanai⁵⁰⁵

- 6.157 According to the UN Expert Panel, there were between 300,000 and 330,000 civilians in the narrow strip of land that comprised NFZ-2.⁵⁰⁶ These civilians moved further south in NFZ-2 to escape the effects of intensified shelling around Putumattalan in April 2009. A senior local official of an international agency described 'huge traffic jams as thousands were trying to get to the new NFZ.'⁵⁰⁷
- 6.158 Witness accounts from a senior local official and local employee of an NGO indicate that, by March 2009, the LTTE had established defences in Ampalavanpokkanai, along the western bank of the Nanthikadal Lagoon.⁵⁰⁸ The accounts of these two witnesses indicate that the LTTE were positioned about 500 metres from civilians in this area.⁵⁰⁹
- 6.159 According to witness accounts that were taken directly by ICEP, attacks on Ampalavanpokkanai were launched from March 2009 from SFs' positions in the west, north around Chalai and south near Wadduvakal and Mullaattivu Town.⁵¹⁰ One witness observed shells being fired by Sri Lankan Navy ships off the east coast towards civilians.⁵¹¹ The witness reported that LTTE boats would attack Sri Lankan Navy ships at night, but that he did not know where they came from.⁵¹² Another witness observed two Sri Lankan Navy ships far out to sea and around 10 LTTE ships along the shoreline.⁵¹³ That same witness reported that the Navy ships would occasionally fire on the LTTE boats.⁵¹⁴

⁵⁰⁴ Galic, Trial Judgement, [57].

⁵⁰⁵ ICEP's analysis of the evidentiary information currently available relies primarily on two witness accounts, both of which were taken directly by ICEP. One of these witnesses is a local employee of an NGO and the other is a senior local official of an NGO

⁵⁰⁶ UN Expert Panel Report, [100].

⁵⁰⁷ WS-1506, [83].

⁵⁰⁸ WS-1513, [148]; WS-1509, [121]. Both statements were taken directly by ICEP.

⁵⁰⁹ WS-1509, [124]; WS-1513, [148].

⁵¹⁰ WS-1513, [150]; WS-1509, [127].

⁵¹¹ WS-1509, [127].

⁵¹² Ibid, [127].

⁵¹³ WS-1513, [151].

⁵¹⁴ Ibid, [151].

Attack on or around the Tamils Rehabilitation Organisation (TRO) food distribution queue

- 6.160 A senior local official and a local employee of an NGO who both worked in Ampalavanpokkanai in March and April 2009 explained that the TRO set up a food distribution hut in the area between Ampalavanpokkanai and Putumattalan.⁵¹⁵ The TRO was an NGO whose main activities during the conflict included distributing food, looking after the injured and the elderly, and burying the dead.⁵¹⁶ There are differing reports regarding the degree to which there was a link between the TRO and the LTTE.⁵¹⁷
- 6.161 The local NGO employee explained that the TRO's food distribution hut was a makeshift structure constructed with six sticks holding up a tarpaulin, and containing a large pot that was used to cook kanji,⁵¹⁸ boiled rice porridge. The senior NGO official stated that kanji was distributed to civilians three to five times per day and usually one person per family would line up with their cooking utensils to collect kanji on behalf of their family.⁵¹⁹ He stated that, at any given time, he believed there were around 300 to 400 people lined up at this distribution point. He also described there to be civilian tents and bunkers constructed around the food distribution hut.⁵²⁰
- 6.162 One of these witnesses noted in respect of the concentration of civilians near humanitarian relief sites around this time that '[g]enerally if shells fall near a food distribution hut or queue for water or relief supplies, hundreds of people can be killed at once because the queues are so long.'⁵²¹
- 6.163 Consistent with the findings of the UN Expert Panel, both of these witnesses detail a shell attack on the TRO distribution line in March 2009, which they believe was launched from the direction of the SFs.⁵²² One of the witnesses stated that in late-March 2009, he saw artillery shells fall on the food distribution line.⁵²³ At the time, he was about 300 to 400 metres away. He stated:

I remember that one shell fell adjacent to the food distribution line and when it exploded the shrapnel hit many civilians who were standing in the line. When I arrived at the scene I remember seeing many dead bodies and cooking utensils. A large number of these dead bodies were elderly people and children... I remember registering 35 people who had died as a result of the attack. There were many more injured.⁵²⁴

- 6.164 This witness further explained:

The artillery shells had come from the west side of the coastal strip from the area where the SFs were located. Judging from the distance of the shells, I believe that they came from the SFs' nearest military base in Ampakamam.⁵²⁵

⁵¹⁵ WS-1509, [122]; WS-1513, [147].

⁵¹⁶ WS-1513, [6]; WS-1509, [13], [137]; WS-1515, [55]; WS-1506, [83]; and WS-1501, [191].

⁵¹⁷ WS-1506, [83]; WS-1513, [9]; WS-1501, [191].

⁵¹⁸ WS-1513, [147].

⁵¹⁹ WS-1509, [122].

⁵²⁰ Ibid, [122].

⁵²¹ WS-1513, [154].

⁵²² WS-1509, [123]–[124]; WS-1513, [153].

⁵²³ Ibid, [122], [123].

⁵²⁴ Ibid, [123].

⁵²⁵ WS-1509, [124].

- 6.165 The local NGO employee stated that he was walking along the seashore from Ampalavanpokkanai towards Putumattalan and the food distribution hut, and was about 'half to one kilometre away from the hut when it was shelled by the SFs'.⁵²⁶ This witness stated:

I remember seeing people running towards me saying that the SFs had shelled the TRO's kanji hut. I did not go to the scene immediately... I went to the TRO hut a short time later... When I arrived... I saw pots, pans and containers scattered everywhere... I also saw one dead body and many injured people scattered around the hut. The TRO volunteers I spoke to at the scene of the attack said that there was a large number of people in the queue at the time, waiting to receive kanji and many of these people had died or were injured. They said the shells had come from the direction of the SLA.⁵²⁷

- 6.166 These witnesses stated that, at the time of this attack on the TRO's food distribution hut, the nearest LTTE position was approximately 500 to 600 metres west of the civilians, adjacent to the Nanthikadal Lagoon.⁵²⁸

Attack on milk powder queue

- 6.167 HRW reported that on 8 April 2009, at around 7:30am:

Hundreds of civilians were waiting in line near a food distribution center [near Pokkanai primary health centre] when four or five artillery shells hit the area, killing at least 13 civilians immediately and wounding over 50 others. The doctor, who examined the site two hours after the attack, said that the shells were 120mm rounds and appeared to have been fired from Sri Lankan army positions to the south.⁵²⁹

- 6.168 HRW also quoted a witness who said he was waiting in the food distribution line with his wife and two-year-old daughter at the time of the shelling. He stated:

There had been no distribution of milk powder for three months, and so when they announced that there would be distribution today [8 April 2009], hundreds of people lined in queue. It was early in the morning. I heard the first shell, and hit the ground. Then several more landed nearby, after three or four minutes. I survived by miracle, but my 45-year-old uncle died on the spot – he lost both legs.⁵³⁰

- 6.169 The UN Expert Panel found:

On 8 April 2009, a large group of women and children, who were queued up at a milk powder distribution line organized by the RDHS, were shelled at Ampalavanpokkanai [by the Army]. Some of the dead mothers still clutched cards which entitled them to milk powder for their children.⁵³¹

- 6.170 The LLRC referred to an account provided by a civilian witness who appeared before the LLRC and stated that, in April 2009, the Army shelled a group of pregnant women and children who had lined up to receive the nutritional supplement 'thriposha'.⁵³² He stated that his daughter was injured in this incident. Referring to the witness' account, the LLRC stated:

⁵²⁶ WS-1513, [148], [152].

⁵²⁷ WS-1513, [152]–[152].

⁵²⁸ WS-1513, [148]; WS-159, [124].

⁵²⁹ HRW, 'Sri Lanka: Stop Shelling "No-Fire Zone"', UN Security Council Action Needed to Avert Humanitarian Catastrophe, 9 April 2009, <http://www.hrw.org/news/2009/04/09/sri-lanka-stop-shelling-no-fire-zone> [accessed 30 July 2013].

⁵³⁰ Ibid.

⁵³¹ UN Expert Panel Report, [105].

⁵³² LLRC Report, [4.111].

When the mothers and children went to the particular spot where the 'thriposha' was supposed to be distributed, the LTTE were using their walkie talkies and the Army had shelled that particular spot and 40 – 45 mothers and children were casualties.⁵³³

- 6.171 The LLRC stated generally that the evidence it heard 'militate[d] against any proposition that deliberate targeting of civilians was part and parcel of a policy although specific episodes which warrant further investigation are referred to above'. This episode was referred to as one of those warranting further investigation.⁵³⁴
- 6.172 Witnesses have provided further information with respect to this incident. A senior Government official explained that, in April 2009, he was involved in collecting milk provisions from the ICRC and providing them to a senior Government doctor, who arranged for the provisions to be distributed to civilians from health clinics and other relief centres. He stated, 'Even though these centres were inside the CSZ [Civilian Safety Zone or NFZ] the RDHS's [sic] had informed the ICRC of the distribution locations.'⁵³⁵ He explained that the milk powder boxes being distributed were for 'the appropriate age group of children and pregnant and lactating mothers.'⁵³⁶
- 6.173 A senior local official of an NGO interviewed by ICEP explained that a milk powder distribution station was set up in Ampalavanpokkanai village under a large tree near the Government Tamil Mixed School (**GTMS**).⁵³⁷ According to this witness, the school had been converted into a makeshift hospital.⁵³⁸ The NGO worker stated that the milk powder line was administered by the AGA with the assistance of the TRO, and was specifically for pregnant mothers and mothers with children aged under five years.⁵³⁹
- 6.174 A senior Government official stated that he was informed on the morning of 8 April 2009 that a mother and childcare centre at Ampalavanpokkanai, which was distributing milk powder boxes, had been shelled, killing and injuring many women and children.⁵⁴⁰ Soon after the attack he described driving past the clinic, and seeing 'obvious shell damage' to the building.⁵⁴¹ The Government official then went to the Putumattalan Hospital where he saw 'so many women and children dead and injured... [and] there was also some fathers seriously injured.'⁵⁴²
- 6.175 He described the injuries sustained by victims as 'terrible; some had injuries to their heads and stomachs others including children had arms and legs blown off.'⁵⁴³ He also stated that he was told by a medical officer at the hospital that over 1,000 women and children were lined up at the time, and that according to the medical officer who spoke to him, there were believed to be surveillance aircraft flying overhead at the time of the attack.⁵⁴⁴

533 Ibid, [4.111].

534 Ibid, [4.263].

535 WS-1501, [225].

536 Ibid, [225]–[226].

537 WS-1509, [122], [125].

538 Ibid, [52].

539 Ibid, [125].

540 WS-1501, [225].

541 Ibid, [226].

542 Ibid, [226]–[227].

543 Ibid, [225]–[227].

544 Ibid, [225].

6.176 This witness account is consistent with another report received by the US Department of State. According to this report, on April 8 2009, a source contacted the BBC from inside the NFZ to report that there had been a shelling attack on a smaller health facility in the Ampalavanpokkanai area where people were waiting to collect milk powder for children. He said that the intensity of shell fire had increased in the last 24 hours and another health facility had also come under attack in the same area where one health worker was killed. The shells allegedly came from an area dominated by the Sri Lankan Government.⁵⁴⁵

6.177 Another witness, who was driving near the Ampalavanpokkanai area on the morning of 8 April 2009, stated that he heard the sound of artillery firing from what he believed to be SFs positions across the Nanthikadal Lagoon from Ampalavanpokkanai.⁵⁴⁶ He described being about one kilometre from the school and clinic in Ampalavanpokkanai, when he saw about 10 to 12 exploding artillery shells land in the area of the school. He drove to the area of the clinic and described seeing craters and blast areas on the narrow road, damage to the clinic's front walls and blood on the road and buildings. He stated that he saw a number of dead bodies of women and children, and screaming women.⁵⁴⁷ He stated:

As far as I knew the closest LTTE place was on the opposite side of the lagoon at least 800 metres away. I do not know why they have bombed the clinic where these women and children were lining up.⁵⁴⁸

6.178 Further to the accounts detailed above, one of the NGO workers interviewed by ICEP reported that in late-March or early April 2009 he heard of a shell attack on the milk powder distribution line.⁵⁴⁹ He stated that, at the time of the incident, he was in Valayanmadam, about two kilometres away.⁵⁵⁰ After having heard of the incident, he immediately went to the scene to help and observed the following:

When I got there I could see that two artillery shells had fallen within 10 feet of the line. There were dead bodies everywhere. I remember seeing a pregnant woman lying on the ground with a fetus coming out of her. We registered approximately 78 people as dead on this occasion, including 38 children. I believed that more than 150 people were injured. Most of the dead and injured were women.⁵⁵¹

6.179 This witness further explained:

I believe that... the artillery shells on this occasion had been launched from the SFs' nearest military base in Ampakamam. At this time, the LTTE's defence line was nowhere near the milk powder distribution. The LTTE had almost entirely left the Pokkanai by then. I believe that the LTTE were fighting in Ananthapuram which was about three to four kilometres away from the milk powder distribution station.⁵⁵²

6.180 Witness accounts obtained by ICEP suggest that there might have been multiple attacks on such relief sites during the final months of the conflict, although further investigation is warranted into the reports. For example, in addition to the witness accounts of the shelling of a milk distribution centre detailed above, a senior local official of an international agency

⁵⁴⁵ Report to Congress, 35.

⁵⁴⁶ WS-1503, [245]–[246].

⁵⁴⁷ Ibid, [247]–[248].

⁵⁴⁸ Ibid, [249].

⁵⁴⁹ WS-1509, [125].

⁵⁵⁰ Ibid.

⁵⁵¹ Ibid.

⁵⁵² Ibid, [126].

reported attending a pregnant mothers' medical centre in Ampalavanpokkanai after an artillery attack sometime in March 2009. The witness stated, 'I arrived there about ½ hour after it happened and I saw all the shell damage and the many civilian casualties, including pregnant mothers.'⁵⁵³ Given that the time period to which this witness report relates is unclear, further investigation is warranted as this witness account also suggests that, in addition to other incidents referred to above, a mothers' medical centre might have been subject to attack in March 2009.

Conclusion

- 6.181 It is reasonable to conclude that the TRO food distribution line and milk powder queue were protected objects, the locations of which would have been known to the Sri Lankan Government. Accordingly, these sites were not legitimate targets. It is also reasonable to conclude that, given the presence of a large and dense civilian population in Ampalavanpokkanai at the time of the attacks, and the minor LTTE targets that may have been identified in Ampalavanpokkanai, the SFs' attacks were indiscriminate or disproportionate or both.
- 6.182 An indiscriminate attack can be evidence of a direct attack on civilians or civilian objects.⁵⁵⁴ There are therefore reasonable grounds to suspect that the TRO food distribution line and milk powder queue might have become the object of attack as a result of the SFs' indiscriminate attack. Accordingly, there are reasonable grounds to suspect that these attacks constitute attacks against civilians as war crimes.

(v) Karaiyamullivaikkal and Vellamullivaikkal

Background

- 6.183 Over the final months of the conflict, while many civilians were able to reach Government-controlled territory, many others were forced to move south from Putumattalan, Ampalavanpokkanai and Valayanmadam towards Mullivaikkal and Wadduvakal.⁵⁵⁵
- 6.184 Karaiyamullivaikkal and Vellamullivaikkal, periodically referred to collectively as 'Mullivaikkal', are two villages located at the southern end of the Mullivaikkal peninsula, separated by a road running across the peninsula.⁵⁵⁶ The peninsula is a thin rectangular strip of land more than 12 kilometres long and about 14 square kilometres,⁵⁵⁷ contained to the north by Valayanmadam and the sea, and to the south by Nanthikadal Lagoon and Wadduvakal.
- 6.185 The UN Expert Panel found that in the final months of the conflict:

Increasingly, LTTE forces, mounting their last defence, moved onto the coastal strip in the second NFZ, particularly in the Mullivaikkal area, where the LTTE leadership had a complex network of bunkers and fortifications and where it ultimately made its final stand.⁵⁵⁸

⁵⁵³ WS-1507, [133].

⁵⁵⁴ Galic, Trial Judgement, [57].

⁵⁵⁵ WS-1501, [240], [246], [265]; TRO, 'TRO's Relief Activities in Vanni' (media release), 26 April 2009.

⁵⁵⁶ WS-1503, [289].

⁵⁵⁷ See OCHA maps, eg, 'Safe Area Declared by the Government of Sri Lanka in Mullaitivu', 16 February 2009.

⁵⁵⁸ UN Expert Panel Report, [97].

6.186 Karaiyamullivaikkal and Vellamullivaikkal were located within NFZ-2 and later, the area south of Karaiyamullivaikkal became part of NFZ-3 which was declared on 8 May 2009. At the time NFZ-3 was declared, the Sri Lankan Ministry of Defence stated that the Army was in full control of two-thirds of NFZ-2.⁵⁵⁹ NFZ-3, or the 'New Safety Zone' as it was also known,⁵⁶⁰ was a 'very small section in the south of the second NFZ'⁵⁶¹ approximately two kilometres in length, and 1.5 kilometres wide.⁵⁶²

Overview of SFs' military operations in and around NFZ-2 and NFZ-3

6.187 On 22 March 2009, *The Nation* reported that the Army Commander intended to increase the SFs' troop strength from 50,000 to 70,000 'to finish off the war expeditiously'.⁵⁶³ The defence analyst Major General Ashok Mehta (retired) noted that, by 2 May 2009,

60,000 [SFs] troops from 53, 58 and 59 Infantry Divisions and Task Force 8 had established a double ring around the NFZ, which had its two flanks resting on the sea and Nanthikadal lagoon. On the sea front, the Navy had set a four-layered blockade...⁵⁶⁴

6.188 In the context of discussing the SFs' operations in April/May 2009, including in Mullivaikkal, the Sri Lankan Ministry of Defence stated, 'The constant use of UAV pictures flashed to the forward commanders in up front positions were the most useful source to identify combatants with weapons, even though some of these were in civilian attire.'⁵⁶⁵ This is corroborated by a civilian witness in the Mullivaikkal area who observed what he believed were UAVs flying overhead '[e]very day'.⁵⁶⁶

6.189 A senior Sri Lankan Government official noted that, in early May 2009, 'the shelling and gunfire continued to move eastwards along the remaining land, and was following us and the rest of the civilian population as we moved steadily towards Wadduvaikkal'.⁵⁶⁷ The official stated:

[N]ot only were the LTTE being compressed between the two SLA front lines, so were over 100,000 displaced civilians. There was nowhere that was safe, shelling was coming into the areas from both the SLA land forces from the west, the Sri Lanka Navy was shelling from the Ocean side, and the Sri Lankan Air Force from above.⁵⁶⁸

⁵⁵⁹ The Hindu, 'It's Now New Safety Zone: Colombo', 9 May 2009, <http://www.thehindu.com/todays-paper/tp-international/its-now-new-safety-zone-colombo/art279039.ece> [accessed 1 December 2013].

⁵⁶⁰ Sri Lankan Ministry of Defence, "'New Safety Zone' Restricted to 2.5 sq km – Army' (webpage), 8 May 2009, http://www.defence.lk/new.asp?fname=20090508_11 [accessed 1 December 2013]; The Hindu, 'It's Now New Safety Zone: Colombo', 9 May 2009, <http://www.thehindu.com/todays-paper/tp-international/its-now-new-safety-zone-colombo/art279039.ece> [accessed 1 December 2013].

⁵⁶¹ UN Expert Panel Report, [114].

⁵⁶² Sri Lankan Ministry of Defence, "'New Safety Zone' Restricted to 2.5 sq km – Army' (webpage), 8 May 2009, http://www.defence.lk/new.asp?fname=20090508_11 [accessed 1 December 2013]; The Hindu, 'It's Now New Safety Zone: Colombo', 9 May 2009, <http://www.thehindu.com/todays-paper/tp-international/its-now-new-safety-zone-colombo/art279039.ece> [accessed 1 December 2013].

⁵⁶³ The Nation, 'Grand Finale of battles?', 22 March 2009.

⁵⁶⁴ Ashok Mehta, *Sri Lanka's Ethnic War: How Eelam War IV was Won*, Centre for Land Warfare Studies New Delhi, Manekshaw Paper No. 22 2010; Ashok Mehta, 'The War Against the LTTE' in Harjeet Singh, *Pentagon's South Asia Defence and Strategic Year Book 2010*, 123.

⁵⁶⁵ Humanitarian Operation Factual Analysis, [205].

⁵⁶⁶ See, eg, WS-1503, [293].

⁵⁶⁷ WS-1501, [265]; WS-1516, [91].

⁵⁶⁸ Ibid, [265].

6.190 This official observed that ‘the shelling was much heavier now’ and ‘[h]eavy shell attacks in Mullaivaikkal West area continued every day and night...’⁵⁶⁹ The official further noted that ‘there was the additional risk as the battle approached and small arms fire was everywhere. Many people just trying to cook or collect water or even to go to the bathroom were now being shot.’⁵⁷⁰

6.191 In respect of the final weeks of the conflict, a witness who was known to senior LTTE cadre, and whose witness statement was taken directly by ICEP, stated:

Bombing and shelling was occurring constantly in the civilian areas close to the sea shore [in NFZ-2 and NFZ-3] in the final weeks of the war. I could see that the bombing and shelling was coming from four directions: Wadduvakal, Putumattalan, from the sea and across the Nanthikadal Lagoon. Bombs were also falling from the sky above us.⁵⁷¹

6.192 This account corroborates the findings of the UN Expert Panel, which found that ‘[d]ue to the lack of space in the third NFZ, civilians had nowhere to hide from the shelling which was coming in from all sides. Shells rained everywhere and bullets whizzed through the air.’⁵⁷²

6.193 Witness accounts of widespread shelling of the NFZs are consistent with satellite imagery analysis indicating that ‘the SLA established, maintained and updated throughout the last five months of the conflict, an operational military capability to fire substantial quantities of artillery munitions into’ the NFZs.⁵⁷³ In particular, the Army:

- rotated the fire bearing of howitzers located south of PTK as the active combat zone moved east and later contracted south into NFZ-2 and NFZ-3;
- emplaced mortar batteries on the western shore of Nanthikadal Lagoon ‘without viable targets except for locations within the NFZ-2 and later NFZ-3’; and
- emplaced mortar batteries ‘progressively closer to and eventually inside NFZ-2 by 6 May 2009, following the retreat of the LTTE forces and tens of thousands of remaining IDPs southwards into the villages of Mullivaykkal and Karaiyaamuilvaykaal’.⁵⁷⁴

Overview of LTTE military operations in NFZ-2 and NFZ-3

6.194 Witness accounts indicate that the LTTE cadres and emplacements were in the NFZs, and civilians were near the frontline.⁵⁷⁵ On or about 1 May 2009, one civilian witness reportedly observed gunfire coming ‘across the lagoon towards the LTTE positions on the spit’.⁵⁷⁶ This witness also observed cadres heading towards the lagoon,⁵⁷⁷ or moving away from the beach to the lagoon, in the final days of the conflict.⁵⁷⁸

⁵⁶⁹ Ibid, [258]–[259].

⁵⁷⁰ Ibid, [258].

⁵⁷¹ WS-1517, [15]–[17]. See also indirect account in ICG Report, 23.

⁵⁷² UN Expert Panel Report, [118].

⁵⁷³ UNITAR Report, 43.

⁵⁷⁴ Ibid.

⁵⁷⁵ WS-1503, [292].

⁵⁷⁶ Ibid, [292].

⁵⁷⁷ Ibid, [338].

⁵⁷⁸ Ibid, [334].

- 6.195 Consistent with witness accounts indicating that the LTTE were at or moving towards the eastern bank of the Nanthikadal Lagoon,⁵⁷⁹ satellite imagery analysis has revealed
- [m]ultiple LTTE security trenches and earthen berms measuring in total over 2km long were constructed between 19 April and 6 May 2009 across most of northern and western sections of the Mullivaykkal area. These security structures were constructed within 600m of the damaged hospitals [Mullivaykkal Medical Station (or Karaiyamullivaikkal Hospital) and the Primary Health Centre] and [Kumara Kanapathi Pillaiyar] temple.⁵⁸⁰
- 6.196 UNITAR considered that, given the reported incursion by the Army into NFZ-2 on 20 April 2009, it was likely that the security trenches and earthen berms were constructed by LTTE forces between 19 and 20 April 2009.⁵⁸¹
- 6.197 An LTTE member in a non-combat role, who relocated to Vellamullivaikkal in early February 2009, stated, 'The LTTE were split up in small groups. There were no fixed places'.⁵⁸² The Sri Lankan newspaper, *The Nation*, reported on the basis of 'intelligence' in early March 2009 that the LTTE could not launch major attacks and were instead utilising small teams.⁵⁸³ This is consistent with the Sri Lankan Ministry of Defence's report, Humanitarian Operation Factual Analysis, which noted:
- In the last stages [of the conflict], the LTTE adopted a new tactic of using isolated small groups to fight until death to hinder the advance of Security Forces. This seemed a last desperate attempt to save the [LTTE] leadership...⁵⁸⁴
- 6.198 While it is unclear how many LTTE cadres remained in NFZ-2 and NFZ-3, the information currently available indicates that the LTTE's strength from late-February 2009 was in the hundreds. In late February 2009, a Sri Lankan Army spokesperson reportedly stated that the LTTE had only 500 fighters remaining.⁵⁸⁵ In early April 2009, an Army spokesperson claimed there were a 'couple of hundred' surviving LTTE cadres.⁵⁸⁶ The defence analyst Major General Ashok Mehta stated that there were '700 Tigers' in NFZ-3,⁵⁸⁷ although the basis of this figure is unstated.
- 6.199 There is some information to suggest that cadres stopped wearing uniforms after the LTTE uniform was used by the SFs to infiltrate LTTE territory.⁵⁸⁸ A civilian eye-witness, who reported witnessing an attack on Vellamullivaikkal Hospital on 10 May 2009,⁵⁸⁹ stated that by this stage of the war, the LTTE were not carrying weapons or wearing uniforms 'so it was very difficult to distinguish who were LTTE and who were civilians'.⁵⁹⁰ By 10 or 11 May

⁵⁷⁹ WS-1501, [265]; WS-1516, [91].

⁵⁸⁰ UNITAR Report, 31–32.

⁵⁸¹ Ibid, 32, fn 33.

⁵⁸² WS-1518, [12].

⁵⁸³ 'House-To-House Fighting Delays Final Victory', *The Nation*, 8 March 2009.

⁵⁸⁴ Humanitarian Operation Factual Analysis, [201].

⁵⁸⁵ Randeep Ramesh, 'Sri Lankan Soldiers Enter Last Town Controlled by Tamil Tiger Guerrillas', *The Guardian*, 24 February 2009.

⁵⁸⁶ 'Sri Lankan Military: Last Tamil Rebel Stronghold Captured', *CNN*, 5 April 2009,

<http://edition.cnn.com/2009/WORLD/asiapcf/04/05/sri.lanka.tamil/>.

⁵⁸⁷ Ashok Mehta, 'The War Against the LTTE' in Harjeet Singh, *Pentagon's South Asia Defence and Strategic Year Book 2010*, 123.

⁵⁸⁸ WS-1504, [25]. The Sri Lankan newspaper, *The Sunday Times*, reported that 'intelligence operatives attached to the [Sri Lankan] army' infiltrated the 'LTTE no fire zone disguised as civilians': Asif Fuard, 'On the Verge of Watershed Victory', *The Sunday Times*, 26 April 2009.

⁵⁸⁹ WS-1515, [84]–[94].

⁵⁹⁰ Ibid, [95].

2009,⁵⁹¹ a local senior NGO official in Vellamullivaikkal stated that almost all of the LTTE had changed out of their uniforms and into civilian clothing.⁵⁹²

- 6.200 While it appears that the LTTE had a limited number of heavy weapons in and around Karaiyamullivaikkal and Vellamullivaikkal, according to the Sri Lankan Ministry of Defence, the LTTE were unable to use such weapons due to the proximity of the LTTE's defences to the SFs advancing from the north and south.⁵⁹³
- 6.201 Further to this, a former LTTE cadre in a non-combat role stated that he was told by Military Wing cadres and bodyguards to the LTTE leadership, that by February 2009, senior LTTE military commanders were complaining to the Political Wing leaders that they were running out of ammunition for their artillery pieces.⁵⁹⁴ In March and April 2009, the witness picked up from conversations between members of the LTTE's military and political leadership that the LTTE had run out of ammunition.⁵⁹⁵ Consistent with this, the witness did not hear any LTTE artillery firing from the area between Ampalavanpokkanai and Valayanmadam from March 2009 until he surrendered to the SFs on 22 April 2009.⁵⁹⁶
- 6.202 Consistent with the witness account above, another witness, who was known to senior LTTE cadres, stated that she did not see any LTTE artillery positions or hear LTTE artillery firing from the area between Karaiyamullivaikkal and Wadduvakal.⁵⁹⁷ According to this witness, it was common knowledge among the civilian population that, by the time she moved to Karaiyamullivaikkal in around late-April or early May 2009,⁵⁹⁸ 'the LTTE no longer had any artillery that could fire.'⁵⁹⁹
- 6.203 However, even though there were military targets in the NFZ, witnesses who were in areas of civilian concentration in Karaiyamullivaikkal and Vellamullivaikkal reported on numerous occasions that there were no LTTE emplacements in the immediate vicinity of shells and gunfire striking.⁶⁰⁰

Civilian population estimates in NFZ-2 and NFZ-3

- 6.204 As stated in paragraph 6.148, according to the UN Expert Panel, after the SFs broke through NFZ-2 between Putumattalan and Ampalavanpokkanai on 19 April 2009, at least another 130,000 civilians remained further south.⁶⁰¹
- 6.205 According to a witness, the Sri Lankan Government officials on the ground conducted a survey on or around 25 April 2009, of the total civilian population in NFZ-2, for the purpose of requesting food and medical supplies from the Sri Lankan Government and international

⁵⁹¹ WS-1509, [142].

⁵⁹² Ibid, [143].

⁵⁹³ Humanitarian Operation Factual Analysis, [204].

⁵⁹⁴ WS-1519, [43].

⁵⁹⁵ Ibid, [45].

⁵⁹⁶ Ibid, [46].

⁵⁹⁷ WS-1517, [19].

⁵⁹⁸ Ibid, [10]: it is unclear precisely when the witness was in the Mullivaikkal area.

⁵⁹⁹ Ibid, [19].

⁶⁰⁰ WS-1516, [47]; WS-1503, [303]; WS-1504, [114]; WS-1511, [30].

⁶⁰¹ UN Expert Panel Report, [109].

agencies.⁶⁰² This survey indicated that approximately 40,000 families, comprising some 165,000 civilians, were present in NFZ-2 around that time.⁶⁰³

6.206 The evidentiary material currently available indicates that fewer civilians remained in and around the area that would become NFZ-3. According to UNITAR, on 6 May 2009 there might have been between 46,000 and 60,000 civilians in the area that would be designated as NFZ-3 on 8 May.⁶⁰⁴ On 11 May 2009, the UN's civilian population estimate in respect of 'rebel territory' was reported to be about 50,000.⁶⁰⁵ In contrast, the Sri Lankan Government reportedly alleged that 20,000 civilians were being held by the LTTE and used as 'human shields'.⁶⁰⁶ By the morning of 13 May, UNITAR suggested that there could have been more than 33,000 civilians remaining in that NFZ.⁶⁰⁷

6.207 On the current information available, it is reasonable to conclude that:

- on or around 20 April 2009, NFZ-2 contained between 130,000 and 165,000 civilians; and
- on or around 6 May 2009, the area that would be designated as NFZ-3 contained around 50,000 civilians.

Karaiyamullivaikkal Hospital

6.208 The medical facility at Thevipuram and its staff reportedly moved to Karaiyamullivaikkal around mid-late February 2009.⁶⁰⁸ According to Crisis Group, 'the first [of two temporary hospitals] was set up at the end of February in the Mullivaykkal Secondary School and operated along with the Putumattalan hospital.'⁶⁰⁹ The UN Expert Panel also referred to the existence of a makeshift hospital in Mullivaikkal, which it called 'Mullivaikkal Hospital' (presumed by ICEP to be located in Karaiyamullivaikkal).

6.209 Witnesses stated that, on or around 20 April 2009, all patients (excluding between 10 and 60 of the most seriously wounded) were evacuated from Putumattalan Hospital to a makeshift hospital in Karaiyamullivaikkal along with what medical supplies and equipment remained.⁶¹⁰

6.210 Three witnesses confirm that the makeshift hospital in Karaiyamullivaikkal (also known as Mullivaikkal West) (**Karaiyamullivaikkal Hospital**) had formerly been a secondary school,

⁶⁰² WS-1501, [250]–[251].

⁶⁰³ Ibid, [251]. It should be noted that the witness does not specify in detail the methodology for conducting this survey or precisely who provided the figures to the Government. The witness stated that this population estimate was sent to the Additional Government Agent and others.

⁶⁰⁴ UNITAR Report, 49.

⁶⁰⁵ 'Hundreds Die in Sri Lanka's "Safety Zone"', *ABC News*, 11 May 2009, <http://www.abc.net.au/news/2009-05-10/hundreds-die-in-sri-lankas-safety-zone/1678170> [accessed 1 December 2013]. This figure is also adopted by Ashok Mehta, *Sri Lanka's Ethnic War: How Eelam War IV was Won*, Centre for Land Warfare Studies New Delhi, Manekshaw Paper No. 22, 2010; and Ashok Mehta, 'The War Against the LTTE' in Harjeet Singh, *Pentagon's South Asia Defence and Strategic Year Book 2010*, 123.

⁶⁰⁶ 'Hundreds Die in Sri Lanka's "Safety Zone"', *ABC News*, 11 May 2009, <http://www.abc.net.au/news/2009-05-10/hundreds-die-in-sri-lankas-safety-zone/1678170> [accessed 1 December 2013].

⁶⁰⁷ UNITAR Report, 49. UNITAR provides a range between 27,000 and 33,000 but notes that, due to reduced resolution of satellite imagery recorded on 13 May, 'it is possible that the IDP tent count was slightly underestimated': 49, fn 51.

⁶⁰⁸ WS-1501, [178]; WS-1507, [152].

⁶⁰⁹ ICG Report, 19.

⁶¹⁰ WS-1501, [238]; WS-1507, [152].

the Mullivaikkal GTMS.⁶¹¹ Satellite imagery analysis indicates that the hospital was adjacent to the A35 Highway within NFZ-2, approximately 300 metres west of NFZ-3.⁶¹² The GTMS complex was larger than the school at which the Vellamullivaikkal Hospital was established, 'so it was known by many as the main Mullivaikkal Hospital.'⁶¹³ According to a hospital volunteer, two operating theatres had been set up in school classrooms.⁶¹⁴ The hospital volunteer stated that the hospital was staffed by four RDHS doctors, a number of nurses and 'about 10' volunteers.⁶¹⁵ A local senior NGO official noted that the disaster management unit of the TRO established four bases at each of the hospitals in NFZ-2, including one at Karaiyamullivaikkal Hospital and another at Vellamullivaikkal Hospital, 'to register and bury the dead'.⁶¹⁶ According to two witnesses, a red cross was on the roof of Karaiyamullivaikkal Hospital and a banner had been placed on the side of the hospital.⁶¹⁷

6.211 The UN Expert Panel found that the GPS coordinates of 'Mullivaikkal Hospital' were known to the Sri Lankan Government.⁶¹⁸ Consistent with this finding, a witness account indicates that the GPS coordinates of Karaiyamullivaikkal Hospital were recorded by an ICRC delegate on 26 April 2009,⁶¹⁹ and according to a second-hand witness account, provided by the ICRC to the SFs on 29 April 2009.⁶²⁰

6.212 Witness accounts of a senior local official of an international agency, of a senior Government official and of a hospital volunteer, detail the overcrowding and desperate conditions at Karaiyamullivaikkal Hospital. On 20 April 2009, the senior local official visited Karaiyamullivaikkal Hospital, which he observed was 'overflowing with civilian men, women, children, babies and the elderly who were wounded', and the wounded 'were on the ground as there were no beds there at the time'.⁶²¹ On 22 April 2009, the senior Government official attended Karaiyamullivaikkal Hospital and observed that 'the Hospital was overflowing and had no space to treat [the wounded persons brought by the official]'.⁶²² Similarly, from around late-April or early May 2009, the official visited the hospital 'almost every day' and described the scene at the hospital as follows:

There were many hundreds of injured people just lying in the sand as there were no beds or places for them to go. On the side there were many bodies just laid out which had not been claimed, the smell was just terrible as they decomposed in the heat. The TRO tried to keep up with the burying but it was such a big job.⁶²³

6.213 A hospital volunteer working at Karaiyamullivaikkal Hospital from around the end of April 2009 stated: 'We were so overwhelmed by the vast numbers of civilian casualties and by our lack of medical staff, lack of equipment and medical supplies'.⁶²⁴ Consistent with the accounts detailed above, in the final days of the conflict this volunteer observed '500 or 600

⁶¹¹ WS-1501, [178], [240]; WS-1516, [60]; WS-1509, [139].

⁶¹² UNITAR Report, 20.

⁶¹³ WS-1509, [106].

⁶¹⁴ WS-1516, [40].

⁶¹⁵ Ibid, [38]–[39].

⁶¹⁶ WS-1509, [106].

⁶¹⁷ Ibid, [139]; WS-1516, [60].

⁶¹⁸ UN Expert Panel Report, [103].

⁶¹⁹ WS-1516, [60].

⁶²⁰ WS-1504, [100].

⁶²¹ WS-1507, [157]. This view is corroborated by a hospital volunteer, who stated that 'there were hardly any beds, there was no room in the buildings for the patients after they had surgery, they had to go outside and lie on the sand under the plastic sheets that were set up as shelters...': WS-1516, [42].

⁶²² WS-1501, [243].

⁶²³ Ibid, [256].

⁶²⁴ WS-1516, [36], [49]–[51].

injured people just lying on the ground in the sand, there were so many that we couldn't even get to treat them all, or stop the bleeding, so many of them just bled to death waiting for treatment.⁶²⁵

- 6.214 Casualty figures from Karaiyamullivaikkal Hospital were conveyed to the Sri Lankan Ministry of Health, the ICRC and members of the international community. However, these figures did not include those who had died away from the hospital.⁶²⁶
- 6.215 In addition to Karaiyamullivaikkal Hospital, there was also a Primary Healthcare Facility in Karaiyamullivaikkal.⁶²⁷ Satellite imagery analysis indicates that what UNITAR refers to as the 'Primary Health Center' was 'adjacent' to the 'makeshift medical station [which] was established within the Mullivaykkal GTMS School.'⁶²⁸ This facility was a small building that had previously been used as a vaccination clinic, before being turned into a first aid centre for those with less serious wounds.⁶²⁹ A senior Sri Lankan Government official reported that '[t]here was always a long queue of people waiting to receive treatment for various injuries and illnesses there.'⁶³⁰
- 6.216 The hospital volunteer reported that '[t]here were no LTTE positions in the area near Karaiyamullivaikkal Hospital'.⁶³¹ According to this volunteer, a senior Government doctor who worked at the hospital reportedly did not 'allow anyone to bring weapons into the hospital or around it' and 'no [LTTE] cadres were allowed in the hospital in uniform'.⁶³²
- 6.217 The volunteer stated that, on the occasions where shells landed on the hospital ('at least four' occasions), 'There were no LTTE cadres in or near the hospital on any of these occasions. The only LTTE who were in the hospital were the Police'.⁶³³ The volunteer stated that the role of the police was 'a support role, they would carry patients for us to and from the operating theatres'.⁶³⁴ The police were uniformed, in light blue shirts and dark trousers, but were not armed.⁶³⁵
- 6.218 Due to heavy shelling that hit the hospital on numerous occasions, the UN Expert Panel found that the RDHS moved away to a second hospital at Vellamullivaikkal.⁶³⁶

Attacks on or around Karaiyamullivaikkal Hospital from 20 March to late-April 2009

- 6.219 While it would have been clear that Karaiyamullivaikkal Hospital was functioning as a hospital, especially in light of the presence of hundreds of wounded civilians who were receiving treatment at the hospital, witness accounts indicate that the immediate vicinity of Karaiyamullivaikkal Hospital received heavy and sustained shelling between March and May

⁶²⁵ Ibid, [55].

⁶²⁶ WS-1501, [258]; WS-1516, [45].

⁶²⁷ WS-1501, [252]; TRO, 'TRO's Relief Activities in Vanni' (media release), 26 April 2009, 2.

⁶²⁸ UNITAR Report, 20.

⁶²⁹ WS-1501, [252].

⁶³⁰ Ibid, [252].

⁶³¹ WS-1516, [47].

⁶³² Ibid, [47], [59].

⁶³³ WS-1516, [59].

⁶³⁴ Ibid.

⁶³⁵ Ibid.

⁶³⁶ UN Expert Panel Report, [111].

2009. These incidents took place in the context of wider, intense shelling of the Putumattalan, Valayanmadam and Mullivaikkal areas.⁶³⁷

- 6.220 On 20 March 2009, a local senior NGO official observed what he believed to be a succession of MBRL shells land on and around Karaiyamullivaikkal Hospital.⁶³⁸ According to this witness, 'There were about 40 shells in total and I recall that four shells fell directly on the hospital'.⁶³⁹ One shell fell at the hospital's entrance killing about 35 people.⁶⁴⁰
- 6.221 According to the same witness, on another occasion in early April 2009, about 50 'artillery and MBRL shells' landed in the area around Karaiyamullivaikkal Hospital in the space of around 10 minutes, with '[a] few' falling directly on the hospital causing serious damage to the hospital.⁶⁴¹
- 6.222 On or around 22 April 2009, a Government doctor and a senior Government official met with ICRC delegates and directly informed them of the situation in NFZ-2.⁶⁴² According to this senior Government official, the ICRC delegates were 'very upset and angry with the continued shelling' and the ICRC delegates stated that they 'were continuing to inform the [Army] and GoSL [i.e. the Sri Lankan Government] of what was happening'.⁶⁴³
- 6.223 On the afternoon of 26 April 2009, soon after an ICRC delegate had departed from Karaiyamullivaikkal Hospital, a hospital volunteer was present in the operating theatre when 'a big blast occurred ... shaking inside the theatre' and causing 'some glass [to] hit the floor'.⁶⁴⁴ The witness was informed that the blast was a shell, and observed the damage caused, including that '[t]here were a number of patients that were killed and wounded'.⁶⁴⁵
- 6.224 The hospital volunteer claimed to be present in the operating theatre 'a day or so after' 26 April 2009, when there was another explosion in the area near the hospital's front entrance.⁶⁴⁶ The volunteer stated, 'I could hear the explosive thing coming in, it was like a rocket that made a noise as it came in ... and as a result there were several of the patients who were waiting near the white tent for assessment of their injuries who suffered further injuries'.⁶⁴⁷ The volunteer claimed that there were white ambulances, marked with Red Cross emblems and flags, parked out the front of the hospital, at the time of the attack.⁶⁴⁸ The witness went outside and observed what the witness believed to be a 'shell or rocket' near the hospital's entrance.⁶⁴⁹
- 6.225 On 28 April 2009, a senior Government official observed that the Primary Healthcare Facility had been hit with what appeared to be a shell.⁶⁵⁰ The witness observed that about 20

⁶³⁷ WS-1501, [248]–[249], [253], [257]; WS-1516, [34]–[35].

⁶³⁸ WS-1509, [139].

⁶³⁹ Ibid.

⁶⁴⁰ Ibid.

⁶⁴¹ See, eg, WS-1509, [141].

⁶⁴² WS-1501, [246].

⁶⁴³ Ibid, [246].

⁶⁴⁴ WS-1516, [61].

⁶⁴⁵ Ibid, [61].

⁶⁴⁶ Ibid, [67]–[68].

⁶⁴⁷ Ibid.

⁶⁴⁸ Ibid, [67].

⁶⁴⁹ Ibid, [68].

⁶⁵⁰ WS-1501, [253]. See also reference to an attack on the 'Primary Health Centre' on Wednesday 29 April 2009 reportedly killing six patients in exhibit to witness statement, contemporaneous correspondence from a senior Government doctor entitled 'Mullivaikkal Hospital Second Time Attacked on 2 May 2009'. It should be noted that it is unclear how the doctor knows about this incident.

persons, including women and children, were killed, and was informed that many others were taken to Karaiyamullivaikkal Hospital for treatment.⁶⁵¹ The US Department of State noted that '[s]ources in the NFZ' reported that 'the Primary Health Center at Mullivaikkal Hospital' was shelled on 28 April.⁶⁵²

- 6.226 According to a senior Government official (and consistent with email correspondence from a senior government doctor and a TRO situation report), a senior Government doctor stated that Karaiyamullivaikkal Hospital was shelled on 30 April 2009, causing the death of nine people and injuring 15 others.⁶⁵³ The official alleged that the doctor informed him that he had reported the shelling to the ICRC.⁶⁵⁴ The official visited the hospital where he observed 'many people crowded into the area. There were a number of dead bodies lying on the ground. I saw that there were many injured people also just lying [on] the ground.'⁶⁵⁵
- 6.227 According to both a senior Government official as well as a TRO Situation Report dated 2 May 2009, the Government intensified attacks after its announcement that it would not use heavy weapons.⁶⁵⁶ According to the head of the TRO Field Office in Mullivaikkal, shells were coming from Mullaitivu, PTK, Oddusuddan and the sea.⁶⁵⁷

Attacks on or around Karaiyamullivaikkal Hospital on 2 May 2009

- 6.228 From 1 to 2 May 2009, there was heavy shelling of the Mullivaikkal area, including around the Karaiyamullivaikkal Hospital.⁶⁵⁸ According to a senior Government official, 'the hospital...just could not cope with the number of casualties [being brought to the hospital]'.⁶⁵⁹ On 2 May 2009, during a short break in the shelling, this official observed what he believed to be a UAV flying over the area.⁶⁶⁰
- 6.229 On 2 May 2009, a Government doctor alleged that between 9am and 10:30am on 2 May, when the hospital was 'very busy with patients', one shell hit the main out-patient department.⁶⁶¹ According to the Government doctor, as a result, 23 civilians allegedly died and 34 civilians were injured, including two medical staff members who were critically wounded.⁶⁶²
- 6.230 The hospital volunteer has described an incident that may either corroborate the above incident or detail an additional incident.⁶⁶³ The volunteer alleged that '[i]n the first week of May 2009', the volunteer arrived at Karaiyamullivaikkal Hospital at 'about 8:30am' and was

⁶⁵¹ WS-1501, [253]. It should be noted that it is unclear whether the witness saw injured people and how he knew that injured people had been taken to the hospital.

⁶⁵² Report to Congress 2009, 38 (although note that the report cited only six patients were killed).

⁶⁵³ Exhibits to WS-151, [257], [263]; Exhibit to witness statement, contemporaneous correspondence from a senior Government doctor entitled 'Mullivaikkal Hospital Second Time Attacked on 2 May 2009'; TRO, 'The Latest Situation Report – by Lawrence Christy' (media release), 2 May 2009, 1 (although note that the date cited is 29 April 2013).

⁶⁵⁴ WS-1501, [257].

⁶⁵⁵ Ibid.

⁶⁵⁶ Ibid, [258]; TRO, 'The Latest Situation Report – by Lawrence Christy' (media release), 2 May 2009, 1.

⁶⁵⁷ TRO Media Release, 'The Latest Situation Report – by Lawrence Christy' (media release), 2 May 2009, 1.

⁶⁵⁸ WS-1501, [259]–[260].

⁶⁵⁹ Ibid, [259].

⁶⁶⁰ Ibid, [260]; ICG Report, 19.

⁶⁶¹ Exhibit to witness statement, contemporaneous correspondence from a senior Government doctor entitled 'Mullivaikkal Hospital Second Time Attacked on 2 May 2009'

⁶⁶² Ibid.

⁶⁶³ HRW, for instance, has stated that there were two shellings around Mullivaikkal Hospital on 2 May 2009 (one at 9am and another at 10:30am): HRW website, 'Sri Lanka: Repeated Shelling of Hospitals Evidence War Crimes', 8 May 2009, <http://www.hrw.org/en/news/2009/05/08/sri-lanka-repeated-shelling-hospitals-evidence-war-crimes%20#Hospital>.

told by a senior Government doctor that a shell had hit the hospital, and that the dead and wounded were being cleared from the debris.⁶⁶⁴ This volunteer observed 'one or two dead bodies' and 'a lot of damage to the brickwork at the front [of the hospital]'.⁶⁶⁵

6.231 Consistent with these accounts, the TRO reported:

On 2nd of May on two occasions, several shells fell in and around the vicinity of Manjolai hospital at Mullivaikal. The shells had hit the hospital crowded by injured patients. In this attack 64 people were killed and over 80 injured. A huge smoke and dust erupted and covered the hospital. We thought that the whole school building which was turned into a makeshift hospital ha[d] collapsed. When TRO staff rushed to the hospital, they saw severely wounded patients lying there. They could not move to anywhere. The parents threw their children into pits in the hospital compound and ran for safety. Scores of patients who didn't have severe injuries were crawling in all directions. Some of them who crawled outside were also killed by shells [that] fell subsequently in the vicinity. Blood splashed everywhere on the ground and on the tarpaulin sheets inside the hospital. Many bodies were mangled beyond recognition. Body parts and pieces of flesh were strewn all over the hospital compound. TRO staff helped in doing first aid to the injured people, removing the dead for burial and cleaning the hospital. One NGO official told me that ICRC is interested in evacuating the wounded by ship to Trincomalee but they are not interested in stopping the killing and wounding of civilians by the government forces.⁶⁶⁶

6.232 Consistent with these witness accounts and open-source reports, a former LTTE member in a non-combat role saw five to six shells land around the outside of the Karaiyamullivaikkal Hospital on 2 May 2009.⁶⁶⁷ The witness states that he went to the scene 'about an hour later' and saw the 'destruction', including 'about 15 dead men, women and small children' that 'had clearly been killed by shrapnel'.⁶⁶⁸

6.233 HRW also reported on the basis of witness accounts provided to it, that shells struck Mullivaikkal Hospital on 2 May 2009, killing 68 persons and wounding 87.⁶⁶⁹

6.234 A senior Government official stated that, after receiving reports on 2 May 2009 that Karaiyamullivaikkal Hospital had been shelled, he called the ICRC and informed an ICRC delegate about the shelling.⁶⁷⁰ The ICRC delegate told him that they would contact the SFs and request them to stop shelling.

6.235 The Sri Lankan Army reportedly denied allegations that it had shelled the hospital on 1 and 2 May 2009, stating that the LTTE had carried out suicide attacks:

A spokesman for the [A]rmy said that although soldiers had heard explosions in the area, they had not fired any shells. The army had not used heavy weapons for some

⁶⁶⁴ WS-1516, [69].

⁶⁶⁵ Ibid.

⁶⁶⁶ TRO, 'The Latest Situation Report – by Lawrence Christy' (media release), 2 May 2009, 1.

⁶⁶⁷ WS-154, [97]–[98] and in relation to the witness's description of the damage caused by the shelling, see video clip on War Without Witness website, '02nd May 2009: Video Witness, Sri Lanka Army (SLA) Attack on Makeshift Hospital at Mullivaikkal',

http://www.warwithoutwitness.com/index.php?option=com_content&view=art&id=148:02nd-may-2009--video-witness-sri-lanka-army-sla-attack-on-makeshift-hospital-at-mullivaaykkaal&catid=34:video&Itemid=55.

⁶⁶⁸ WS-154, [98] and in relation to the witness's description of the damage caused by the shelling, see video clip on War Without Witness website, '02nd May 2009: Video Witness, Sri Lanka Army (SLA) Attack on Makeshift Hospital at Mullivaikkal', http://www.warwithoutwitness.com/index.php?option=com_content&view=art&id=148:02nd-may-2009--video-witness-sri-lanka-army-sla-attack-on-makeshift-hospital-at-mullivaaykkaal&catid=34:video&Itemid=55.

⁶⁶⁹ HRW website, 'Sri Lanka: Repeated Shelling of Hospitals Evidence War Crimes', 8 May 2009, available at:

<http://www.hrw.org/en/news/2009/05/08/sri-lanka-repeated-shelling-hospitals-evidence-war-crimes%20#Hospital>. WS-1501, [261].

⁶⁷⁰

days, he said, since the Government announced on Monday that it was halting its use of heavy weapons in the conflict zone. [He] said [LTTE] rebels had launched eight suicide attacks in the space of two days.⁶⁷¹

6.236 An Army spokesman reportedly told *The Independent* newspaper that allegations the Army had shelled the hospital were 'not true'.⁶⁷² This spokesman was quoted as stating, 'There is no necessity to put shells into that area. There has been no heavy weaponry used and no aerial intervention. We demarcated this area for the safety of civilians. That is the main reason we resist using heavy weapons.'⁶⁷³

6.237 Witness accounts detailed above are consistent with satellite imagery analysis that reveals that the '*Mullivaykkal Medical Station*' (presumed by ICEP to be Karaiyamullivaikkal Hospital), and the adjacent Primary Health Centre

were subject to direct artillery fire between 19 April and 10 May 2009; at least eight separate likely impact craters were identified on the roofs of four separate hospital buildings which were seriously damaged; additionally, two mortar impact craters were identified within the makeshift Medical Center [Karaiyamullivaikkal Hospital] grounds.⁶⁷⁴

6.238 According to satellite imagery analysis, between 19 April 2009 and 10 May 2009, the area around Karaiyamullivaikkal Hospital was subjected to 'heavy artillery shelling'.⁶⁷⁵ The same analysis shows that, on 19 April 2009, the Mullivaikkal area affected by this shelling was occupied by between 7,000 and 9,000 IDP tent shelters.⁶⁷⁶ While this imagery cannot confirm the proportion of these tents present at the time of the shelling, it indicates 'virtually no IDP tents remained standing within this area as of 6 May 2009'.⁶⁷⁷ UNITAR ultimately concluded, however, that 'it was highly improbable that families would en mass[e] risk leaving their current site (especially after investing time and resources to construct family bomb shelters) unless they were reacting to an imminent danger to their lives'.⁶⁷⁸ UNITAR found that 'the majority of identified hospital damages occurred between 19 April and 6 May 2009', with:

- two likely mortar impact craters on a building within the Primary Health Centre;
- three likely mortar craters on one of the main hospital buildings;
- two additional mortar craters within the hospital grounds; and
- over 250 identified likely artillery impact sites within a 500 metre radius of the Kariyamullivaikkal Hospital grounds between 19 April and 10 May 2009.⁶⁷⁹

Vellamullivaikkal Hospital

6.239 A second makeshift hospital was established at a primary school in Vellamullivaikkal, around three kilometres towards Wadduvaikkal (**Vellamullivaikkal Hospital**).⁶⁸⁰ By around

⁶⁷¹ 'Hospital "hit by Sri Lankan army"', *BBC*, 2 May 2009.

⁶⁷² Andrew Buncombe, "'75 die" as Sri Lanka forces accused of shelling hospital', *The Independent*, 3 May 2009.

⁶⁷³ *Ibid.*

⁶⁷⁴ UNITAR Report, 20.

⁶⁷⁵ *Ibid.*, 31.

⁶⁷⁶ *Ibid.*

⁶⁷⁷ *Ibid.*

⁶⁷⁸ *Ibid.*, 32.

⁶⁷⁹ UNITAR Report, 20.

9 May 2009, Karaiyamullivaikkal Hospital had reportedly closed and was merged into Vellamullivaikkal Hospital.⁶⁸¹

- 6.240 The UN Expert Panel found that the hospital was 'prominently marked'.⁶⁸² A hospital volunteer observed that there was a 'large flag on the roof of the hospital' with a 'large Red Cross'.⁶⁸³ According to one civilian witness, the rooms of the hospital had walls that did not run all the way to the roof and one wall of each room was completely open.⁶⁸⁴
- 6.241 The civilian witness also reported that there were thousands of people at this hospital with serious wounds, lying or sitting on the ground. The witness said, 'We were so close to one another that we were touching.'⁶⁸⁵ In respect of the Vellamullivaikkal area, a senior Government official, stated, 'The land area available for us was too small and there was barely any space for us to dig a bunker to hide in.'⁶⁸⁶
- 6.242 There might have been some wounded LTTE cadres (unarmed and not in uniforms) being treated in the hospital on 10 May 2009, and there were LTTE Police in uniforms helping the wounded and dealing with bodies.⁶⁸⁷
- 6.243 The UN Expert Panel found that on 13 May 2009, the 58th Division pushed east towards the coastline aiming to advance south, and the 53rd Division moved along the A35 Highway towards the lagoon.⁶⁸⁸ The 55th Division advanced south from Putumattalan.⁶⁸⁹ Vellamullivaikkal Hospital, located at the southern end of the Mullivaikkal peninsula, was within the area that was surrounded by advancing SFs' troops.⁶⁹⁰
- 6.244 According to the LLRC, Vellamullivaikkal was captured on 14 May 2009.⁶⁹¹ The UN Expert Panel found that on 16 May 2009, the 58th and 59th Divisions linked on the coastline and the 53rd Division continued to advance south along the Nanthikadal Lagoon.⁶⁹² The same day, Army Commander, Lieutenant General Fonseka, declared victory over the LTTE.⁶⁹³ Karaiyamullivaikkal was finally captured on 18 May, which then brought an end to active military operations.⁶⁹⁴

Attacks on and around Vellamullivaikkal and the Vellamullivaikkal Hospital in early to mid-May 2009

- 6.245 Shelling on or near the Vellamullivaikkal Hospital reportedly took place in the context of wider shelling and small arms fire, which affected the Mullivaikkal area from early May

⁶⁸⁰ Witness accounts indicate that there was a second hospital facility in Mullivaikkal: see witness statements of WS-1516, [71], [74] referring to 'the second Mullivaikkal Hospital located in the Primary School' at a 'new location [that] was closer to Wadduvaikal... a bit of a distance from the original Mullivaikkal Hospital'; WS-159, [142] (referring to 'a primary school in Vellamullivaikkal which was operating as a make shift [sic] hospital'); UN Expert Panel Report, [111]. The distance between Karaiyamullivaikkal and Vellamullivaikkal has been verified by map.

⁶⁸¹ WS-1516, [71]. See also WS-1501, [265].

⁶⁸² UN Expert Panel Report, [111].

⁶⁸³ WS-1516, [74].

⁶⁸⁴ WS-1515, [94].

⁶⁸⁵ Ibid, [98]; see also [96].

⁶⁸⁶ WS-1501, [265].

⁶⁸⁷ WS-1515, [95].

⁶⁸⁸ UN Expert Panel Report, [115].

⁶⁸⁹ Ibid, [115].

⁶⁹⁰ WS-1501, [265].

⁶⁹¹ LLRC Report, [3.18].

⁶⁹² UN Expert Panel Report, [120].

⁶⁹³ Ibid, [121].

⁶⁹⁴ LLRC Report, [3.18].

2009.⁶⁹⁵ According to eye-witness accounts, the shelling of the Mullivaikkal area reportedly became more intense over the first weeks of May 2009.⁶⁹⁶ According to the UN Expert Panel, 'The final days of the armed conflict saw a steep rise in the number of civilian casualties.'⁶⁹⁷

- 6.246 A hospital volunteer who relocated to Vellamullivaikkal Hospital in early May 2009 stated that '[d]uring the nights there was no shelling in the hospital, but in the area around the hospital the shelling was constant, a continuous sound of explosions in the background.'⁶⁹⁸ The volunteer further stated that 'bullets...were coming into the area around the hospital, and into the hospital itself' and 'came in burst[s] one after the other'.⁶⁹⁹ The witness said that these bullets 'came from the direction north west of [the hospital], and came in the direction of Wadduvaikal'. In the days leading up to the closure of Vellamullivaikkal Hospital, the witness observed an '[increase in] the number of patients presenting at the [h]ospital with bullet wounds'.
- 6.247 A religious leader saw what he believed to be MBRLs launched by the SFs in the Vellamullivaikkal area between 6 and 8 May 2009.⁷⁰⁰ In respect of one 'big incident' on 8 May 2009, the witness observed 'more than 100 dead' in the 'immediate area of [his] bunker' alone, but he believed '[m]ore than 1000' may have died. This religious leader claimed there were no LTTE positions in the 'immediate area' during any of the incidents he observed.⁷⁰¹
- 6.248 Consistent with this witness' account, a senior local NGO official witnessed a 'very severe shell attack involving the use of MBRLs between 5 and 10 May at [Vellamullivaikkal Hospital]'.⁷⁰² The witness attended the scene to assist the injured and estimated that 'about 500 people [were] killed... and 2,500 to 3,000 people injured'. The witness was standing 'about 300 meters away' and believed the shells had 'come from the north of Vellamullivaikkal in the direction of Valayanmadam where the SFs were located by that time'.⁷⁰³ Around the time of this attack, the witness stated that 'the LTTE were barely fighting and almost all of them had changed out of their uniforms into civilian clothing'.⁷⁰⁴
- 6.249 After relocating to Vellamullivaikkal in early May 2009, a senior Government official observed '[t]housands were now dying every day, from the shelling there was nowhere to hide'.⁷⁰⁵ The witness stated, 'In addition, there was small arms and heavy gunfire coming into the civilian areas from the Lagoon and from the advancing SLA forces that were by this time in Mullaivaykkal West [Karaiyamullivaikkal]'.⁷⁰⁶
- 6.250 One evening, on or about 7 or 8 May 2009, a witness, who was known to senior LTTE members, who was in Karaiyamullivaikkal observed shells being fired by the Sri Lankan

⁶⁹⁵ WS-1501, [269]–[270]; WS-1516, [83], [90], [95]; WS-1509, [143]; WS-1503, [314]–[315]; WS-1515, [84].

⁶⁹⁶ WS-1501, [270].

⁶⁹⁷ UN Expert Panel Report, [116].

⁶⁹⁸ WS-1516, [73].

⁶⁹⁹ Ibid, [83].

⁷⁰⁰ WS-1511, [30]–[31].

⁷⁰¹ Ibid, [30].

⁷⁰² WS-1509, [142].

⁷⁰³ Ibid, [142].

⁷⁰⁴ Ibid, [142].

⁷⁰⁵ WS-1501, [268].

⁷⁰⁶ Ibid, [265].

Navy which was positioned more than one kilometre from the shore.⁷⁰⁷ The witness saw ‘a flashing light’ as the shells were discharged, and reported ‘hear[ing] the sound of an explosion as the shell hit a target’.⁷⁰⁸ Once the witness left her bunker, she saw ‘many injured being transported on stretchers’.

6.251 On 10 May 2009, an eye-witness in the hospital yard saw a shell fall on the operating theatre, killing a doctor and patients lying nearby, and also wounding nurses.⁷⁰⁹ This witness stated that more than five shells fell on the hospital within a period of two hours and that ‘[t]here was shelling continuously in the hospital’s surrounding area’.

6.252 The UN Expert Panel found that ‘[o]n 11 or 12 May [2009], [Vellamullivaikkal Hospital] was also hit by SLA shells, killing many people’.⁷¹⁰ Witness accounts obtained by ICEP indicate that the hospital was shelled on 11 and 12 May 2009 while the greater Mullivaikkal area was subjected to wider, intense bombardment and large numbers of wounded civilians sought treatment at the hospital.

6.253 For example, on 11 May 2009, a senior Government official observed shelling ‘all around the [Vellamullivaikkal] Hospital, people were just dying in their bunkers, there was no one to come and collect them and no one to bury them.’⁷¹¹

6.254 This official also stated ‘on 12th [May 2009], the SLA shelled the whole of the Mullivaikkal area, hundreds of casualties and their relatives flooded into the [Vellamullivaikkal] Hospital’.⁷¹² On that same day, the Sri Lankan Army shelled the hospital itself.⁷¹³ According to a hospital volunteer, at the time of the shelling the hospital had over 700 patients.⁷¹⁴ After this attack, a senior Government official visited the scene and observed

hundreds of people dead and dying, the shelters which had previously protected the injured from the sun and rain, which were only plastic sheets were all shredded from the shell blasts. Seriously injured people suffered additional injuries and their relatives were either killed or injured.⁷¹⁵

6.255 Similarly, ‘on either the 11th or 12th of May [2009]’, a volunteer at Vellamullivaikkal Hospital ‘heard the explosion and then lots of screaming from patients and everyone who had been hurt’.⁷¹⁶ The witness recalled that the shell landed on one of the hospital’s two entrances.

6.256 As a result of this shelling, the Government official and a hospital volunteer claimed that many patients, hospital volunteers and staff were killed, including the hospital’s Administrative Officer, Mr Tharmakulasingham, and many were also wounded.⁷¹⁷ According to one of the hospital volunteers present at the time of the attack, this administrator had been working in front of Vellamullivaikkal Hospital at the time he was killed by the attack.⁷¹⁸

⁷⁰⁷ WS-1517, [18].

⁷⁰⁸ Ibid, [18].

⁷⁰⁹ WS-1515, [99].

⁷¹⁰ UN Expert Panel Report, [111].

⁷¹¹ WS-1501, [270].

⁷¹² Ibid, [270].

⁷¹³ Ibid, [270].

⁷¹⁴ WS-1516, [85].

⁷¹⁵ WS-1501, [270].

⁷¹⁶ WS-1516, [75].

⁷¹⁷ WS-1501, [271]; WS-1516, [75]–[76].

⁷¹⁸ WS-1516, [75].

The volunteer estimated that ‘there were about 40 or 50 people killed’.⁷¹⁹ In respect of those wounded, the volunteer recalled ‘at this time we had nothing to treat them with, all that could be done was to try and tie cloth and whatever we could around the wounds to try and stop the bleeding’.⁷²⁰ The Government official observed that ‘these [victims] were not LTTE these were just families[,] children, old people’.⁷²¹

- 6.257 Consistent with the witness accounts detailed above, *The Guardian* reported that, on 12 May 2009, a hospital doctor ‘said that 47 people died and 56 were injured’ after a shell struck a hospital established in ‘Mullivaikal East primary school’.⁷²² The doctor reportedly stated that the shell ‘appeared to have been fired from Government positions’. Similarly, the UN published a news release stating ‘shelling of the makeshift hospital in Mullivaikkal today [12 May 2009] reportedly resulted in loss of life and injuries among civilians’.⁷²³
- 6.258 A senior Government official stated that the situation at the hospital deteriorated over the course of the day on 12 May 2009.⁷²⁴ As more patients came into the hospital, gunfire intensified and people inside the hospital compound were shot.⁷²⁵ As noted above, the hospital volunteer believed that bullets constituted a real threat to hospital staff and patients, and that these bullets were coming from the direction of Wadduvakal,⁷²⁶ where the SFs were located.
- 6.259 Around the time of these attacks, hospital officials and doctors allegedly reported the situation at Vellamullivaikkal Hospital to the ICRC.⁷²⁷ The senior Government official referred to above was told by the ICRC that although the ICRC relief ships were off the coast and were ‘trying to come and collect patients’, the SFs ‘would not allow them to land’.⁷²⁸
- 6.260 On 12 May 2009, the Sri Lankan Ministry of Defence ‘vehemently denied’ reports published by ‘international media and pro-LTTE websites’ alleging that the SFs shelled a hospital inside the ‘Civilian Safe Zone’, killing at least 45 civilians.⁷²⁹ It is not clear to which reports the Ministry of Defence was referring.
- 6.261 From the evening of 12 May 2009, a senior Government official observed that the Vellamullivaikkal Hospital ‘was completely paralysed, there was nothing left to treat the hundreds of patients coming into the hospital, there was shelling and small arms fire everywhere’.⁷³⁰ This official also observed that outside the hospital ‘was just as bad, destroyed shelters everywhere with dead and dying people ... it was so dangerous, with continued shelling, and bullets whizzing by us’.⁷³¹

719

Ibid, [75]

720

Ibid, [78].

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WS-1501, [271].

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Gethin Chamberlain, ‘Makeshift Sri Lanka Hospital is Shelled, Taking 47 Lives’, *The Guardian*, 12 May 2009.

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UN News Service, ‘Sri Lanka: UN Officials Denounce Impact of Conflict on Children’, 12 May 2009,

http://www.un.org/apps/news/story.asp?NewsID=30772#_Uf97vkR- 4g.

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WS-1501, [272].

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Ibid, [272].

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WS-1516, [83].

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WS-1501, [273].

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Ibid, [273].

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Sri Lankan Ministry of Defence Media Release, ‘Defence Ministry Denies “Hospital Attack”’, 12 May 2009.

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WS-1501, [274]; ICG Report, 20.

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Ibid, [275].

- 6.262 During the night, the hospital and its surroundings were subjected to heavy shelling and small arms fire.⁷³² According to the Government official, he and others on-the-ground notified the UN, Government Agents and the ICRC of the situation, but ‘they all said that the GoSL [i.e. Sri Lankan Government] or SFs would not allow them to assist.’⁷³³
- 6.263 A senior local official of an NGO stated that ‘in the final week of the war’ ‘a combination of artillery shelling, MBRL shelling and white phosphorous were used’ at Vellamullivaikkal Hospital.⁷³⁴ The witness alleged that hundreds of people died, and potentially thousands were injured. This witness observed what he believed to be ‘distinct chemical burns on those who had been injured.’⁷³⁵
- 6.264 The Vellamullivaikkal area continued to be subjected to shelling and small arms fire between 13 and 16 May 2009.⁷³⁶ The shelling was described by a senior Government official as ‘so heavy and non-stop’ such that ‘[w]e couldn’t leave the bunker.’⁷³⁷ By this time, there were reportedly many dead people at Vellamullivaikkal Hospital, some of whom had started decomposing because of the warm conditions,⁷³⁸ and in addition, there were several hundred critically wounded patients who could not be moved.⁷³⁹
- 6.265 A senior Government doctor reported to *The Guardian* that, on 13 May 2009, the area around Vellamullivaikkal primary school was being heavily shelled, with one shell landing in the hospital’s administrative office and another shell hitting a ward with wounded patients.⁷⁴⁰ The doctor estimated that at least 50 people were killed and another 60 injured.⁷⁴¹ According to another senior Government doctor, *The Guardian* reported that one of the shells came from the direction of PTK, which the doctor believed was held by Government forces.⁷⁴²
- 6.266 The hospital volunteer reported that, on the evening of 13 May 2009, Vellamullivaikkal Hospital was forced to shut down due to the exhaustion of medical supplies and the repeated shelling of the hospital.⁷⁴³ Hundreds of wounded patients were left in the hospital.⁷⁴⁴
- 6.267 The UN Expert Panel found that on 14 May 2009, the hospital’s doctors could no longer attend the hospital due to the intensity of the shelling.⁷⁴⁵ A former LTTE member in a non-combat role stated that the shelling in Vellamullivaikkal on 13 and 14 May was ‘so intensive that those who had shelters, as our group did, had to stay in the bunkers for 48 hours.’⁷⁴⁶

732

Ibid.

733

Ibid, [276].

734

WS-1509, [144].

735

Ibid.

736

WS-1501, [277]–[281]; WS-1516, [95]–[96].

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WS-1501, [280]–[281].

738

Ibid, [281].

739

Ibid, [277].

740

Gethin Chamberlain and Haroon Siddique, ‘At Least 50 Die in Second Day of Shelling at Sri Lankan Hospital’, *The Guardian*, 13 May 2009.

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The article also refers to a Government health official who stated that at least 50 people were killed on 13 May 2009.

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Gethin Chamberlain and Haroon Siddique, ‘At Least 50 Die in Second Day of Shelling at Sri Lankan Hospital’, *The Guardian*, 13 May 2009.

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WS-1516, [86]–[88].

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Ibid, [88]; WS-1501, [277].

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UN Expert Panel Report, [119].

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WS-1504, [114].

6.268 SFs' soldiers reportedly moved into the Vellamullivaikkal area in the early afternoon of 15 May 2009.⁷⁴⁷ As a senior Government official ran towards the SFs with a group of other Government employees, he saw 'hundreds of bodies lying everywhere, we had to carefully try and step over them, they were all over the ground[,] they appeared to be civilians, there were women, children, elderly people and men.'⁷⁴⁸ The official stated that, as they were walked by the SFs back to Karaiyamullivaikkal, 'it was a scene of destruction in front of me, the whole are[a] seemed to be on fire, buildings, vehicles, and there were just bodies everywhere for the whole two kilometres we walked ... I believe I saw thousands of dead civilians.'⁷⁴⁹

6.269 The Sri Lankan Army had substantial capability to launch indirect fire weapons on the Vellamullivaikkal area, including the southern portion of NFZ-2 and NFZ-3. Satellite imagery analysis has found:

- between March and early May 2009, the Sri Lankan Army emplaced six separate mortar batteries on the western shore of the Nanthikadal Lagoon.⁷⁵⁰ UNITAR concluded: 'A review of the estimated fire bearings of the batteries indicated that they were exclusively targeting areas within the NFZ-2, and later NFZ-3, based on the lack of available intermediate targets over the lagoon',⁷⁵¹
- between March and May 2009, the Army emplaced seven mortar batteries along the southern shore of the Nanthikadal Lagoon, in Wadduvakal and Mullaitivu 'with fire bearings directly into the southern quarter of the NFZ-2, and NFZ-3';⁷⁵²
- by 10 May 2009, the fire bearing of the Army's artillery battery in Mannakandal had rotated further east 'directly into the center of NFZ-3, without any viable potential targets in between the battery and NFZ-3';⁷⁵³ and
- by 10 May 2009, the Army emplaced three artillery batteries (composed of 19 mortars) inside NFZ-2, and some time after 10 May a fourth battery was emplaced (composed of 6 mortars), all of which had 'approximate fire bearings targeting the center of the remaining NFZ-2 and NFZ-3'.⁷⁵⁴

E. Legal analysis

(i) *Were the attacks legitimate under international law?*

6.270 Under customary IHL, it is prohibited to direct an attack against civilians or civilian objects.⁷⁵⁵ It is also prohibited to direct an attack against a zone established to shelter civilians from the effects of hostilities.⁷⁵⁶

6.271 The Sri Lankan Army unilaterally declared successive areas to be NFZs 'to provide maximum safety for civilians'.⁷⁵⁷ There was no indication that the Government or the SFs

⁷⁴⁷ WS-1501, [281].

⁷⁴⁸ WS-1501, [282], in relation to many dead bodies observed lying in this area, some of which were showing signs of decomposition; WS-1516, [96].

⁷⁴⁹ WS-1501, [282].

⁷⁵⁰ UNITAR Report, 45.

⁷⁵¹ Ibid.

⁷⁵² Ibid.

⁷⁵³ UNITAR Report, 44–45.

⁷⁵⁴ Ibid, 45.

⁷⁵⁵ Rules 1, 7, CIHL Study

⁷⁵⁶ Rule 35, CIHL Study.

publicly changed the status of any NFZ or gave warning that the Government or SFs considered a particular NFZs status to have changed. This report has not analysed whether attacks on the NFZs *per se*, and in particular, NFZ-3, were unlawful. However, both parties' conduct in respect of the NFZs is a cause of grave concern particularly in light of their status.

6.272 Specific incidents occurring in and around the NFZs have been examined below where the evidentiary material available to ICEP makes it reasonable to conclude that IHL was violated and, as a result, that there are reasonable grounds to suspect war crimes were committed. The detailed analysis of attacks on Karaiyamullivaikkal and Vellamullivaikkal can be applied to any of the other incidents discussed above.

6.273 Furthermore, examination of the conduct of the LTTE in the NFZs is required as there is an obligation on parties to the conflict to protect civilians under their control.⁷⁵⁸ It is also prohibited to co-locate military objectives and civilians with the intent to protect the military objectives.⁷⁵⁹ Even if the LTTE are found to have violated these principles of IHL, it would not annul the Sri Lankan Government's targeting obligations:

- to distinguish between civilians and fighters, and civilian objects and military objectives;
- to target only military objects and personnel;
- to adhere to the principle of proportionality and the prohibition of indiscriminate attacks; and
- to take precautionary measures.

(ii) Case study: Karaiyamullivaikkal and Vellamullivaikkal

Were the attacks against legitimate military objectives?

6.274 It is unclear whether the SFs were targeting legitimate military objectives within NFZ-2 and NFZ-3. This is particularly important in relation to Karaiyamullivaikkal and Vellamullivaikkal Hospitals, which were objects that were protected from attacks.⁷⁶⁰

6.275 While there were cadres, individuals and material that could be classified as military targets in the Mullivaikkal area, further investigation is required to determine their number and positions. According to the UN Expert Panel, in the final days of the conflict, the remaining LTTE members included 'many of the top leaders and around 250 hard-core fighters'.⁷⁶¹ Reported statements by Sri Lankan Army spokespeople and the defence analyst Major General Ashok Mehta, place the number of LTTE cadres from February to May 2009 in the

⁷⁵⁷ Sri Lankan Presidential Secretariat Media Release, 'New Safe Zone for Trapped Civilians in Mullaitivu', 22 January 2009, http://www.priu.gov.lk/news_update/Current_Affairs/ca200901/20090122new_safe_zone.htm [accessed 13 September 2013].

⁷⁵⁸ Rule 22, CIHL Study.

⁷⁵⁹ Rule 97, CIHL Study.

⁷⁶⁰ Rule 35, CIHL study

⁷⁶¹ UN Expert Panel Report, [120].

hundreds.⁷⁶² These leaders and cadres would have been legitimate objects of attack, as would any defensive positions and cadres defending them.

6.276 The allegations referred to above in respect of some LTTE not wearing uniforms, if proven, could constitute a violation of IHL.⁷⁶³ Whether or not LTTE cadres were wearing uniforms, such cadres are legitimate military objects unless they had laid down their arms or were placed *hors de combat*.⁷⁶⁴ One witness also observed that 'the civilians and the cadres were all mixed together'.⁷⁶⁵ The presence of LTTE personnel in the civilian population or their vicinity does not render the civilian population a legitimate target of attack.⁷⁶⁶ As such, for each attack, a legitimate military objective must be identified.

6.277 Furthermore, the parties to the conflict must not co-locate military objectives and civilian objects in order to protect the former.⁷⁶⁷ Nonetheless, even if the LTTE did refrain from wearing uniforms, this would not relieve the Government and SFs from the obligation at all times to distinguish between civilian objects and military objectives,⁷⁶⁸ and to do everything feasible to verify that targets are in fact military objectives.⁷⁶⁹ In that respect, area bombardment is prohibited as it treats several separate military objectives as one, especially when located in a civilian area.⁷⁷⁰

6.278 Looking specifically at Karaiyamullivaikal and Vellamullivaikal Hospitals, it must be considered whether there is any possibility that these could have been legitimate military objectives. The UN Expert Panel and an eye-witness who volunteered at these functioning hospitals both note that there were no uniformed LTTE cadres or weapons in the Karaiyamullivaikkal Hospital.⁷⁷¹ Further, the hospital volunteer stated that, at the time of attacks on the hospital, which she observed in April and May 2009, there were no LTTE cadres in or near the hospital.⁷⁷²

6.279 Furthermore, it is prohibited to direct an attack against medical personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law, which includes the Red Cross or ICRC flags exhibited on the Karaiyamullivaikkal and Vellamullivaikkal Hospitals.⁷⁷³ Medical personnel, as well as medical units and transport, must be respected and protected in all circumstances.⁷⁷⁴ This rule is implicit in common Article 3, which requires that wounded and sick be collected and cared for.⁷⁷⁵

⁷⁶² Randeep Ramesh, 'Sri Lankan Soldiers Enter Last Town Controlled by Tamil Tiger Guerrillas', *The Guardian*, 24 February 2009; 'Sri Lankan Military: Last Tamil Rebel Stronghold Captured', *CNN*, 5 April 2009, <http://edition.cnn.com/2009/WORLD/asiapcf/04/05/sri.lanka.tamil/>.

⁷⁶³ Rules 62, 65, CIHL Study.

⁷⁶⁴ Common Article 3 to the Geneva Conventions.

⁷⁶⁵ WS-153, [334].

⁷⁶⁶ Rule 5, CIHL Study; *Tadic (Judgment)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II) 7 May 1997, [643]; *Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Decision of 2 September 1998, [582].

⁷⁶⁷ Rule 97, CIHL Study.

⁷⁶⁸ Rules 1, 6–10, CIHL Study.

⁷⁶⁹ Rule 16, CIHL Study.

⁷⁷⁰ Rule 13, CIHL study

⁷⁷¹ UN Expert Panel Report, [110] which appears to rely on the witness statement of WS-1516, [47], [59]. Given that WS-1516 worked at 'the hospital' from late-April to 14 May 2009 (at [36]), and that she goes on to clarify that there were two hospitals in Mullivaikkal at which she assisted, it is possible that her references at [47] and [59] to seeing no LTTE cadres or positions at 'the hospital' might also apply to Vellamullivaikkal Hospital although this is unclear. WS-1516, [59].

⁷⁷² Rule 30, CIHL Study; UN Expert Panel Report, [207].

⁷⁷³ Rules 25, 28–29 of CIHL Study.

⁷⁷⁴ Report of the Commission of Inquiry on Libya, [159].

6.280 A former LTTE cadre in a non-combat role stated that there were ‘not many’ severely wounded LTTE inside the makeshift hospitals, and these people were not in uniform and were unarmed.⁷⁷⁶ Customary international law is clear that persons placed *hors de combat*, a designation that would include wounded or sick LTTE cadres, must not be attacked.⁷⁷⁷ Accordingly, if the object of attack was the wounded cadres in the Mullivaikkal Hospitals, these were not legitimate targets. Furthermore, the presence of wounded cadres did not transform the hospitals from protected objects into legitimate military objectives.⁷⁷⁸

6.281 In respect of the LTTE Police who were providing assistance to hospital staff at Karaiyamullivaikkal Hospital, the evidentiary material suggests their role in the hospital was not as members of the armed group but as medical support. Assuming they consistently played this role and did not engage directly in hostilities, they are unlikely to be classified as legitimate military targets.⁷⁷⁹ It is difficult to conclude the Karaiyamullivaikkal Hospital was anything other than a protected object. Nonetheless, any LTTE military positions or guns in Karaiyamullivaikkal and Vellamullivaikkal would likely be legitimate targets. Even if an objective is a legitimate target, an attack on such an object must not be indiscriminate, it must be proportionate and precautionary measures must be taken.

Attacks against a legitimate military objective must not be indiscriminate

6.282 Even if there were legitimate military objectives in NFZ-2 and/or NFZ-3, and there were LTTE cadres in Karaiyamullivaikkal, Vellamullivaikkal and at the LTTE frontline along the Nanthikadal Lagoon, indiscriminate attacks on such targets were prohibited.⁷⁸⁰

6.283 As noted above, the presence of LTTE cadres within the civilian population ‘does not necessarily change the fact that the ultimate character of the population remains, for legal purposes, a civilian one.’⁷⁸¹ This means that the civilian population was not a legitimate target simply because there were LTTE cadres within it; only the cadres and their bases or positions were lawful targets, and every effort must be made to discriminate between civilians and military objectives in planning for and undertaking an attack.

6.284 The concentration of civilians in NFZ-2, and then NFZ-3, was extremely high (especially due to their having been declared ‘safe zones’ by the Sri Lankan Government), varying between approximately 50,000 and 165,000 depending on the time examined (see paragraph 6.207).

6.285 Given the high density of civilians, it is difficult to surmise how any but the most targeted attacks on military objectives in the Karaiyamullivaikkal or Vellamullivaikkal area could have complied with the prohibition on indiscriminate attacks. For a lawful attack to be launched on legitimate military targets in the NFZs, it would have been necessary to choose means and methods of warfare that would limit civilian casualties.⁷⁸² Rather, on the present evidentiary material, it is reasonable to conclude that the repeated, continuous and widespread use of direct and indirect fire weapons (including MBRs) on the NFZs was in violation of IHL. Furthermore, artillery, which was allegedly regularly used in attacks on the NFZ, is an area

⁷⁷⁶ WS-1518, [12]; WS-1516, [59].

⁷⁷⁷ Rule 47, CIHL Study.

⁷⁷⁸ UN Expert Panel Report, [199].

⁷⁷⁹ Rule 6, CIHL study.

⁷⁸⁰ See Rules 11–13, CIHL Study.

⁷⁸¹ *Galic*, Case No. IT-98-29-A, Appeal Judgement of 30 November 2006, [136]. See also *Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Decision of 2 September 1998, [582]; Rule 5, CIHL Study.

⁷⁸² Rule 12, CIHL Study.

weapon.⁷⁸³ Although technology has improved its accuracy – for example, through the use of ground-based observers, UAVs,⁷⁸⁴ airborne observers, range finding and GPS technology – artillery is not meant to provide a precision capability.⁷⁸⁵

6.286 ICEP's independent artillery expert has stated, based on the information before him, that artillery shelling in the NFZ was indiscriminate and that, although hospitals and humanitarian sites did not appear to have been specifically targeted, they did suffer from indiscriminate area bombardment by the SFs.⁷⁸⁶ Moreover, assuming the existence of legitimate targets in the NFZs, indiscriminate bombardment of the whole of the NFZs (or large areas within it) in an attempt to target these military objectives is prohibited.⁷⁸⁷

6.287 In respect of satellite imagery of Karaiyamullivaikal, UNITAR found:

A review of the larger spatial and temporal context of the identified building damages to these hospitals [in Karaiyamullivaikal] strongly indicates that they were not the result of isolated or misdirected artillery fire but part of a much larger bombardment event spread across most of the Mullivaykkal West division [Karaiyamullivaikal].⁷⁸⁸

6.288 Moreover, UNITAR's analysis indicated that, not only was Karaiyamullivaikal Hospital hit by direct artillery fire, but that

within 500 meters of the hospital compounds [in Karaiyamullivaikal] there were an additional 250 identified likely artillery impact sites that occurred between 19 April and 10 May 2009, indicating that the hospitals were directly exposed to a much larger and generalized event of artillery fire within this area of NFZ-2.⁷⁸⁹

6.289 UNITAR stated that, likely between 19 April and 10 May 2009, 'over 650 likely shelling impact sites were identified within a larger area encompassing the villages of Mullivaykkal, Thaazhampam and Ottaippanaiyadi'.⁷⁹⁰ According to UNITAR, of these 650 likely shelling impact sites:

- Over 25 permanent buildings were destroyed or severely damaged;
- 83 impact craters fell on building roofs;
- 509 impact craters fell on open fields; and
- 34 impact craters fell on main roads.⁷⁹¹

6.290 Witnesses in Vellamullivaikal during the final weeks and days of the conflict also reported that the area was subjected to constant artillery bombardment, including by the use of what witnesses believed to be MBRLs, in addition to small arms fire, indicating that the Mullivaikal area as a whole was treated as a single military objective in violation of IHL.

⁷⁸³ Expert artillery report commissioned by ICEP, [2.2].

⁷⁸⁴ While information on the observation capability of the Army's artillery is difficult to locate, ICEP's artillery expert noted that 'UAV capability is available and even though it is controlled by the Sri Lankan Air Force it seems to have been employed for target acquisition not fire direction': Expert artillery report commissioned by ICEP, [3.5].

⁷⁸⁵ Expert artillery report commissioned by ICEP, [2.2].

⁷⁸⁶ Ibid, [6.6].

⁷⁸⁷ Rule 13, CIHL study.

⁷⁸⁸ UNITAR Report, 20.

⁷⁸⁹ Ibid, 20.

⁷⁹⁰ Ibid, 31.

⁷⁹¹ Ibid.

6.291 On the available evidentiary material, it is reasonable to conclude that the attack on the Mullivaikkal area, and specifically on Karaiyamullivaikkal Hospital, Vellamullivaikkal Hospital and their surroundings, constituted an indiscriminate attack.

Were the attacks proportionate?

6.292 Even if an attack is on a legitimate military objective, and not indiscriminate, the attack must still be proportionate. An attack is deemed disproportionate if it is expected to cause excessive civilian loss in relation to the anticipated military advantage.⁷⁹²

6.293 Looking at NFZ-2 and NFZ-3 as a whole, while there was an LTTE presence in the NFZs, there were few remaining LTTE cadres. According to the Sri Lankan Ministry of Defence, these cadres operated in small groups, and seemed to be concentrated along the Nanthikadal Lagoon. The Ministry of Defence has also acknowledged that, given the proximity of the advancing SFs to the LTTE, the LTTE could not use their artillery fire.⁷⁹³ This is consistent with witness accounts referred to above, which indicate that the LTTE did not have sufficient space to fire their artillery pieces, or had limited heavy weaponry remaining by late-March 2009.⁷⁹⁴ Furthermore, according to the Sri Lankan Army, 'There [was] no necessity to put shells into that area [NFZ-2]. There has been no heavy weaponry used and no aerial intervention. We demarcated this area for the safety of civilians. That is the main reason we resist using heavy weapons.'⁷⁹⁵

6.294 In spite of these factors, SFs' artillery shelling only increased in the last phase of the conflict, when the SFs had taken control of a vast proportion of the peninsula. Even if LTTE cadres were among the civilian population, and the SFs used means and methods of warfare capable of discriminating between civilians and cadres, the principle of proportionality requires that any attack on these cadres be proportionate so as to avoid excessive civilian loss in relation to the anticipated military advantage.⁷⁹⁶

6.295 The NFZs were densely populated, which is consistent with the fact that the Sri Lankan Government had recommended that civilians move to each of these areas that the Government had designated as a 'safe zone'. The geography of the area, as well as the fact that for months the SFs had controlled areas to the south, west and north of the NFZs, meant there was no other place for the LTTE or civilians to go by this time, apart from moving towards the advancing SFs' lines, which might have put them in even greater danger of being fired upon by either party to the conflict.

6.296 As noted above, it is unclear how many LTTE cadres remained in the NFZs at this time but the numbers appear to be between 200 and 700.⁷⁹⁷ Considering the high density of civilians in the NFZs, it is unclear what sort of military advantage would have warranted an attack on any targets within such a densely populated civilian area.

⁷⁹² Rule 14, CIHL Study.

⁷⁹³ Humanitarian Operation Factual Analysis, [204].

⁷⁹⁴ WS-1515, [54], referring to NFZ-2 generally in March/April 2009; WS-1509, [124].

⁷⁹⁵ Andrew Buncombe, "'75 Die" as Sri Lanka Forces Accused of Shelling Hospital', *The Independent*, 3 May 2009.

⁷⁹⁶ Rule 14, CIHL Study.

⁷⁹⁷ Randeep Ramesh, 'Sri Lankan Soldiers Enter Last Town Controlled by Tamil Tiger Guerillas', *The Guardian*, 24 February 2009; 'Sri Lankan Military: Last Tamil Rebel Stronghold Captured', *CNN*, 5 April 2009, <http://edition.cnn.com/2009/WORLD/asiapcf/04/05/sri.lanka.tamil/>; Ashok Mehta, 'The War Against the LTTE' in Harjeet Singh, *Pentagon's South Asia Defence and Strategic Year Book 2010*, 123.

- 6.297 Turning to the specific incidents in and around the Karaiyammullivaikkal and Vellammullivaikkal Hospitals, the available evidentiary material consistently suggests these sites received repeated artillery fire, including MBRL fire, in March, April and May 2009.
- 6.298 Around the time of these alleged attacks, witnesses describe the hospitals as overflowing with wounded civilians such that there was no space to treat them.⁷⁹⁸ Many hundreds of wounded civilians lay on the sand at Karaiyammullivaikkal Hospital.⁷⁹⁹ Similarly, thousands of seriously wounded patients were lying or sitting in the Vellammullivaikkal Hospital grounds and vicinity, with limited space in Vellammullivaikkal for shelters and bunkers to be established.⁸⁰⁰ A senior Government official stated that the heaviest civilian casualties occurred during the final weeks of the conflict in May 2009, at a time when the ICRC was not allowed to conduct medical evacuations.⁸⁰¹ The available evidentiary material contradicts Government announcements, on 25 February and 5 April 2009, that the SFs had ceased using heavy weaponry, and indicates that to the contrary, attacks on the Mullivaikkal area intensified and caused significant civilian casualties in and around the hospitals.
- 6.299 Even if the few remaining LTTE cadres in the Mullivaikkal area and, in particular, those concentrated along Nanthikadal Lagoon, were deemed military objectives, it is reasonable to conclude that the civilian casualties and damage to civilian objects that resulted from SFs' attacks were excessive in relation to the possible military advantage in launching these attacks. This is made even more apparent by the density of the civilian population in these areas, their physical situation (the number of people wounded), the lack of bunkers and other facilities for protection, as well as the direct and indirect fire weapons deployed by the SFs.

Were precautionary measures taken?

- 6.300 In the unlikely scenario that the attacks are found not to have been indiscriminate and to have complied with the principle of proportionality, the available evidentiary material suggests that insufficient precautionary measures were taken by the SFs to avoid, or to minimise, civilian casualties.
- 6.301 In spite of reported statements made by hospital staff to international media sources, and the presence of thousands of civilians and civilian objects in the Mullivaikkal area, there appears to have been no advance warning⁸⁰² of the attacks and no indication that weapons were chosen in order to minimise civilian casualties.⁸⁰³ For instance, while there is some evidentiary material showing that small arms fire was increasingly used by the SFs towards the final stages of the war (which may indicate a move towards more proportionate weapons), UNITAR's satellite imagery analysis and eye-witness accounts consistently indicate that the use of heavy artillery, including MBRLs, intensified.
- 6.302 While the Government did provide notice to the population of the applicable NFZs and their locations, there is little suggestion that this provided any real warning of the location of fire and objects within those area designated as 'safe zones' were attacked repeatedly and

⁷⁹⁸ WS-1507, [157]; WS-1516, [42]; WS-1501, [256].

⁷⁹⁹ WS-1501, [256].

⁸⁰⁰ WS-1515, [96], [98]; WS-1501, [265].

⁸⁰¹ WS-1501, [264].

⁸⁰² Rule 20, CIHL Study.

⁸⁰³ Rule 17, CIHL Study.

frequently. It is therefore reasonable to conclude that the SFs failed in its obligation under IHL to take sufficient precautionary measures in respect of each attack.

Possibility that civilians were the object of attack

- 6.303 The preceding analysis calls into question the intentions behind the SFs' attacks on Karaiyamullivaikkal and Vellamullivaikkal. The evidentiary material outlined above points to the SFs' practice of sustained area bombardment of the NFZs, resulting in extensive loss of civilian life, extensive wounding of civilians and damage to civilian and protected objects that included Karaiyamullivaikkal Hospital and Vellamullivaikkal Hospital. It is reasonable to conclude that such loss of life and damage occurred as a result of a much wider, intense and indiscriminate shelling of far larger areas on the Mullivaikkal peninsula.
- 6.304 ICEP stated in paragraphs 6.283 - 6.299 that there are reasonable grounds to suspect that the SFs' attacks on Karaiyamullivaikkal and Vellamullivaikkal were indiscriminate or disproportionate or both. In light of this, it is necessary to consider whether the current evidentiary material available may give rise to reasonable grounds to suspect that civilians, and/or the Karaiyamullivaikkal and Vellamullivaikkal Hospitals, were in fact the object of attack.⁸⁰⁴
- 6.305 In discussing the *actus reus* of the crime of 'attack on civilians' under Article 3 of the ICTY Statute, the Trial Chamber in *Galic* 'agree[d] with previous Trial Chambers that indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians.'⁸⁰⁵ For example, the Trial Chamber referred to the *Blaskic* Trial Judgement, and the *Martic* Rule 61 Decision, in which previous Trial Chambers had inferred direct attack from the indiscriminate character of the weapons used.⁸⁰⁶ However, it is clear that such an inference must be 'determined on a case-by-case basis in light of the available evidence'.⁸⁰⁷
- 6.306 More broadly, the ICTY Appeals Chamber has held that factors for determining whether an attack was 'directed against' the civilian population included

the means and methods used in the course of the attack, the status of the victims, their number, [...] the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.⁸⁰⁸

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Art 8(2)(e)(i), ICC Statute.

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Galic, Trial Judgement, [57].

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Galic, Trial Judgement, fn. 101.

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Galic, Trial Judgement, [60].

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Prosecutor v Kunarac (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No ICTY-96-23-A, 12 June 2002), [91] quoted in *Galic*, Appeal Judgment, [132]; see also *Blaskic*, Appeal Judgement, [106], [188]. The Trial Chamber in *Galic* outlined further questions to be considered:

distance between the victim and the most probable source of fire; distance between the location where the victim was hit and the confrontation line; combat activity going on at the time and the location of the incident, as well as relevant nearby presence of military activities or facilities; appearance of the victim as to age, gender, clothing; the activity of the victim could appear to be engaged in; visibility of the victim due to weather, unobstructed line of sight or daylight.

6.307 In respect of the *mens rea* of the war crime of attacks against civilians, the ICTY has held that '[t]he perpetrator who recklessly attacks civilians acts 'wilfully'.⁸⁰⁹

6.308 Summarising the evidentiary material available to ICEP, it is reasonable to conclude that:

- the conflict zone was under direct observation and surveillance by the SFs;
- observation capabilities available to the SFs were certainly sufficient to identify large groups of IDPs and protected objects such as hospitals that were marked with Red Cross emblems;
- the presence of a civilian population in the attacked areas was well known to the Government and the international community;
- the presence and movements of a large civilian population would have been obvious to close military observation;
- NFZ-2 and NFZ-3 were subject to sustained area bombardment through the repeated and heavy use of indirect fire weapons (usually in combination with direct fire weapons) that were inherently incapable of targeting specific military objectives;
- the SFs appeared to make very limited use of its precision capability to target specific military targets using the Sri Lankan Air Force's ground attack aircraft;
- the LTTE was virtually immobilised in these NFZs, especially in respect of their diminished capability to launch artillery from within the shrinking conflict zone. Accordingly, the LTTE was largely unable to mount reasonable defensive, and much less counter-measures, in the closing stages of the conflict;
- in contrast, by May 2009 the SFs had achieved complete dominance of the sea and air, the Army's indirect fire capabilities were significantly built up to the north, west and south of the NFZs, almost all LTTE-controlled territory was captured, the LTTE's supply routes were no longer available to them and the few hundred remaining LTTE fighters were confined on the Mullivaikkal peninsula from which they could not use whatever remaining artillery assets they still possessed; and
- on the basis of civilian population estimates discussed above, the LTTE's presence appears to have accounted for 0.5% (on a conservative estimate) of the total civilian population in NFZ-2 (650 LTTE cadres in a population of 130,000 civilians) and less than 1.4% (on a conservative estimate) of the total civilian population in NFZ-3 (700 LTTE cadres in a population of 50,000 civilians).

6.309 It is reasonable to conclude that the perpetrators knew the civilian status of the overwhelming proportion of the people in this area. Furthermore, if it is also proved that the

⁸⁰⁹ *Galic*, Trial Judgement, [54]. The ICC Elements of Crime, Art 8(2)(e)(i)-3 state for this war crime: 'the perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.'

specific SFs' attacks on Karaiyamullivaikkal and Vellamullivaikal were indiscriminate, there are reasonable grounds to suspect the perpetrators knew that civilians would be targeted in the course of employing indiscriminate area bombardment on NFZ-2 and NFZ-3.

- 6.310 It is still also necessary to prove that the perpetrators intended to target civilians. There are reasonable grounds to suspect that the SFs gave little regard to the consequences of indiscriminate area artillery bombardment on civilians, even though the Sri Lankan Government and SFs acknowledged there were tens of thousands of civilians in the conflict zone. There are reasonable grounds to suspect that SFs' members meant to engage in directing these indiscriminate attacks and accordingly either intended to target the civilian population or protected objects, or were reckless as to whether civilians or protected objects would be targeted.

Attacks in the NFZ as war crimes or crimes against humanity

- 6.311 There are reasonable grounds to suspect that war crimes, or crimes against humanity, or both were committed by members of the SFs, or members of the Sri Lankan Government, or both.
- 6.312 First, although further investigation is needed regarding the attacks on Karaiyamullivaikkal and Vellamullivaikkal, there are reasonable grounds to suspect that SFs' members committed the war crime of intentionally directing attacks against the civilian population in these villages, under Article 8(2)(e)(i) of the ICC Statute.
- 6.313 Secondly, there are reasonable grounds to suspect that SFs' members intentionally directed attacks against Karaiyamullivaikkal Hospital and Vellamullivaikkal Hospital, under Article 8(2)(e)(ii) and Article 8(2)(e)(iv) of the ICC Statute.
- 6.314 Thirdly, although not listed as a war crime under Article 8 of the ICC Statute, it is possible that in another forum a disproportionate attack will be considered a war crime even if committed in a NIAC.⁸¹⁰ For example, the ICTY has held that the prohibition on disproportionate attacks applies to NIACs and may entail individual criminal responsibility.⁸¹¹
- 6.315 Fourthly, there are reasonable grounds to suspect that people were killed, suffered serious injury to physical and mental health and that this happened on a large scale as a result of the shelling attacks in the NFZs. In addition to these underlying acts, there are reasonable grounds to suspect these acts were committed as part of a widespread or systematic attack against the civilian population pursuant to a State policy to commit such an attack (as discussed in section 5). There are therefore reasonable grounds to suspect that the shelling that occurred in the NFZs amounted to murder, extermination and inhumane acts as crimes against humanity committed by members of the SFs and the Sri Lankan Government. These acts may also amount to the crime against humanity of persecution.

⁸¹⁰ In an international conflict, such conduct is criminalised in Art 8(2)(b)(iv).

⁸¹¹ See ICTY jurisprudence mainly *Prosecutor v. Martić*. The review of the Indictment (§ 139) and *Prosecutor v. Kupreskić* (§ 140).

(iii) Possible violations by the LTTE

- 6.316 The evidentiary material indicates that the LTTE had cadres and military assets within the NFZs, and from within NFZ-2 and NFZ-3, the LTTE engaged the SFs across the Nanthikadal Lagoon between March and May 2009.
- 6.317 While the NFZs were unilaterally declared by the SFs, the LTTE still had an obligation to ‘take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks’.⁸¹² Precautions included avoiding ‘locating military objectives within or near densely populated areas’.⁸¹³ Allegations that LTTE combatants deliberately wore civilian clothing are also of grave concern. There have also been allegations concerning the LTTE’s use of human shields, which is a violation of IHL in NIACs, and may be a war crime.
- 6.318 The UN Expert Panel found credible allegations that the LTTE refused to allow civilians to leave the conflict zone (see section 7), on the taking of hostages, and shooting civilians trying to leave the conflict zone. However, the UN Expert Panel considered this conduct did not, in law, amount to the use of human shields under the customary definition of that war crime. Specifically, the UN Expert Panel ‘did not find credible evidence of the LTTE deliberately moving civilians towards military targets to protect the latter from attacks as is required by the customary definition of that war crime (Rule 97, ICRC Study)’.⁸¹⁴
- 6.319 ICEP notes that the rule of customary IHL relied on by the UN Expert Panel in fact sets a different test to that which appears to have been applied by the UN Expert Panel, in that a human shield is created not only by moving civilians towards military targets, but also moving military targets towards civilians. Rule 97 of the ICRC’s study on customary IHL provides:
- [T]he use of human shields requires an intentional co-location of military objectives and civilians or persons hors de combat with the specific intent of trying to prevent the targeting of those military objectives.⁸¹⁵ [emphasis added]
- 6.320 The UN Expert Panel found credible allegations that the LTTE ‘deliberately located or used mortar pieces, other light artillery, military vehicles, mortar pits, bunkers, and trenches in proximity to civilian areas’, including hospitals, concentrations of IDPs and in each of the NFZs.⁸¹⁶ As detailed in this section of the report, witness accounts provided to ICEP are consistent with the LTTE positioning its artillery and other weaponry within the NFZs (although as noted earlier, some of these assets were already positioned within the NFZs at the time of their declaration), which were heavily concentrated with civilians, and on specific reported occasions, firing at the SFs from such positions.
- 6.321 As the UN Expert Panel clearly raised the possibility that the LTTE intentionally located its military positions near civilian areas, and in light of the allegations that the LTTE ceased wearing uniforms, further investigation is warranted in order to determine whether the LTTE did so with the intention of shielding its military positions from attack.

⁸¹² Rule 22, CIHL Study.

⁸¹³ Rule 23, CIHL Study.

⁸¹⁴ UN Expert Panel Report, [237]; see also Rule 97, CIHL Study.

⁸¹⁵ Rule 97 of CIHL Study (underline added).

⁸¹⁶ UN Expert Panel Report, [239].

7 RESTRICTION OF CIVILIAN MOVEMENT

A. Summary

7.1 The available evidentiary material shows it is reasonable to conclude that:

- the LTTE instituted a pass system that restricted the free movement of civilians out of the Vanni region;
- as the war progressed, the LTTE's pass system effectively prevented civilians from escaping the conflict zone;
- whether in furtherance of, or quite apart from, the LTTE's pass system, the LTTE appeared to have in place a policy to forcibly prevent civilians from leaving the conflict zone;
- civilians who attempted to leave the area controlled by the LTTE were prevented from doing so by the LTTE, and in some instances civilians were shot while trying to do so; and
- LTTE cadres have been accused of taking civilians hostage.

7.2 While restricting civilian movement is not a crime *per se*, such conduct may constitute a criminal offence if a nexus can be proved between the conduct and a criminal offence. There are reasonable grounds to suspect that the restriction of civilian movement during the final stages of the conflict in some instances may have constituted the following crimes: hostage-taking as a war crime; murder as a war crime and a crime against humanity; and the prevention of people from fleeing the conflict zone as a war crime of cruel treatment, and as a crime against humanity of inhumane acts.

7.3 ICEP has identified a number of areas requiring further investigation, including what the intentions were behind the LTTE preventing members of the civilian population from leaving the conflict zone; the nature and scope of the restriction on civilian movement; the nature and scope of incidents relating to the alleged shooting of civilians fleeing; and whether any potential perpetrators can be identified.

B. Evidentiary material analysis

(i) *The LTTE's pass system*

7.4 The LTTE had a pass system whereby Tamil civilians in LTTE-controlled territory were required to obtain official approval from the LTTE in order to leave the Vanni region. The witness account of a senior LTTE member, which was likely to have been before other inquiries, indicates that the pass system was instituted in Jaffna in 1991, 'and remained in force in varying strictness until the end of the war'.⁸¹⁷ According to this witness, the pass system was created by the Head of the LTTE's Intelligence Wing, Pottu Amman.⁸¹⁸

7.5 The senior LTTE member referred to above stated that there were several reasons behind the creation of the pass system:

⁸¹⁷ WS-1401, [26]. However, an international agency official stated that the pass system was introduced by the LTTE in June 2008: Summary of statement and exhibit to WS-1402, [4].

⁸¹⁸ WS-1401, [26].

One reason was for security to ensure no one came into the Vanni who should not be there and to ensure that those who were leaving for whatever purpose would not betray us. In other words, to ensure that any information getting out could be controlled. Another reason was that we wanted to show to the international community, in our seeking independence that we were capable of forming a civil government with all forms of civil administration in place. The Pass was like a passport. Lastly, the LTTE wanted the Tamil people to stay on the land that we had been fighting for to gain sovereignty. If all the people left, it would be difficult to justify or carry on a war if we had no one to fight or no one to fight for.⁸¹⁹

- 7.6 According to the UN Expert Panel, the LTTE ‘forcibly prevented those living in the Vanni from leaving’.⁸²⁰ The LTTE pass system was applied strictly ‘to anyone who originally came from the Vanni’.⁸²¹ Few civilians were granted permission to leave the Vanni.⁸²² Those who were granted permission ‘could do so only by providing [a] bond in the form of a relative’.⁸²³ If the person failed to return, the relative being held as a bond ‘could be forcibly incorporated into the LTTE’.⁸²⁴ According to the UN Expert Panel, ‘[d]espite the grave dangers and terrible conditions in the conflict zone, the LTTE refused civilians permission to leave’.⁸²⁵
- 7.7 A witness stated, ‘This pass system also included [international agency local] staff and depend[ants]’.⁸²⁶ Another witness understood that ‘[t]he pass requirements only applied to those staff[] that were born in the Vanni or on the Jaffna Peninsula’, while ‘[t]hose not born in those areas could come and go, as they liked for the most part’.⁸²⁷ This same witness explained that whenever a national staff member wished to leave the Vanni, he or she was required to apply to the LTTE for a pass, ‘and, in order for [the pass to be granted] generally, the LTTE gave a prescribed period of time that they could be outside the Vanni before they had to return’.⁸²⁸ Further, the witness stated that staff members ‘had to nominate a family member in the Vanni to be the guarantor that they would return’; ‘if the staff member failed to return to the Vanni within the period granted, then the guarantor would be required to be conscripted into the LTTE, forcibly if necessary’.⁸²⁹ This witness ‘believe[d] it was the same case for most of the population’.⁸³⁰
- 7.8 The UN Expert Panel found that ‘retaining’ the civilian population in LTTE-controlled territory, known as the Vanni Region, was ‘crucial to the LTTE strategy’.⁸³¹ According to the UN Expert Panel, the continued presence of civilians served two purposes: it gave legitimacy to the LTTE’s claim for a separate homeland; and provided a buffer against the SFs’ offensive.⁸³²
- 7.9 One witness explained that there were a number of factors that contributed to the ‘humanitarian crisis’ that was unfolding by August 2008, including ‘[t]he border control policy and the measures the LTTE had in place as part of their claim for sovereignty over their

819

Ibid, [27].

820

UN Expert Panel Report, [70].

821

Ibid, [70], fn. 27.

822

Ibid.

823

Ibid.

824

Ibid.

825

UN Expert Panel Report, [177(a)].

826

Summary of statement and exhibit to WS-1402, [4]. See also reference to staff *and dependants* in WS-1403, [44].

827

WS-1404, [32].

828

Ibid.

829

Ibid.

830

Ibid.

831

UN Expert Panel Report, [70].

832

Ibid, [70].

controlled areas.⁸³³ The witness stated that this policy ‘was a restriction on the movement of civilians who were trying to come or go from the territory controlled by the LTTE preventing civilians free movement across the border, much the same as any state has in place.’⁸³⁴ However, the witness pointed out ‘the consequence of the action, in the face of the escalating conflict, was... [to] prevent[] civilians from fleeing the combat (LTTE) areas to cross to the GoSL [ie, Government of Sri Lanka] controlled areas, essentially trapping them in the conflict zone.’⁸³⁵

- 7.10 A senior LTTE member characterised the reasons for the LTTE wanting the Tamil civilians to remain in the Vanni as being:

When the war grew more desperate the [LTTE] Political Wing wanted to ensure that sufficient numbers of civilians remained in the Vanni in order to force the international community to step in and broker an agreement with the GoSL [ie. Government of Sri Lanka] to end the war.⁸³⁶

- 7.11 A senior local official of an international agency who worked in the Vanni until the final weeks of the war, explained that while up until the end of 2008 there had been a variety of reasons for which passes were issued, ‘[at] the end of 2008 and as the war deteriorated the only reason that the LTTE would allow civilians to leave was for medical treatment’.⁸³⁷

- 7.12 Three eye-witness accounts detail a particular incident in late January 2009⁸³⁸ when approximately 100⁸³⁹ local UN staff members and their families were refused permission to leave the Vanni as part of a humanitarian convoy.⁸⁴⁰ One witness recalled that when a colleague suggested that they leave without LTTE permission, ‘the LTTE commander made a radio call and all of the LTTE cadres brought their guns, large and small to bear on [the convoy].’⁸⁴¹ Their attempt to leave the Vanni allegedly led to increased aggression on the part of cadres at the scene, and eventually these civilians were prevented at gunpoint from leaving, having been surrounded by LTTE cadres who were armed with automatic weapons and rocket launchers.⁸⁴²

- 7.13 In the third week of March 2009, a senior local official of an international agency witnessed another incident in which the LTTE prevented people from leaving the conflict zone. This witness saw almost 1000 people trying to escape across the Nanthikadal Lagoon from Putumattalan.⁸⁴³ The witness explained:

[T]he LTTE had hurriedly set up a number of sentry points near the water. When the people tried to leave, the LTTE surrounded all the people and then separated all of them. The men were sent to building [sic] bunkers for the LTTE. The women were

⁸³³ WS-1404, [26], [26(b)].

⁸³⁴ Ibid, [26(b)].

⁸³⁵ Ibid, [26(b)].

⁸³⁶ Ibid, [29].

⁸³⁷ WS-1405, [140]–[141].

⁸³⁸ These three eye-witnesses provided different dates for the incident: WS-1403, [44] stated it occurred on 23 January 2009; WS-1404, [138] stated it occurred on 21 January 2009; and summary of statement and exhibit to WS-1402, [30] stated it occurred on 20 January 2009.

⁸³⁹ WS-1404, [141].

⁸⁴⁰ WS-1403, [44]–[46]; WS-1404, [138]–[148]; exhibit to WS-1402, [30]–[33].

⁸⁴¹ WS-1404, [148].

⁸⁴² Ibid, [148]; summary of statement and exhibit to WS-142, [35]–[36].

⁸⁴³ WS-1403, [104].

allowed to go with a warning. Some of the unmarried were forcibly recruited as cadres.⁸⁴⁴

(ii) Policy and practice in relation to the LTTE shooting at escaping civilians

7.14 The UN Expert Panel found, 'From February 2009 onwards, the LTTE instituted a policy of shooting civilians who attempted to escape the conflict zone'.⁸⁴⁵ According to the UN Expert Panel, this 'significantly [added] to the death toll in the final stages of the war'.⁸⁴⁶ The LTTE

[p]ositioned cadre[s] along points where civilians were trying to escape and shot at groups of men, women and children whom in their desperation were prepared to wade through the lagoon or cross minefields to try to reach Government-controlled areas. Some drowned in the panic as they tried to escape the shooting.⁸⁴⁷

7.15 The LLRC found that the LTTE had a 'blatant disregard of principles of IHL', citing examples such as 'the practice of placing and using military equipment in civilian centres' and 'the shooting at civilians trying to escape into safe areas'.⁸⁴⁸

7.16 The Sri Lankan Government also referred to the LTTE shooting those attempting to leave the control of the LTTE.⁸⁴⁹ Specifically, it alleged that '[i]n a well documented incident, the LTTE started shooting at many thousands of civilians amassed on the border of the lagoon, attempting to cross over to the safety of government controlled areas'.⁸⁵⁰

7.17 ICEP has been unable to locate any official information or response from the LTTE on these matters. However, the witness account of a senior LTTE member indicates that he was told by the Political Wing leaders, Nadesan and Pulidevan, in February and May 2009 that:

[w]hen the war grew desperate and some of the people decided to cross over to the SFs, there was a high-level policy made that the Military Wing would block the civilians and force them back.⁸⁵¹

7.18 However, this LTTE member stated, 'I have never heard of any high level policy that people leaving the Vanni without permission were to be shot'.⁸⁵² He also stated that '[i]f there were orders to shoot, those orders would be given to the Military Wing to carry out'.⁸⁵³

7.19 The senior LTTE member allegedly raised with Nadesan an incident where civilians were shot 'in the last month or two of the war'. According to this witness, Nadesan responded that 'there had been one incident that had occurred and that he (Nadesan) had taken steps to ensure that it did not happen again'.⁸⁵⁴ Furthermore, he stated:

I was told that when Prabhakaran heard of [an incident of civilians being shot while trying to escape] he punished the cadres responsible and reaffirmed that though civilians were not to be allowed to cross over to GoSL [Government of Sri Lanka]

844

Ibid.

845

UN Expert Panel Report, [177(b)].

846

Ibid.

847

Ibid.

848

LLRC Report, [4.321].

849

Humanitarian Operation Factual Analysis, [187], [191].

850

Ibid, [182].

851

WS-1401, [29].

852

WS-1401, [30].

853

Ibid, [30].

854

Ibid, [30].

controlled territory, they were not to be shot if found doing so but otherwise forced back.⁸⁵⁵

7.20 In one example, however, a senior local official of an international agency alleged that, after witnessing an incident involving the shooting of a young girl in late March 2009, he asked an LTTE cadre why the cadre had shot the young girl.⁸⁵⁶ The witness alleged that the cadre replied, 'Shut up, we have orders. If people try to leave we can shoot... if I shoot the girl they will stop trying to escape. If I kill the father then they will continue to escape.'⁸⁵⁷

7.21 Ultimately, the senior LTTE member's witness account indicates that there was at least a policy of the LTTE Military Wing to forcibly prevent civilians from leaving the Vanni. While this witness alleged that the LTTE's policy did not extend to shooting civilians, evidentiary material detailed further below suggests civilians were shot trying to escape. However, further investigation is required to ascertain whether such instances formed part of a broader LTTE policy to shoot civilians attempting to escape as found by the UN Expert Panel or, at least, a policy to prevent civilians from leaving. Further investigation is also required into the extent to which the LTTE leaders took steps to prevent cadres from shooting escaping civilians and the extent to which they punished cadres who did.

(iii) Incidents of LTTE members shooting at civilians

7.22 A senior local official of an international agency allegedly saw several incidents in March 2009 where LTTE cadres shot at civilians who were escaping into Government-held territory. The official stated, 'I have seen a lot of bad things when civilians tried to escape. They were shot whether in the day or night time.'⁸⁵⁸

7.23 In one such incident, during an evening in March 2009, the official 'saw a group of people from the Pokkanai area gather next to [an international agency compound in Putumattalan] in order to enter the [Nanthikadal Lagoon].'⁸⁵⁹ The witness described the ensuing scene as follows:

The LTTE opened up on them with [a] lot of AK-47s. People started falling while others ran with their baggage, some ran past [the compound]. Many were screaming. More than 6-7 were taken to the hospital with serious injuries who later died in the hospital. Five or six were dead on the spot. I know this because I saw the bodies on the ground and I went to the hospital and saw the dead in the hospital [...]. In all, 12 were killed and more than fifty were wounded. This included men, women and children.⁸⁶⁰

7.24 This senior local official recalled another incident in late-March 2009 (adverted to in paragraph 7.20), also near the international agency compound in Putumattalan.⁸⁶¹ In the afternoon, the witness observed a 'family, with a two and 12 year old girl, [run] for the [Nanthikadal Lagoon].'⁸⁶² The witness explained that 'LTTE cadres came from the south and shot the 12 year old girl and all [other] family members fell into the water. The whole family

⁸⁵⁵ Ibid. It is not clear from the witness statement who informed the witness of Prabhakaran's actions.
⁸⁵⁶ WS-1403, [103].

⁸⁵⁷ Ibid, [103].

⁸⁵⁸ Ibid, [101]; see also [103] and [124].

⁸⁵⁹ Ibid, [101].

⁸⁶⁰ Ibid.

⁸⁶¹ Ibid, [103].

⁸⁶² Ibid, [103].

was brought back to the LTTE shore and then they were taken to [Putumattalan Hospital].⁸⁶³

- 7.25 On 30 March 2009, the senior local official reportedly experienced a similar event when he and his family and other civilians were about to escape into Sri Lankan Government-controlled territory.⁸⁶⁴ While waiting on the Government-side of the Nanthikadal Lagoon before the SFs would permit the group through the gates, and as the sun began to rise, the witness stated that the LTTE ‘started firing in our direction with a cannon.’⁸⁶⁵ According to the witness, ‘the shells did not land near us and no one was hurt.’⁸⁶⁶
- 7.26 Further, witness accounts provided to ICEP by a senior local official of an international agency, a senior local official of an NGO, and a LTTE member in a non-combat role, indicate that they had also heard of incidents in which escaping civilians were shot by LTTE cadres.⁸⁶⁷
- 7.27 Other witness accounts indicate that groups of people were allowed to move into Government-held territory without being harmed by the LTTE. For example, a local employee of an international agency described crossing from Valayanmadam to Government territory in late April 2009 ‘with a group of about 50 people’.⁸⁶⁸ He stated, ‘We went through the LTTE lines as the LTTE had moved further south. The LTTE did not shoot at us to stop us.’⁸⁶⁹
- 7.28 Ultimately, while there are accounts of people fleeing or attempting to flee without being directly shot at, based on other incidents detailed above and the findings of the UN Expert Panel that people trying to flee were shot at, further investigation is required to determine the number and extent of these incidents.

C. International legal framework

(i) *Restriction of civilian movement as a war crime of taking hostages*

- 7.29 The taking of hostages is prohibited under both customary IHL⁸⁷⁰ and by common Article 3.⁸⁷¹ It is also prohibited specifically by human rights treaties such as the *1979 International Convention against the Taking of Hostages (Hostages Convention)*,⁸⁷² although the Hostages Convention does not apply in the context of armed conflict.⁸⁷³ International criminal tribunals have prosecuted hostage taking⁸⁷⁴ and under the ICC Statute, hostage taking has also been deemed a war crime in NIACs.⁸⁷⁵
- 7.30 According to the commentary to common Article 3, hostage-taking must be understood in the broadest sense.⁸⁷⁶ According to the CIHL Study, the definition of hostage-taking in the

⁸⁶³ Ibid, [103].

⁸⁶⁴ Ibid, [124].

⁸⁶⁵ Ibid.

⁸⁶⁶ Ibid.

⁸⁶⁷ WS-1406, [78]–[79]; WS-1405, [142]; WS-1407, [23].

⁸⁶⁸ WS-1408, [7].

⁸⁶⁹ Ibid.

⁸⁷⁰ Rule 96, CIHL Study.

⁸⁷¹ Common Article 3(1)(b) of the Geneva Conventions.

⁸⁷² Sri Lanka acceded to the Hostages Convention on 8 September 2008.

⁸⁷³ Hostages Convention, Art 12.

⁸⁷⁴ *The Prosecutor v Thimor Blaskic*, ICTY (TC) Judgement 3 March 2000, IT-95-14-T (hereafter ‘*Blaskic*’).

⁸⁷⁵ Art 8(2)(a)(viii), ICC Statute.

⁸⁷⁶ Pictet Commentary to Common Article 3, 229–230.

Hostages Convention, although drafted outside the IHL context, provides useful guidance as to the elements of the offence.⁸⁷⁷ The Hostages Convention defines hostage-taking as the seizure or detention of a person (the hostage), combined with threatening to kill, injure or continue to detain the hostage, in order to compel a third party to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.⁸⁷⁸ According to ICTY jurisprudence, it must be established that ‘at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage.’⁸⁷⁹

- 7.31 Article 8(2)(c)(iii) of the ICC Statute largely adopts the definition of the offence as set out in the Hostages Convention, namely, that ‘the perpetrator seized, detained or otherwise held hostage one or more persons’ and ‘threatened to kill, injure or continue to detain such persons’. However, in addition, the ICC Elements of Crimes require that the act of hostage-taking must be intended to compel a State or international organisation or person to act in a certain way in order to secure the safety or release of the person.⁸⁸⁰

(ii) Murder

- 7.32 The prohibition of murder is well established in international law. Under common Article 3, it is prohibited to murder ‘persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’’.⁸⁸¹ The prohibition of murder is also recognised as a rule of customary international law.⁸⁸²

- 7.33 Under the ICC Statute, murder is a war crime in a NIAC⁸⁸³ and a crime against humanity.⁸⁸⁴ Under the ICC Elements of Crimes, murder requires the killing of one or more persons, who are either *hors de combat*, civilians, or medical or religious personnel taking no active part in the hostilities. Murder may be committed by an act or omission and a causal link is required with the death of the victim resulting from the conduct of the perpetrator.⁸⁸⁵ ICEP will consider allegations of shooting civilians who were attempting to leave the conflict zone in the context of the war crime or crime against humanity of murder or both.

(iii) Other crimes (arising from preventing people from fleeing the conflict zone)

- 7.34 ICEP will consider the refusal to allow people to leave the conflict zone within the ambit of other crimes within the ICC’s jurisdiction – namely, hostage taking (considered above), cruel treatment as a war crime under Article 8(2)(c)(i) of the ICC Statute and/or inhumane acts as crimes against humanity under Article 7(1)(k) of the ICC Statute.

D. Legal analysis

- 7.35 The evidentiary material set out above relates to the refusal to allow civilians to leave the conflict area and the shooting of those civilians who did attempt to leave.

⁸⁷⁷ Rule 96, CIHL Study (discussion).

⁸⁷⁸ Art 1.

⁸⁷⁹ *Blaskic*, [158].

⁸⁸⁰ Art 8(2)(a)(viii), ICC Elements of Crimes.

⁸⁸¹ Common Article 3(1)(a) of the Geneva Conventions.

⁸⁸² Rule 89, CIHL Study.

⁸⁸³ Art 8(2)(c)(i), ICC Statute.

⁸⁸⁴ Art 7(1)(a), ICC Statute.

⁸⁸⁵ *Prosecutor v Bemba*, Decision pursuant to Art 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC_01/05-01/08, 15 June 2009, [274].

7.36 The appraisal below considers whether refusing to allow civilians to leave the conflict zone could have amounted to the war crime of taking hostages and, in some cases, the war crime of murder or the crime against humanity of murder. Further to this, the appraisal will address whether, by not allowing civilians to leave the conflict zone and by allegedly co-locating civilians and military objectives, this amounted to war crimes or crimes against humanity.

(i) Taking hostages as a war crime

7.37 The elements required to establish the war crime of taking hostages as set out in the ICC Elements of Crimes,⁸⁸⁶ are addressed below in relation to one incident. In respect of the general incidents reported by witnesses, as mentioned at paragraphs 7.4 - 7.21, the available evidentiary material indicates that LTTE cadres refused to allow groups of civilians to leave LTTE-territory and did so at gunpoint.

Seized, detained or otherwise held hostage and threatened to kill, injure or continue to detain

7.38 In the incident in late-January 2009 mentioned at paragraph 7.12, an eye-witness reported that approximately 100 national staff and their dependants were prevented at gun point from leaving the Vanni by LTTE Police and LTTE cadres who were armed with automatic weapons and rocket launchers.⁸⁸⁷ On the available information, it is reasonable to conclude that these civilians were 'otherwise held hostage' as they were deprived of the freedom to leave the conflict zone under the threat of death or injury.

Intended to compel a State, international organisation, person or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of the victim(s)

7.39 In the incident discussed above, further investigation is required to determine the intention of those LTTE Police and cadres who forcibly prevented the national staff members and their dependants from leaving the Vanni. Other evidentiary material that has been obtained by ICEP suggests a number of possible purposes of this conduct and other analogous incidents as mentioned in paragraph 7.5 and paragraph 7.10 above.

7.40 According to ICTY jurisprudence, detention is unlawful where it is for the purpose of halting the advance of enemy armed forces and so in the relevant case, it amounted to the war crime of taking hostages.⁸⁸⁸ However, there is no information to suggest that the continued presence of these national staff members and their dependants would have realistically had this effect or that the LTTE members in question acted in the manner alleged for such a purpose.

7.41 Furthermore, and as mentioned earlier, according to a senior LTTE member, the LTTE Political Wing wanted to ensure that sufficient numbers of civilians remained in the Vanni in order to force the international community to step in and broker an agreement with the Government to end the war.⁸⁸⁹ Allegations by the SFHQ-Vanni Commander suggest the civilians were being prohibited from leaving so they could serve as involuntary human

⁸⁸⁶ Art 8(2)(c)(iii), ICC Elements of Crimes. As discussed earlier, the ICC Elements of Crimes for the most part reflect the definition of hostage-taking set out in the Hostages Convention.

⁸⁸⁷ WS-1404, [148]; summary of statement and exhibit to WS-1402, [35]–[36].

⁸⁸⁸ *Blaskic*, [701], [708].

⁸⁸⁹ WS-1401, [29].

shields,⁸⁹⁰ thereby protecting LTTE military objectives. If these, or any other intentions, are proven in the case of the individual perpetrators, this element of the war crime of taking hostages would be satisfied in connection to the incidents detailed above.⁸⁹¹

The victim(s) were hors de combat or otherwise taking no active part in hostilities and the perpetrator was aware of the factual circumstances that established this status

7.42 In relation to the incident detailed above, it is reasonable to conclude that the alleged perpetrators would have been aware of the status of these groups as civilian, particularly as the group seems to have included children.

In the context of an armed conflict

7.43 On the available evidentiary material, it is also reasonable to conclude that the alleged perpetrators, LTTE police and cadres who prevented approximately 100 national staff members and their dependants from leaving the Vanni, would have been aware that their conduct was closely related to the armed conflict, given the possible intentions on the part of the LTTE to retain its civilian population within the conflict zone in order to halt the SFs' advance and/or encourage the international community to intervene in the conflict. Accordingly, the perpetrators' conduct in refusing to allow the civilian population to leave was directly related to the armed conflict.

Conclusion

7.44 The UN Expert Panel found that there were credible allegations that the LTTE violated

Common Article 3's ban on the taking of hostages insofar as they forced thousands of civilians, often under threat of death, to remain in areas under their [ie, LTTE] control during the last stages of the war and enforced this control by killing persons who attempted to leave that area.⁸⁹²

7.45 While further investigation is required there are reasonable grounds to suspect that the LTTE cadres responsible for preventing at gunpoint the escape of the 100 national staff members and their dependants in particular, and possibly other incidents in which civilians were forcibly prevented from leaving the Vanni, may have committed the war crime of taking hostages pursuant to Article 8(2)(c)(iii) of the ICC Statute.

(ii) Murder as a war crime or crime against humanity (shooting and killing those who were fleeing)

7.46 The elements for the underlying offence of murder is the same for both war crimes and crimes against humanity, however, as discussed throughout this report, the contextual elements differ.⁸⁹³ The ICC Elements of Crimes,⁸⁹⁴ state that for the war crime and the crime against humanity of murder the perpetrator killed one or more persons (the victim(s)).

7.47 Many of the incidents described above relate to LTTE cadres shooting and killing civilians who appear to be attempting to flee the conflict zone. In one particular incident outlined at paragraph 7.22, a witness observed LTTE members opening fire on a group of people, including some who were described running with their baggage, who were trying to enter the

⁸⁹⁰ 'Transcript of Jagath Jayasuriya's testimony before the LLRC', 8 September 2010, 2.

⁸⁹¹ Art 8(2)(c)(iii), ICC Elements of Crimes.

⁸⁹² UN Expert Panel Report, [237].

⁸⁹³ Arts 8(2)(c)(i), 7(1)(a), ICC Statute.

⁸⁹⁴ Arts 8(2)(c)(i)-1, 7(1)(a), ICC Elements of Crimes.

Nanthikadal Lagoon from Ampalavanpokkanai. The witness stated that five or six people died on the spot, and more than six to seven others died in the hospital. The dead included men, women and children.

7.48 The alleged war crime relates to killing civilians who were leaving the conflict area, and at least one of the alleged intentions was related to the LTTE's war strategy. At least in relation to the incident discussed above, and likely in the case of other similar incidents, it is reasonable to conclude that the alleged perpetrators were aware that their conduct was closely related to the armed conflict.

7.49 The contextual elements in relation to the LTTE are discussed in detail in section 5 of this report. If these contextual elements are proven to be present then there are reasonable grounds to suspect that shooting civilians attempting to flee the conflict zone formed part of a widespread attack on the civilian population.

(iii) Cruel treatment as a war crime (arising from preventing people from fleeing)

7.50 During a NIAC, preventing people leaving the conflict zone may amount to the war crime of cruel treatment under the ICC Statute. The elements are outlined below. Furthermore, according to the jurisprudence, it must be proved that the conduct allegedly amounting to cruel treatment was 'an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.'⁸⁹⁵

Severe physical or mental pain or suffering

7.51 Being physically and forcefully prevented from fleeing the conflict zone would likely have caused considerable mental suffering for people. Further investigation is required to identify the extent of such suffering and injury – in particular, to assess any potential psychological damage suffered as a result of being unable to leave a conflict zone and as a result of being kept in an area that was under constant threat of attack and direct attack.

Victims were civilians and nexus to the conflict

7.52 The incidents described all relate to people trying to leave the conflict zone and to get to safety. Each incident will need to be considered individually in order to make an assessment of whether it is reasonable to conclude that these elements are satisfied.

(iv) Inhumane acts as a crime against humanity (arising from preventing people from fleeing)

7.53 During a NIAC, preventing people from leaving the conflict zone may amount to the crime against humanity of other inhumane acts under the ICC Statute. The elements are outlined below.

Contextual elements

7.54 See paragraph 7.49.

Serious injury to body or to mental or physical health

7.55 For the reasons already considered in the legal analysis relating to the war crime of cruel treatment, it is possible that the denial of the civilians' free movement by the LTTE caused

⁸⁹⁵ The Prosecutor v Zejnir Delalic and Others, IT-96-21-T, [552].

great suffering or serious injury to those within the LTTE-controlled areas. Evidentiary material collected by ICEP indicates that a proportion of civilians who attempted to flee were subjected to physical injury. It is therefore reasonable to conclude that this element would be satisfied.

Character similar to other acts in Article 7(1) of ICC Statute

- 7.56 Further investigation is required to identify the extent of such suffering and injury; in particular, to assess any psychological damage suffered as a result of being unable to leave a conflict zone that was under constant threat of attack and direct attack. Nonetheless, it is reasonable to conclude that this threshold would be met in the circumstances.

Conclusion

- 7.57 There are reasonable grounds to suspect that civilians were prevented from leaving the conflict zone. While further investigation is required to determine the number, extent and seriousness of such instances as well as whether or not such actions were merely isolated events or pursuant to official policies, the individual incidents raised may still amount to cruel treatment as a war crime or as inhumane acts as crimes against humanity on the part of members of the LTTE.
- 7.58 If further investigation reveals that specific perpetrators prevented people from fleeing the conflict zone, and if it can be proven that these perpetrators had the requisite *mens rea*, there are reasonable grounds to suspect that war crimes and crimes against humanity were committed.

E. Further investigation

- 7.59 ICEP has identified areas that require further investigation. Among other things, these include, the nature and scope of LTTE policies in relation to the restriction of civilian movement in and from the conflict zone, and allegedly shooting at escaping civilians; and the scale of incidents of shooting at escaping civilians by the LTTE and the extent to which the LTTE's leadership took steps to prevent cadres from shooting such civilians, and punishing those who did.

8 DENIAL OF HUMANITARIAN ASSISTANCE

A. Summary

8.1 The available evidentiary material shows it is reasonable to conclude that:

- the Sri Lankan Government understated the number of civilians remaining in the conflict zone as well as the demand for food and basic medical supplies;
- the SFs did not call a ceasefire to allow for the delivery of food and medical supplies;
- UN humanitarian aid convoys ceased to operate in January 2009 due to repeated incidents of shelling in proximity to these convoys, allegedly by Government forces;
- the amount of food provided was approximately 2% of the amount required, based on calculations of the World Food Programme (**WFP**); and
- the ongoing fighting between the SFs and the LTTE seriously impeded the ICRC in its ability to aid wounded civilians.

8.2 Under customary IHL, parties to international and non-international armed conflicts must allow humanitarian assistance to be provided to civilians in need,⁸⁹⁶ and must not deliberately impede its delivery.⁸⁹⁷ Humanitarian assistance includes, among other things, food, water, medicine and medical supplies. The prohibition against impeding humanitarian assistance also means that under customary IHL attacks may not be directed at medical personnel or objects displaying the distinctive emblems of the Geneva Conventions – that is, the Red Cross, the Red Crescent and the Red Crystal.

8.3 While the denial of humanitarian assistance is not a crime *per se*, it may constitute a war crime in a NIAC if, for example, it is found to amount to cruel treatment.⁸⁹⁸ It may also constitute the crime against humanity of persecution or other inhumane acts, providing that the relevant contextual, knowledge and intent requirements are met.⁸⁹⁹ Attacks on persons, transports or objects lawfully using the distinctive ICRC emblem also constitute a war crime.⁹⁰⁰

8.4 Further investigation should be undertaken to confirm whether, as ICEP's evidentiary material suggests, the denial of humanitarian assistance was the result of deliberate Government decisions not to provide this assistance. Further investigation should also be conducted to determine the extent to which military and other conflict-related objectives were associated with the provision (or lack thereof) of humanitarian assistance. Finally, further investigation should be undertaken to determine if ICRC personnel or ships were intentionally attacked and, if so, by whom.

⁸⁹⁶ Rule 55, CIHL Study.

⁸⁹⁷ Rule 55, CIHL Study (commentary).

⁸⁹⁸ See, eg, Art 8(2)(c) of the ICC Statute.

⁸⁹⁹ Art 7, ICC Statute.

⁹⁰⁰ Art 8(2)(e)(ii), ICC Statute.

B. Evidentiary material analysis

(i) *Limitations placed on food convoys and humanitarian actors in the Vanni*

- 8.5 Three witness accounts, which are likely to have been before other inquiries, assert that the Sri Lankan Government and SFs impeded the provision of food to civilians located in the Vanni.⁹⁰¹ For example, one eye-witness said that the Government and SFs were uncooperative in the planning and implementation of convoys.⁹⁰² One witness, a senior Government official, expressed the opinion that the Government 'could have called a ceasefire and brought in food and medicine if they wanted to'.⁹⁰³ A third eye-witness, who liaised closely with the SFHQ-Vanni Commander in the course of his work, expressed the opinion that the SFs did not want to call a ceasefire to allow food and medical convoys into the area and that in the witness' opinion, the SFHQ-Vanni Commander made up invalid reasons why UN food could not be delivered, namely that the ships could not dock or it was too risky.⁹⁰⁴
- 8.6 On 3 September 2008, the UN High Commissioner for Refugees (**UNHCR**) and WFP received written communications from the Army informing them that the Government could not guarantee the safety and security of aid workers within the Vanni and that any movements would be at their own risk.⁹⁰⁵ Following this information, it was also reported that the Secretary of Defence, Gotabaya Rajapaksa, informed a committee of humanitarian aid leaders that they should relocate out of the northern war zone.⁹⁰⁶ A HRW report states:
- [I]n a directive to the NGOs, [Gotabaya Rajapaksa] ordered the withdrawal 'with immediate effect' of all NGO equipment and non-resident staff from the Vanni. Henceforth, 'in consideration of the prevailing security situation', no expatriates or NGO workers, including Sri Lankan nationals who are not residents of the Vanni, would be allowed to pass the Omanthai checkpoint into the Vanni.⁹⁰⁷
- 8.7 The relocation of most UN staff out of the Vanni 'was prompted by repeated shelling and bombardment adjacent to UN compounds and by the Government's announcement that it could no longer guarantee the safety of staff'.⁹⁰⁸ Some UN national staff chose to remain with their families who were prevented from leaving by the LTTE.⁹⁰⁹
- 8.8 According to an eye-witness, UN food convoys continued to enter the Vanni from 4 October 2008.⁹¹⁰ According to another eye-witness,

⁹⁰¹ WS-1301, [26], [77]–[78], [81]; WS-1302, [267]; WS-1303, [75], [114].

⁹⁰² WS-1301, [81]. See also [26], [77]–[78].

⁹⁰³ WS-1302, [267].

⁹⁰⁴ WS-1303, [75], [114].

⁹⁰⁵ UN Internal Review Panel Report, Annex III.B.1.b, [26]. See also WS-1302, [50] who stated: 'In September 2008 the UN and other NGOs evacuated Kilinochchi and in effect the Vanni, when they were requested to leave by the GoSL [Government of Sri Lanka]. The reasons provided by the GoSL [Government of Sri Lanka] was that: a) They could not guarantee their safety from the fighting, and b) That some of the internationals were supporting the LTTE.'

⁹⁰⁶ Ranga Sirilal, 'Sri Lanka Orders Aid Workers Out of War Zone' *Reuters*, 8 September 2008, <http://www.reuters.com/art/2008/09/08/idUSL8200793>; See also reported comments of Defence Spokesman Minister Keheliya Rambukwella in Shamindra Fernando, 'INGOs asked to quit LTTE-held area, UN 'relocations' to start', *The Island*, 10 September 2008, available at: <http://www.island.lk/2008/09/10/news16.html>.

⁹⁰⁷ HRW, *Besieged, Displaced and Detained: The Plight of Civilians in Sri Lanka's Vanni Region*, December 2008 (hereafter '**Besieged, Displaced and Detained Report**'), 35.

⁹⁰⁸ UN Internal Review Panel Report, Annex III.A.1 [44]

⁹⁰⁹ *Ibid*; see also WS-1302, [50].

⁹¹⁰ WS-1303, [74].

continued discussions ensued before each convoy to ensure that they would allow the convoys to proceed. This was, of course, in addition to the arguments as to what the convoys could actually carry by way of humanitarian relief supplies. Almost all convoys were delayed and hence the relief supplies were delayed, despite numerous reports coming as to how the situation in the Vanni was deteriorating day by day.⁹¹¹

- 8.9 The 11th and final UN food convoy entered the Vanni on 16 January 2009 and returned on 29 January 2009.⁹¹² The 11th convoy encountered very difficult conditions, as explained by the Report of the Secretary-General's Internal Review Panel on United Nations Action in Sri Lanka:

The [11th] convoy's travel into the [V]anni was cleared by the Security Forces and the LTTE. Although it had pre-approval to return the following day the convoy was trapped for two weeks, with national UN staff and two internationals who had volunteered to stay under intense artillery fire, primarily from Government forces.⁹¹³

- 8.10 The UN convoys ceased to operate in January 2009 following '*repeated incidents of shelling in proximity to humanitarian convoys*,⁹¹⁴ which in most instances listed in the UN Internal Review Panel Report are alleged to have been by Government forces;⁹¹⁵ and after the events during the 11th convoy.⁹¹⁶ From February 2009, food and medical supplies were delivered into the Vanni via ICRC ships.⁹¹⁷

(ii) Deliberate understating of civilian population figures

- 8.11 The UN Expert Panel found that the total amount of convoyed food that went into the Vanni over a period of five months was insufficient to sustain the civilian population.⁹¹⁸ In addition to the limitations placed on convoys, the UN Expert Panel found that the Government 'deliberately used greatly reduced estimates, as part of a strategy to limit supplies going into the Vanni, thereby putting ever-greater pressure on the civilian population.'⁹¹⁹
- 8.12 The UN Expert Panel found that the Government had 'more than sufficient information at its disposal during the final stages of the armed conflict to accurately estimate the actual numbers of civilians in the Vanni.'⁹²⁰ More specifically, the UN Expert Panel found that Government Agents collated data on IDPs on a monthly basis in order to make appropriate requests for dry rations to the WFP.⁹²¹ Prior to September 2008, a witness, who was a senior Government official, was unaware of any instance where the Government disputed these population figures collected by Government officials.⁹²²
- 8.13 Despite the Sri Lankan Government having such data available to it, the UN Expert Panel found:

⁹¹¹ WS-1301, [81].

⁹¹² WS-1303, [74].

⁹¹³ UN Internal Review Panel Report, at II.B [17].

⁹¹⁴ Ibid.

⁹¹⁵ Ibid II.B [17]; Annex III.B.2.ii [42]–[43].

⁹¹⁶ UN Internal Review Panel Report, at II.B [17].

⁹¹⁷ WS-1303, [115]; WS-1304, [19].

⁹¹⁸ UN Expert Panel Report, [78].

⁹¹⁹ Ibid, [131].

⁹²⁰ Ibid, [125].

⁹²¹ Ibid.

⁹²² WS-1302, [13].

Throughout the final stages of the conflict, particularly from January to May 2009, the Government downplayed the number of civilians present in the LTTE-controlled area, using the low estimates to restrict the amount of humanitarian assistance that could be provided, especially food and medicine.⁹²³

8.14 The LLRC concluded that

the strenuous efforts taken by the Government in coordination with international agencies ... does not warrant any possible inference that there was a deliberate intention to downplay the number of civilians in the NFZs [No Fire Zones] for the purpose of starving the civilian population as a method of combat.⁹²⁴

8.15 According to the UN Expert Panel, 'some Government employees working in the zone were reprimanded, when they provided other figures or different calculations of need'.⁹²⁵ The UN Expert Panel stated:

[O]n 18 March, the [Additional Government Agent] received a response from the Secretary of the Ministry of National Building and Estate Infrastructure Development, stating that the figure of 330,000 [persons in Mullaitivu District] was 'arbitrary and baseless' and that the Government would be 'reluctantly compelled' to take disciplinary action against him for providing 'wrong information to any source especially in regard to IDP figures'.⁹²⁶

8.16 According to a senior Government official, the Government provided 'less than 100mt of food to feed in excess of 330000 people or about .3 of a Kg [kilogram of food] per person' in February 2009.⁹²⁷ This witness stated, 'According to WFP calculations ... for the amount of people we had in the Vanni we required 4950mt [of food], this was just to sustain the people'.⁹²⁸ The amount of food provided was approximately 2% of the amount required based on the WFP calculations reported by this witness.⁹²⁹ A graph titled 'Vanni Convoys – September 2008 to March 2009 – Food items – in Metric Tons (Mt)', created by the UN, depicts a dramatic drop in the food deliveries into the Vanni commencing from December 2008, with only 150 Mt of food delivered in February 2009.⁹³⁰ This document stated that at least 3,000 Mt of food was needed to be sent into the Vanni for a caseload of 200,000:

Food stocks are on standby outside the Vanni but delivery of required food to IDPs is restricted by GoSL [Government of Sri Lanka] access. The latest negotiation with the Government allowed 500 MT mixed food commodities to be dispatched, using the sea.⁹³¹

8.17 Conversely, in late January 2009, the Government stated that, on a high estimate, the number of civilians in the No Fire Zone may fluctuate to around 75,000 to 100,000.⁹³² The Government claimed that the estimate of over 250,000 civilians by 'foreign news agencies

⁹²³ UN Expert Panel Report, [124].

⁹²⁴ LLRC Report, [4.304].

⁹²⁵ UN Expert Panel Report, [126].

⁹²⁶ Ibid, referring to a letter dated 18 March 2008, 'Issue of Dry Ration under WFP-Mullaitivu District', signed W.K.K. Kumarasiri.

⁹²⁷ WS-1302, [175].

⁹²⁸ Ibid.

⁹²⁹ Ibid (calculation details: 100mt food provided/ 4950mt of food required x 100 = 2.02%).

⁹³⁰ Exhibit to witness statement: United Nations Office of the Resident Coordinator and Humanitarian Coordinator, 'Food Delivery to IDPs in the Vanni', March 2009.

⁹³¹ Ibid.

⁹³² Sri Lankan Ministry of Defence, 'LTTE Clamps Down on Civilian Outflow: Mounts Artillery Batteries Inside No-Fire zones – Mullaitivu' (webpage). While the article is undated, the context indicates that it was published on 30 January 2009, http://www.defence.lk/new.asp?fname=20090130_F01.

and tribal media stooges of the ‘Sri Lankan victim industry’ was exaggerated.⁹³³ By 26 February 2009, the Government’s civilian population estimate inside ‘the shrinking territory in the coastal area of Mullattivu’ was 70,000.⁹³⁴ In an interview on 28 April 2009, the President, Mahinda Rajapaksa, claimed, in what appears to be a reference to the second No Fire Zone, that there were ‘5,000 people even as many as 10,000 still trapped’.⁹³⁵

(iii) Malnutrition and starvation

8.18 According to the account of a senior Government official provided to ICEP, and situation reports ICEP has obtained that were compiled by senior Government officials and medical staff on the ground, in the final months of the conflict people starved to death.⁹³⁶ According to one Government doctor, ‘13 people have died of starvation in the latter part of February [2009] alone.’⁹³⁷ Six witnesses, including a senior Government official and an international official of an international agency, stated that people were suffering from starvation or malnutrition.⁹³⁸

8.19 A situation report produced by a senior Government doctor in March 2009 stated:

[P]eople are threatened with starvation unless the food condition is urgently rectified. Particularly children, women, elders and those who are seriously ill become vulnerable to the onslaught of starvation.⁹³⁹

8.20 According to a senior Government official, on a number of occasions, the Government asserted that the LTTE was taking food supplies brought into the Vanni.⁹⁴⁰

(iv) Informing the Government of the urgent need for medical aid

8.21 Correspondence from the UN Resident/Humanitarian Coordinator (**UNR/HC**) to the Ministry of Foreign Affairs on 16 February 2009 that ICEP has obtained highlighted that the UN had received reports that the situation with respect to medicines was ‘especially dire with almost all supplies now exhausted.’⁹⁴¹ The UNR/HC requested that ‘the authorities responsible for clearance of medicines review the situation and provide the necessary clearances so that these can go in with the next ship.’⁹⁴²

8.22 On 26 February 2009, the UNR/HC informed the Special Advisor to the President, Basil Rajapaksa, that ‘we are informed that given the number of patients and the nature of injury

⁹³³ Ibid.
⁹³⁴ Data and Information Unit of the Presidential Secretariat, ‘Civilians Slowing Sri Lanka Advance: Defence Secretary’ (webpage), 26 February 2009, http://www.priu.gov.lk/news_update/Current_Affairs/ca200902/20090226_civilians_slowing_sl_advance_defence_secretary.htm.
⁹³⁵ Comments made in an interview with CNN-IBN on 28 April 2009, reported in Data and Information Unit of the Presidential Secretariat, ‘We Want to Catch Prabhakaran Alive: President’ (webpage), 29 April 2009, http://www.priu.gov.lk/news_update/Current_Affairs/ca200904/20090429we_want_to_catch_prabhakaran_alive.htm.
⁹³⁶ Exhibit to a witness statement, [175] (a report addressed to Secretary, Ministry of Nation Building and Estate Infrastructure Development dated March 2009); Exhibit to a witness statement (health sector report dated March 2009).
⁹³⁷ Exhibit to a witness statement (health sector report dated March 2009).
⁹³⁸ WS-1302, [175]; WS-1304, [286], [288]; WS-1305, [101]; WS-1306, [84]; WS-1303, [114]. All these statements are likely to have been before other inquiries.
⁹³⁹ Exhibit to a witness statement (health sector report dated March 2009).
⁹⁴⁰ WS-1302, [55]; WS-1307, [32]; Malinda Seneviratne, ‘Man Behind the Country’s Defence Strategy’, *Business Today*, November 2008, http://businesstoday.lk/cover_page.php?art=537&hl=man%20behind; ‘Transcript of Gotabaya Rajapaksa’s Testimony before the LLRC’, [17], <http://www.llrcarchive.org/2010/08/gotabaya-rajapaksa/>.
⁹⁴¹ Correspondence from the Office of the UNR/HC to the Minister of Foreign Affairs, Rohitha Bogollagama, dated 16 February 2009.
⁹⁴² Ibid.

or illnesses, that these [medicine] supplies [provided by the Government a few days before] have been used and there remains an urgent need for antibiotics, dressings, sutures and disinfectants.⁹⁴³ This correspondence was also sent to: the Minister of Disaster Management and Human Rights, Mahinda Samarasinghe; the Secretary of Defence, Gotabaya Rajapaksa; and the Secretary to the Ministry of Foreign Affairs, Dr Palitha Kohona.⁹⁴⁴

- 8.23 It is also alleged that senior Government doctors working on the ground also regularly informed the Government of the urgent need for medical aid. According to a situation report produced by a senior Government doctor in March 2009, the Mullaitivu and Kilinochchi Districts had not been sent drugs for four months.⁹⁴⁵ This Government doctor reported that there was a severe shortage of medicines, including particularly anaesthetics, surgical items, intravenous (IV) fluids, IV antibiotics and vaccines.⁹⁴⁶
- 8.24 According to three witnesses – including a senior Government official, a senior local official of an international agency, and a hospital volunteer – the Government reportedly either rejected the requests for medical supplies or approved totally inadequate amounts of supplies.⁹⁴⁷ Witnesses explained that the Government particularly refused to send critical items including blood and blood bags,⁹⁴⁸ and anaesthetic.⁹⁴⁹

(v) Government clearances of medical aid

- 8.25 According to a senior Government official, any medical items brought into the Vanni had to be first approved by the SFs at the Joint Operation Headquarters in Colombo, because there was a risk that such items could be used by the LTTE to treat injured cadres.⁹⁵⁰
- 8.26 As mentioned above in paragraph 8.10, from February 2009, food and medical supplies were delivered into the Vanni via ICRC ships. The witness account of a senior Government official indicates that he was directly informed by the ICRC that the ICRC was required to seek clearance from the Sri Lankan Ministry of Defence for every trip it made:

The ICRC told me that ... the MoD [Ministry of Defence] were not very cooperative, and they would not allow them to come when fighting was occurring, which was incessant; and that the GoSL [Government of Sri Lanka] was not willing to have a ceasefire to enable the ship to come in. When the GoSL did allow the ship to come in they would only give them a limited period of time to be in the area off shore to the CSZ [Civilian Safety Zone or NFZ]. So if the ICRC were loading the patients from the small boats and shelling occurred, they would have to abort the operation to move out to a safe location off shore, and if or when the shelling stopped they could return to continue collecting the patients ... Unfortunately, having to relocate used up their allocated time and very often they were forced to halt missions due to shelling which appeared to come from the SLA ... When the time was up, the ICRC ships then had to leave, often with the ship less than full of patients due to the expiration of their

⁹⁴³ Correspondence from the Office of the UNR/HC to Basil Rajapaksa, Special Advisor to the President, dated 26 February 2009.

⁹⁴⁴ Ibid.

⁹⁴⁵ Exhibit to a witness statement (health sector report dated March 2009).

⁹⁴⁶ Ibid.

⁹⁴⁷ WS-1302, [75]; WS-1306, [54]; WS-1308, [98], [110].

⁹⁴⁸ WS-1308, [98], [110]; see also WS-1306, [58] which states that blood products were not brought in by ship.

⁹⁴⁹ WS-1306, [54]; WS-1308, [98], [110].

⁹⁵⁰ WS-1302, [75].

permission by the GoSL, meaning they had to leave behind hundreds of injured patients.⁹⁵¹

8.27 Consistent with this account, a local official of an international agency also stated that the SFs caused delays to ICRC relief efforts. The official noted that some planned operations were cancelled due to the Government simply not allowing ICRC ships to come into the Vanni.⁹⁵²

8.28 According to an eye-witness, most of the medical supplies dispatched from Colombo and stockpiled in Vavuniya were never cleared by the Ministry of Defence to enter the Vanni.⁹⁵³ According to a letter to the Secretary to the Ministry of Health from senior Government doctors, which was referred to by the UN Expert Panel,⁹⁵⁴ by 16 March 2009, less than 5% of the combined quota of drugs and dressings meant for the past six months had been delivered.⁹⁵⁵

8.29 These Government doctors stated in the letter:

You are well aware of the fate of the remaining bulk (of drugs) – to be kept in Vavuniya – awaiting security clearance from the Ministry of Defence, despite our repeated requests and reminders made to you directly and through the Provincial Director of Health Services at regular intervals by all available means of communication. The Government Agents of both districts were also informed of this dangerous situation...⁹⁵⁶

(vi) Deterioration of health conditions in the Vanni

8.30 Based on the witness accounts provided to ICEP (whose accounts were all likely to have been before other inquiries), situation reports produced by Government Agents and correspondence between Government doctors and Government departments, it appears that the Ministry of Defence's alleged refusal to approve the security clearance of urgently needed medicines and medical supplies to enter the Vanni, had devastating effects on the ability of medical practitioners on the ground to continue to provide basic health services.⁹⁵⁷

8.31 On 15 February 2009, a senior Government doctor noted in a letter to the Ministry of Health that '[o]ur health care system is on the verge of complete collapse'.⁹⁵⁸ Given the daily influx of people wounded by the conflict, an average of more than 100 people and sometimes as many as 200, he noted that '[i]f we are not going to receive at least IV antibiotics, anaesthetics and surgical consumables in minimum amounts ASAP, we may not be able to provide even emergency first aid to the war wounded'.⁹⁵⁹

8.32 In the 16 March 2009 letter mentioned above, senior Government doctors highlighted the urgent need for additional drugs and medical supplies.

[A]ny further delay in sending essential medicines would only cause more and more deaths of innocent civilians. We have urged for urgent sending of drugs and

⁹⁵¹ WS-1302, [247].
⁹⁵² WS-1308, [122].
⁹⁵³ WS-1301, [78].
⁹⁵⁴ UN Expert Panel Report, [128], fn 75.
⁹⁵⁵ Exhibit to WS-1302, [205].
⁹⁵⁶ WS-1302, Exhibit 25.
⁹⁵⁷ See [1.20]–[1.24].
⁹⁵⁸ Exhibit to WS-1302.
⁹⁵⁹ Ibid.

dressings several times during the past weeks and, in fact, [Government officials] have promised us to send urgent medical items in the ship when it came here last time. However, we were shocked and felt very sad when we were informed by ICRC that no medicines have been handed over by the ministry officials to be taken in the ship.⁹⁶⁰

- 8.33 On 19 March 2009, according to documentation cited by ICEP, a senior Government official drew attention to the deteriorating health conditions in the Vanni in a letter addressed to the Commissioner of Essential Services.⁹⁶¹ This official detailed and attached to this letter the 16 March 2009 letter from two senior Government doctors.⁹⁶² The following people were copied into this letter: Basil Rajapaska, Senior Advisor to the President; Richard Badudeen, Minister of Resettlement and Disaster Relief Services; the Secretary to the Ministry of Health (Colombo); the Chief Secretary of the Northern Province (Trincomalee); and the Secretary of the Ministry of Health (Northern Province, Trincomalee).⁹⁶³
- 8.34 The urgent need for blood bags and antibiotics is consistent with four witness accounts provided to ICEP, including by a senior Government official and two international agency officials.⁹⁶⁴ One of these witnesses further stated that there was a need for surgical items, including bandages, swabs and syringes, and other items such as gloves and disinfectant.⁹⁶⁵ The other witnesses also described the urgent need for similar medical items.⁹⁶⁶
- 8.35 Correspondence between Government doctors and Government departments highlights the potentially fatal health risks faced by civilians in the Vanni as a result of allegedly inadequate supplies of basic medicines. In a letter obtained by ICEP, in mid February a senior Government official informed the Ministry of Health:

We were in total frustration when we had to re-amputate the limbs at higher levels in days after initial lifesaving amputations, just because of lack of IV penicillin and other antibiotics essential to prevent fatal sepsis.⁹⁶⁷

- 8.36 According to two local officials of international agencies, surgical procedures, including amputations, were performed without anaesthetic.⁹⁶⁸

(vii) Attacks on or near ICRC ships

- 8.37 As referred to above, towards the end of the conflict, attempts were made to evacuate wounded people out of the conflict zone. According to a senior local official of an international agency, wounded civilians were transferred via ICRC ships for treatment in Government-controlled areas.⁹⁶⁹ A senior local official of an NGO who was interviewed directly by ICEP stated that the ICRC ships anchored approximately one kilometre from the shore and smaller boats were used to ferry patients out to the ships.⁹⁷⁰ According to the UN

⁹⁶⁰ Ibid.

⁹⁶¹ Exhibit to a witness statement (letter to Commissioner General of Essential Services dated March 2009).

⁹⁶² Ibid.

⁹⁶³ Ibid.

⁹⁶⁴ WS-1302, [74]; WS-1308, [28], [98]–[99], [108], [110]; WS-1305, [66]; WS-1306, [49]–[51], [78].

⁹⁶⁵ WS-1302, [74].

⁹⁶⁶ WS-1308, [28], [98]–[99], [108], [110]; WS-1305, [66]; WS-1306, [42], [44], [49]–[52], [64], [78], [87].

⁹⁶⁷ Exhibit to a witness statement (letter to Commissioner General of Essential Services dated March 2009).

⁹⁶⁸ WS-1308, [110]; WS-1309, [88].

⁹⁶⁹ WS-1308, [110].

⁹⁷⁰ WS-1310, [121].

Expert Panel, this was because the ICRC ships were not permitted to come closer than one kilometre offshore.⁹⁷¹

8.38 There are various witness accounts pointing to attacks on or around ICRC ships and patient loading sites. Witness accounts described some ICRC ships as being marked with red crosses, although it is unclear whether all ICRC ships were marked. ICEP has collected photographs of some of the relevant ICRC ships emblazoned with red crosses.⁹⁷² One witness described the markings of an ICRC ship, saying the ship, the Green Ocean, 'was clearly marked as an ICRC ship with its white paint and Red Crosses.'⁹⁷³ Another witness explained, 'The [ICRC] ships to pick up wounded or bring relief supplies always came in the daylight. At least one of them would be flying a large red cross.'⁹⁷⁴ A senior local official of an international agency reported that the location for unloading relief supplies and loading casualties was around 100 metres from an area on the beach, demarcated by ICRC flags and ICRC vehicles equipped with red flashing lights.⁹⁷⁵

8.39 The same witness, the senior local official of an international agency, on some occasions 'saw the SFs fire RPGs toward the general direction of where [the ICRC] were unloading the relief supplies, and loading the casualties.'⁹⁷⁶ Another witness, the senior local NGO official (whose statement was taken directly by ICEP), stated:

[O]n some occasions the SFs started shelling the area near the shoreline where the smaller boats were delivering civilians to and from the ICRC ships. This meant the smaller boats were not able to move towards the ICRC ship and, sometimes, when the shelling did not subside for a while, the ICRC ship was forced to retreat back to its base location. This made it very difficult for the ICRC ships to collect the injured from the hospitals within the No Fire Zone.⁹⁷⁷

8.40 The UN Expert Panel found that on several occasions wounded civilians, who were lined up on the beach for evacuation, came under fire.⁹⁷⁸ However, the UN Expert Panel did not specify who was responsible for this action. An ICRC media release dated 20 April 2009 noted that '[s]ome of the people involved in the [ICRC medical] evacuations, including ICRC personnel, have been injured while helping patients to board the ferries.'⁹⁷⁹ The media release does not specify how these people were injured.

8.41 ICEP has similarly received accounts of witnesses who allege that ICRC ships (or their immediate surrounds) were attacked. Witness accounts from two local employees of an international agency indicate that, in 2009, bullets were fired at ICRC ships. One of these witnesses, who held a senior position in the agency, gave an account of when the SFs fired machine guns at the ship from across the lagoon in mid-March 2009.⁹⁸⁰ The other employee, whose statement was taken directly by ICEP, also reported bullets being fired at the ship 'in March or April 2009.'⁹⁸¹ These witnesses gave independent accounts of being on

⁹⁷¹ UN Expert Panel Report, [107].

⁹⁷² Exhibit to WS-1305.

⁹⁷³ WS-1308, [127].

⁹⁷⁴ WS-1305, [91].

⁹⁷⁵ WS-1308, [126].

⁹⁷⁶ WS-1308, [126].

⁹⁷⁷ WS-1310, [121].

⁹⁷⁸ UN Expert Panel Report, [107].

⁹⁷⁹ WS-1308, Exhibit 15: ICRC News Release No.09/08, 20 April 2009.

⁹⁸⁰ WS-1308, [124].

⁹⁸¹ WS-1311, [33].

board the ship, standing on deck with ICRC staff, when a bullet struck a window beside them.⁹⁸² Both witnesses stated that the ship was immediately moved further out to sea after coming under fire.⁹⁸³ While ICEP considers that there is insufficient information at this time to verify the origin of fire, the precise intended target, or the circumstances in which this incident is alleged to have taken place, the seriousness of the allegations means that they warrant further investigation.

8.42 In late April 2009, the senior local official referred to above also observed artillery impact within 40 to 50 metres of an ICRC ship located within 1.5 kilometres of the coast.⁹⁸⁴ This official witnessed the incident from his position in Mullivaikkal, and asserted that the artillery had been launched from SFs' positions on the western bank of the Nanthikadal Lagoon.⁹⁸⁵ He observed artillery exploding around the ICRC ship, although not hitting the ship itself. The witness reported that, as a result of this incident, the ICRC ship was forced to move to safety out at sea, 'until the Delegates managed to negotiate with the SFs, and they were able to eventually return to Mullaiyaiakkal.'⁹⁸⁶ Further investigation is warranted with respect to the allegation that the SFs were responsible for the shelling near the ICRC ships engaged in relief activities. The UN Expert Panel also found that on '[a]round 22 April, shelling near a ship forced the captain to return to deeper waters,'⁹⁸⁷ but did not identify the party responsible for this shelling.

C. International legal framework

(i) *Humanitarian assistance under customary international humanitarian law*

8.43 Under customary IHL, 'parties to a conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control'⁹⁸⁸ in both international and NIACs. Accordingly, the delivery of humanitarian assistance requires the consent of the parties concerned, but such consent cannot be withheld arbitrarily.⁹⁸⁹ Hence, the deliberate impeding of humanitarian assistance violates customary IHL.

8.44 Humanitarian assistance can be defined as 'all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character indispensable for the survival and the fulfilment of the essential needs of the victims of disaster.'⁹⁹⁰ Such humanitarian assistance indispensable for the survival of the victims may include 'foodstuffs, water, medication, medical supplies and equipment, minimum shelter, clothes' and 'medical services, tracing services, religious and spiritual assistance, as well as civil defence, in conformity with the tasks defined in IHL.'⁹⁹¹ For assistance to be humanitarian in nature, 'its sole purpose must be to prevent and alleviate human

⁹⁸² WS-1308, [124]; WS-1311, [33].

⁹⁸³ Ibid.

⁹⁸⁴ WS-1308, [123].

⁹⁸⁵ Ibid, [123].

⁹⁸⁶ Ibid, [123].

⁹⁸⁷ UN Expert Panel Report, [107].

⁹⁸⁸ Rule 55, CIHL Study.

⁹⁸⁹ Rule 55, CIHL Study (commentary). See also Institute of International Law, Resolution 'Humanitarian Assistance' (Bruges, 2003), art VIII.

⁹⁹⁰ Institute of International Law, Resolution 'Humanitarian Assistance' (Bruges, 2003), art I (1).

⁹⁹¹ Institute of International Humanitarian Law, Guiding Principles on the Right to Humanitarian Assistance (San Remo, 1993), Principle 9. See also Institute of International Law, Resolution 'Humanitarian Assistance' (Bruges, 2003), arts I(1)(a)–(b).

suffering'.⁹⁹² According to the UN General Assembly, humanitarian assistance 'is to be given without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature'.⁹⁹³

8.45 As a corollary to the prohibition of deliberately impeding humanitarian assistance, customary IHL requires respect for and protection of humanitarian relief personnel⁹⁹⁴ and objects⁹⁹⁵ in both non-international and international armed conflicts. In addition, attacks directed against medical personnel and religious personnel as well as objects lawfully displaying the distinctive emblems of the Geneva Conventions are prohibited under customary IHL.⁹⁹⁶ As noted above, the 'distinctive emblems' are the Red Cross, the Red Crescent and the Red Crystal.⁹⁹⁷ Attacks against humanitarian relief personnel and objects not only violate customary IHL but may also amount to war crimes.⁹⁹⁸

8.46 Customary IHL prohibits the starvation of civilians as a method of warfare during both international and NIACs.⁹⁹⁹ Under certain conditions, the denial of humanitarian assistance may amount to a violation of this prohibition.

(ii) Denial of humanitarian assistance as an international crime

8.47 Although the denial of humanitarian assistance as such is not expressly criminalised, it may under certain circumstances amount to an international crime.¹⁰⁰⁰ The ICC Statute criminalises starvation as a prohibited method of warfare for international armed conflicts,¹⁰⁰¹ but not for NIACs. This distinction has been the subject of heavy criticism,¹⁰⁰² and there is some authority that customary international law criminalises starvation during both international and NIACs.¹⁰⁰³ Denial of humanitarian assistance may, however, constitute a war crime in a NIAC if it is found to amount to cruel treatment.¹⁰⁰⁴

8.48 Second, the denial of humanitarian assistance may also constitute a crime against humanity, in particular if it is found to amount to persecution,¹⁰⁰⁵ or another inhumane act or acts,¹⁰⁰⁶ and was part of a widespread or systematic attack directed against any civilian population.¹⁰⁰⁷ The denial of humanitarian assistance may be also found to amount to the

⁹⁹² Christa Rottensteiner, 'The Denial of Humanitarian Assistance as a Crime under International Law', International Review of the Red Cross, No. 835, 30-09-1999, <http://www.icrc.org/eng/resources/documents/misc/57jq32.htm>.
⁹⁹³ UN General Assembly Resolution 46/182, 1991.

⁹⁹⁴ Rule 31, CIHL Study.

⁹⁹⁵ Rule 32, CIHL Study.

⁹⁹⁶ Rule 30, CIHL Study.

⁹⁹⁷ The Geneva Conventions of 12 August 1949, Chapter VII; Additional Protocol I, 8 June 1977, Art 8(1); Additional Protocol II, 8 June 1977, Art 12; Additional Protocol III, 8 December 2005, Art 2.

⁹⁹⁸ See section 15 on shelling in and around civilian areas.

⁹⁹⁹ Rule 53, CIHL Study.

¹⁰⁰⁰ Christa Rottensteiner, 'The Denial of Humanitarian Assistance as a Crime under International Law', International Review of the Red Cross, No. 835, 30-09-1999, <http://www.icrc.org/eng/resources/documents/misc/57jq32.htm>.

¹⁰⁰¹ Art 8(2)(b)(xxv).

¹⁰⁰² See, for example, Djamchi Momtaz 'War Crimes in Non-International Armed Conflicts Under the Statute of the International Criminal Court', 1999, 2 *Yearbook of International Humanitarian Law* 177 at 186; Darryl Robinson and Herman von Hebel, 'War Crimes in Internal Armed Conflicts: Art 8 of the ICC Statute', 1999, 2 *Yearbook of International Humanitarian Law* 193 at 208.

¹⁰⁰³ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, [166]–[167].

¹⁰⁰⁴ Art 8(2)(c)(i) of the ICC Statute; see also Christa Rottensteiner, 'The Denial of Humanitarian Assistance as a Crime under International Law', International Review of the Red Cross, No. 835, 30-09-1999, <http://www.icrc.org/eng/resources/documents/misc/57jq32.htm>.

¹⁰⁰⁵ Arts 7(1)(h) and 7(2)(g), ICC Statute.

¹⁰⁰⁶ Art 7(1)(k), ICC Statute.

¹⁰⁰⁷ Christa Rottensteiner, 'The Denial of Humanitarian Assistance as a Crime under International Law', International Review of the Red Cross, No. 835, 30-09-1999, <http://www.icrc.org/eng/resources/documents/misc/57jq32.htm>.

crime against humanity or the war crime of murder if it can be proven that death was caused by the denial and the alleged perpetrator had the requisite *mens rea*. Furthermore, the ‘intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population’¹⁰⁰⁸ may amount to the crime against humanity of extermination¹⁰⁰⁹ if the requisite elements of causation, scale and *mens rea* are proven.

- 8.49 In this report, ICEP will assess whether there are reasonable grounds to suspect that the alleged denial of humanitarian assistance amounts to the war crime of cruel treatment or the crime against humanity of persecution or other inhumane acts.

(iii) Attacks on or near ICRC as a war crime

- 8.50 As well as allegations that humanitarian assistance was denied or restricted, there are allegations of attacks being directed on or near ICRC relief activities. According to the ICC Statute, it is a war crime in NIACs intentionally to direct ‘attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law’.¹⁰¹⁰ ICEP will consider both of these war crimes in respect of the relevant evidentiary material. Some incidents described above relating to attacks against evacuation or collection sites could amount to the war crime of attacking protected objects.¹⁰¹¹ ICEP will not consider this war crime in relation to these incidents as this war crime was dealt with extensively in section 6 of this report. Nonetheless, further investigation and analysis may make it reasonable to conclude that the war crime of attacking protected objects was committed.

D. Legal analysis

(i) Denial of humanitarian assistance as a war crime of cruel treatment

- 8.51 The elements of the war crime of cruel treatment as set out in the ICC Elements of Crimes¹⁰¹² are addressed below. This section also addressed the jurisprudential requirement that the conduct allegedly amounting to cruel treatment was ‘an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity’.¹⁰¹³

Severe physical or mental pain or suffering

- 8.52 Based on the available evidentiary material outlined above, throughout the final months of the conflict, regular and repeated requests for food and medical aid were conveyed directly by Sri Lankan Government employees on the ground to Government departments ultimately responsible for the provision of humanitarian assistance. It is reasonable to conclude the Government responded to requests for additional food supplies by ignoring them, refusing them or stating that food deliveries had been delayed. In addition, it is reasonable to conclude that the Government responded to requests for medicine and medical supplies by

¹⁰⁰⁸ Art 7(2)(b), ICC Statute.
¹⁰⁰⁹ Art 7(1)(b), ICC Statute.
¹⁰¹⁰ Art 8(2)(e)(ii), ICC Statute.
¹⁰¹¹ Art 8(2)(e)(iv), ICC Statute.
¹⁰¹² ICC Elements of Crimes, Art 8(2)(c)(i)-3.
¹⁰¹³ The Prosecutor v Zejnir Delalic and Others, IT-96-21-T, [552].

rejecting them, approving inadequate amounts of particular items requested or approving non-critical items. In early September 2008, UN agencies, which played a pivotal role in the provision of humanitarian assistance, were directed by the Government to leave the conflict zone.

- 8.53 The information available to ICEP and outlined above indicates that the deteriorating humanitarian conditions in the Vanni were repeatedly reported to Government ministers by senior UN officials, Government doctors and other Government employees on the ground. Reports indicate that the food that was provided was grossly inadequate to meet the needs of the civilian population, and according to witnesses this was made clear to the Government. There is reason to conclude that a senior Government official, who continued to report on the size of the Vanni population, was threatened with disciplinary action by a Government department, as the Government continued to justify its provision of humanitarian aid on the basis of its own understated population estimates.
- 8.54 On the above analysis, there are reasonable grounds to suspect that the Government, and more specifically the Government departments and officials responsible for approving and/or providing humanitarian assistance to civilians, deliberately and consistently acted (or in some cases, failed to act) so as to severely restrict the provision of essential food and medical aid to the Vanni population.
- 8.55 The assessment of 'seriousness' in the context of the war crime of cruel treatment is a relative one:
- All the factual circumstances must be taken into account, including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health.¹⁰¹⁴
- 8.56 However, it is important to note that the suffering inflicted by the act upon the victim need not be lasting, as long as it is both 'real and serious'.¹⁰¹⁵
- 8.57 According to a situation report by a senior Government doctor in the conflict zone, the ongoing battles in the Vanni gave rise to 'a humanitarian catastrophe,' and there was a severe shortage in food and medicines, which was causing deaths in addition to the casualties caused by shelling and aerial attacks.¹⁰¹⁶ According to the witness account of a senior Government official, from around the night of 12 May 2009, the Vellamullivaikkal Hospital was 'completely paralysed' by the reportedly complete exhaustion of medical supplies and the shelling and small arms fire everywhere.¹⁰¹⁷ This account is consistent with observations of a hospital volunteer.¹⁰¹⁸ In the context of the evidentiary material presented in the preceding paragraphs with respect to the surrounding conflict, and the loss of life, it is reasonable to conclude that the suffering caused by the persistent lack of food and medical supplies would meet the requisite level of seriousness such as to amount to cruel treatment.

¹⁰¹⁴ *The Prosecutor v Krnojelac*, Trial Judgment, IT-97-25-T, [131].

¹⁰¹⁵ Ibid.

¹⁰¹⁶ Exhibit to a witness statement (health sector report dated March 2009).

¹⁰¹⁷ WS-1302, [274].

¹⁰¹⁸ WS-1306, [87].

The victim(s) were either hors de combat, or were civilians, or were medical personnel, or religious personnel taking no active part in hostilities and this status was known

8.58 In circumstances where hundreds of thousands of civilians were displaced by the hostilities that were taking place in close proximity to areas of civilian concentration, it is reasonable to conclude, based on the available evidentiary material, that the Government's alleged denial of humanitarian assistance inflicted severe pain or suffering, predominately on civilians. Furthermore, based on the evidentiary material available – namely, the various letters and reports sent by the Government doctors to Government departments – it is reasonable to conclude that the Government would have been aware that the people suffering from a lack of food and medical supplies were civilians.

Context of armed conflict and awareness of the factual circumstances

8.59 The reason for the humanitarian assistance was directly related to the existence of the armed conflict. The ability to deny the humanitarian aid was also connected to the existence of an armed conflict, as were the systems in place for its provision, which had been established by the Government itself. Furthermore, the reasons (whether correct or not) put forward by the Government as to why the civilian population was unable to receive the humanitarian assistance, also appeared to relate to the armed conflict – for example, that the LTTE cadres would take the aid for themselves or that it was unsafe to transport the relief supplies. It is reasonable to conclude that the elements relating to the nexus requirements to the armed conflict would be satisfied.

Conclusion

8.60 If the *mens rea* is satisfied with respect to individual perpetrators, there are reasonable grounds to suspect that war crimes of cruel treatment were committed by the denial of humanitarian assistance.

(ii) Denial of humanitarian assistance as a crime against humanity

Contextual elements

8.61 Section 5 of this report addressed the contextual elements required to establish a crime against humanity. It is reasonable to conclude that if members of the SFs can be proven to have knowingly denied humanitarian assistance to the civilian population, they were aware that such acts formed part of a widespread or systematic attack against a civilian population. This can be inferred from, among other things, evidentiary material that numerous people within the Sri Lankan Government and the SFs were informed of the dire humanitarian situation in the Vanni, the desperate need for medical supplies and food, and the resulting consequences of the lack of supplies. Further to this, senior members of the Sri Lankan Government appeared to dismiss suggestions that the population figures were considerably higher than the Government's estimates. In one case, there is evidentiary material that a person was reprimanded for providing different figures of need to the Government. Furthermore, even if there were initial unintentional miscalculations of the humanitarian need, there is no evidentiary material suggesting that once this was brought to the Government's attention, that steps were taken to improve the crisis. It is reasonable to conclude that senior SFs and Government officers were either aware of the starvation, suffering and insufficiency of provisions in the Vanni or were put on notice via reports provided to them.

Underlying offence: other inhumane acts

8.62 The denial of humanitarian assistance as detailed above may amount to the crime against humanity of ‘other inhumane acts’. Under Article 7(1)(k) of the ICC Statute, other inhumane acts must be of a similar nature and gravity to any other act referred to in Article 7(1).¹⁰¹⁹ Interpreting the provision, the ICC Pre-Trial Chamber I stated:

[I]nhumane acts are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the [ICC] Statute.¹⁰²⁰

8.63 Assuming that the denial of humanitarian assistance was part of a broader widespread or systematic attack on the civilian population, the denial of humanitarian assistance may constitute an inhumane act, if it intentionally caused great suffering, or serious injury to body or to mental or physical health.

8.64 On the analysis of the war crime of cruel treatment at paragraphs 8.52 - 8.57,¹⁰²¹ and in light of the incidents detailed above, it is reasonable to conclude that the denial of humanitarian assistance caused great suffering and serious injury to the physical and mental health of civilians in the conflict zone who were denied adequate nutrition and access to medical supplies. Accordingly, it is reasonable to conclude that the conduct of those responsible for this denial would constitute the *actus reus* of the crime against humanity of other inhumane acts.

Underlying offence: persecution

8.65 For the crime against humanity of ‘persecution’, it must be proved that the perpetrator contravened international law by severely depriving one or more persons of fundamental rights and that the perpetrator targeted these persons because of the identity or collectivity of the group, or targeted the group or collectivity as such.¹⁰²² This targeting must be based on political, racial, national, ethnic, cultural, religious, gender or other grounds universally recognised as impermissible under international law.¹⁰²³ The crime against humanity of persecution is a crime of discrimination.¹⁰²⁴

8.66 The evidentiary material suggests that the alleged denial of humanitarian assistance affected the population in the Vanni and the vast majority of the population in the Vanni were Tamil (a distinct group on the basis of ethnicity and religion, as per the ICC Elements of Crimes). Given the denial of humanitarian assistance appears to have disproportionately affected a particular subset of the population, there are reasonable grounds to suspect that this denial had a discriminatory element, however, this would need to be investigated further. If it is established that there was a discriminatory intention with respect to the alleged denial of food and medical assistance, it is reasonable to conclude that the element

¹⁰¹⁹ ICC Elements of Crimes, Art 7(1)(k)-2 and fn. 30.

¹⁰²⁰ *Katanga*, Decision on the Confirmation of the Charges, 30 September 2008, [448].

¹⁰²¹ The ICTY held that the notion of ‘inhumane acts’ as a crime against humanity is synonymous with ‘cruel treatment’ as a war crime, see *Jelisić* (IT-95-10-T), Trial Chamber, 14 December 1999, para.52.

¹⁰²² ICC Elements of Crimes, Art 7(1)(h)-1, 7(1)(h)-2.

¹⁰²³ ICC Elements of Crimes, Art 7(1)(h)-3.

¹⁰²⁴ *Kupreskic et al.* (IT-95-16-T), Judgement, 14 January 2000, [621]; *Krstic* (IT-98-33-T), Judgement, 2 August 2001, [534]; *Naletilic et al.* (IT-98-34-T), Judgement, 31 March 2003, at 634; *Kordic et al.* (IT-95-14/2-A), Appeals Judgement, 17 December 2004, at 101.

that one or more persons were severely denied fundamental rights and that these persons were targeted because of the identity of the group or collectivity would be satisfied.

- 8.67 It must also be proved that the conduct was committed in connection with any act referred to in Article 7(1) or any crime within the jurisdiction of the ICC.¹⁰²⁵ If the war crime of cruel treatment or a crime against humanity of other inhumane acts is found as a result of the alleged denial of humanitarian assistance, this element will be satisfied.

Conclusion

- 8.68 If the *mens rea* is satisfied with respect to individual perpetrators, there are reasonable grounds to suspect that crimes against humanity were committed by the denial of humanitarian assistance.

(iii) Attacking persons and objects bearing the distinctive emblems as a war crime

- 8.69 At this time, ICEP is unable to verify many of the elements required to establish this war crime as set out in the ICC Elements of Crimes.¹⁰²⁶ Some witness accounts indicate that ICRC collection sites and ships displayed the distinctive Red Cross emblem; however, it is not clear if all ships displayed the emblem. In addition, although some witness accounts indicate that the fire originated from the SFs, ICEP is not able to verify the origin of fire or the circumstances in which the reported artillery incidents discussed in this section took place. Furthermore, ICEP is unable to identify whether the ICRC vessels and/or collection sites were the target of the attacks or whether there were military objectives in the area that were being targeted and that any damage to ICRC ships, vehicles or personnel was incidental damage.

- 8.70 Nonetheless, these allegations are grave and warrant further investigation as they raise serious questions about compliance with principles of international law relating to respect for the ICRC emblem, the protection of ICRC personnel who were engaged in relief activities and the protection of the wounded and sick.

(iv) Violations of customary international humanitarian law

- 8.71 The denial of humanitarian assistance and access to civilians may under certain conditions violate customary IHL. Customary IHL also prohibits the starvation of civilians as a method of warfare.¹⁰²⁷
- 8.72 On the available evidentiary material, it is reasonable to conclude that: the Government deliberately and publicly understated the size of the civilian population in the Vanni to justify a reduced amount of humanitarian aid, and the Government impeded UN and ICRC convoys from delivering aid to the conflict zone. As a consequence, the civilian population was deprived of essential food, medicine and medical supplies. The evidentiary material also indicates that civilians died as a result of starvation or malnutrition, and otherwise treatable wounds. Given the frequent and reliable reports that were provided to the Government by its officials and doctors on the ground, as well as international agencies, it is

¹⁰²⁵ Art 7(1)(h)-4, Elements of Crimes.

¹⁰²⁶ Art 8(2)(e)(ii), Elements of Crimes.

¹⁰²⁷ See above, International Legal Framework at paragraphs 8.43–8.46.

reasonable to conclude that the Government knew or ought to have known of the grave consequences of the denial of humanitarian assistance on the civilian population.

- 8.73 Further investigation is warranted into the question whether the Government employed starvation as a means of warfare. In the event that such investigation reveals, consistent with the findings of the UN Expert Panel, additional evidentiary material that starvation (in combination with the denial of medicine and medical supplies) was used by the Government as a means by which to pressure the Vanni population into fleeing the conflict zone, and accordingly, isolate the LTTE forces, there are reasonable grounds to suspect that this would constitute an unlawful means of warfare.

E. Further investigation

Further investigation should be undertaken to ascertain whether or not the denial of humanitarian assistance was the result of deliberate Sri Lankan Government decision-making. Further investigation is also required to determine: if the Government was aware of the population figures as indicated in this section why the amount of humanitarian assistance actually provided was so inadequate; why the Government failed to provide adequate medical supplies despite repeated and urgent requests from both the UNR/HC and local government doctors; and the circumstances in which the incidents relating to attacks on or near ICRC ships or relief activities discussed in this section took place.

9 KILLINGS

A. Summary

- 9.1 On the available evidentiary material, which includes witness statements taken directly by ICEP from former LTTE cadres, it is reasonable to conclude that:
- by 17 May 2009, the LTTE Political Wing leaders, Balasingham Mahendran (**Nadesan**), and Seevaratnam Pulidevan (**Pulidevan**), made clear their intention to surrender and were involved in negotiations regarding their surrender. They surrendered to the 58th Division with a white flag early in the morning on 18 May 2009. Nadesan and Pulidevan were killed within two hours of surrendering;
 - senior LTTE Military Commander, Colonel Thambirasa Thurairasingam (**Ramesh**), surrendered on 18 May 2009 and was taken into custody by the SFs. On 22 May 2009 he was questioned, and died later that day;
 - Tamil newsreader Isaipriya, was taken into SFs' custody on 18 May 2009 and soon after died; and
 - the 12-year-old son of Prabhakaran, Balachandran, was taken into the SFs' custody and was shot five times at close-range on or about 19 May 2009.
- 9.2 Customary IHL, including common Article 3, enshrines the principle of humane treatment of civilians and persons *hors de combat*.¹⁰²⁸ From this principle derives the prohibition against 'violence to life', including murder of civilians and persons *hors de combat*.¹⁰²⁹ Under Article 8(2)(c)(i) of the ICC Statute, 'violence to life' – including murder, cruel treatment and torture – is a war crime. It applies to acts of violence committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*. Under Article 7(1)(a) of the ICC Statute, murder committed as part of a widespread or systematic attack against the civilian population is a crime against humanity. Human rights law also prohibits murder by enshrining the right to life¹⁰³⁰ and so, in addition to individuals being criminally responsible for these deaths under international criminal law, the State may also bear responsibility for these deaths under international human rights law.
- 9.3 There are reasonable grounds to suspect that the war crime of murder or the crime against humanity of murder, or both, were committed in the killing of the LTTE Political Wing leaders Nadesan and Pulidevan, Colonel Ramesh, the Tamil newsreader Isaipriya, and the 12-year-old Balachandran.

B. International legal framework

- 9.4 Each incident in this section is analysed by reference to the international legal framework set out below.

¹⁰²⁸ Common Article 3 of the Geneva Conventions; Rule 87, CIHL Study.
¹⁰²⁹ Common Article 3 of the Geneva Conventions; Rules 47, 89, CIHL Study.
¹⁰³⁰ See, eg, Art 6, ICCPR. Sri Lanka is a party to the ICCPR.

- 9.5 The principle of humane treatment of both civilians and persons *hors de combat* is explicit in both common Article 3 and customary IHL.¹⁰³¹ As a corollary of this principle, ‘violence to life’ is prohibited, including murder of civilians and persons *hors de combat*.¹⁰³²
- 9.6 Customary IHL and the ICC Statute also prohibit the killing, injuring and possibly the capture of an enemy by resort to perfidy, including during a NIAC.¹⁰³³
- 9.7 Under Article 8(2)(c)(i) of the ICC Statute, ‘violence to life’ – including murder, cruel treatment and torture – is a war crime. The provision applies to acts of violence committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*. The war crime of murder may be committed by act or omission. It requires a causal link: the death of the victim must result from the perpetrator’s conduct.¹⁰³⁴
- 9.8 Under Article 7(1)(a) of the ICC Statute, murder is also a crime against humanity. While the underlying unlawful act - the killing of one or more persons - is the same, the determination of whether the murder is a war crime, or a crime against humanity or both will depend on the relevant contextual elements being present.¹⁰³⁵
- 9.9 Although international human rights law will not be considered in detail in this section, it is also relevant to the responsibility of the Sri Lankan Government for the deaths of the five individuals referred to below. Human rights law, including the *International Covenant on Civil and Political Rights (ICCPR)*, prohibits the arbitrary deprivation of life.¹⁰³⁶ The murder of civilians and persons *hors de combat*, constitutes such an arbitrary deprivation of life.¹⁰³⁷ Under human rights law, the State is considered responsible for the death of a person in custody or in the power of State agents, unless it can provide a satisfactory explanation.¹⁰³⁸ This in turn implies the duty to investigate¹⁰³⁹ and includes situations where a person is not only confined to a prison cell but is otherwise in the power of State agents.¹⁰⁴⁰

C. Evidentiary material and legal analysis

- 9.10 ICEP has obtained new evidentiary material, including eye-witness accounts, photographs and videos, in relation to the alleged killing of the Political Wing leaders Nadesan and Pulidevan, Colonel Ramesh, Balachandran, and Isaipriya, persons who surrendered to, or

¹⁰³¹ Common Article 3 of the Geneva Conventions; Rule 87, CIHL Study.

¹⁰³² Common Article 3 of the Geneva Conventions; Rules 47, 89, CIHL Study. According to Rule 47 of the CIHL Study, the following people are considered *hors de combat*: anyone who is in the power of an adverse party; anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape.

¹⁰³³ See Rule 65, CIHL Study. See also *Prosecutor v Tadić* (Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995), [125]. Moreover, under the Statute of the International Criminal court ‘killing or wounding treacherously a combatant’ constitutes a war crime in non-international armed conflicts: see art 8(2)(e)(ix), ICC Statute.

¹⁰³⁴ *Prosecutor v Bemba*, Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC_01/05-01/08, 15 June 2009, para. 274.

¹⁰³⁵ The contextual elements are discussed in detail in section 5 of this report.

¹⁰³⁶ Art 6, ICCPR.

¹⁰³⁷ See rule 89, CIHL Study (commentary).

¹⁰³⁸ HRC, *Eshonov v. Uzbekistan*, Communication No. 1225/2003, Views of 22 July 2010, [9.2]: ‘...a death of any type in custody should be regarded as prima facie a summary or arbitrary execution, and there should be a thorough, prompt and impartial investigation to confirm or rebut the presumption, especially when complaints by relatives or other reliable reports suggest unnatural death.’

¹⁰³⁹ HRC, *Sathasivam and Saraswathi*, Communication No. 1436/2005, Views of 8 July 2008, para. 64.

¹⁰⁴⁰ For a general discussion on these issues see Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, (OUP, 2011), 178–180.

who were otherwise in, SFs custody in the final days of the conflict. This material has been considered alongside open-source information, including official Government and SFs media releases and the UN Expert Panel Report. Furthermore, photographs and videos relied on by ICEP have been analysed by independent experts engaged by ICEP, including a leading forensic pathologist, a forensic audio-visual specialist and a ballistics expert.¹⁰⁴¹ This evidentiary material is consistent with, and builds upon, the findings of the UN Expert Panel.

Incident 1: Killing of Political Wing Leaders

(i) Evidentiary material

Background

9.11 As detailed in Annex II, the head of the LTTE Political Wing was Nadesan, and the head of the Political Wing's Peace Secretariat was Pulidevan. These men are collectively referred to below as the Political Wing leaders.

9.12 Media and other sources reported that the Political Wing Leaders, Nadesan and Pulidevan, intended to surrender in the final days of the conflict. Their intention to surrender was considered by the UN Expert Panel, which made factual findings in relation to the circumstances of their surrender into SFs' custody on or around 18 May 2009 (known as the 'White Flag incident').¹⁰⁴² It found that in the final days of the conflict:

[Nadesan and Pulidevan] were in regular communication with various interlocutors to negotiate a surrender. They were reportedly with a group of around 300 civilians. The LTTE political leadership was initially reluctant to agree to an unconditional surrender, but as the SLA [Sri Lankan Army] closed in on the group in their final hideout, Nadesan and Pulidevan, and possibly Colonel Ramesh, were prepared to surrender unconditionally. This intention was communicated to officials of the United Nations and of the Governments of Norway, the United Kingdom and the United States, as well as to representatives of the ICRC and others. It was also conveyed through intermediaries to Mahinda, Gotabaya and Basil Rajapaksa, former Foreign Secretary Palitha Kohona and senior officers in the SLA.¹⁰⁴³

9.13 The UN Expert Panel found that '[b]oth President Rajapaksa and Defence Secretary [Gotabaya] Rajapaksa provided assurances that their surrender would be accepted.'¹⁰⁴⁴ It stated that intermediaries conveyed the Government's assurances to the Political Wing leaders

who were advised to raise a white flag and walk slowly towards the army... Around 6.30am on 18 May 2009, Nadesan and Pulidevan left their hideout to walk towards the area held by the 58th Division, accompanied by a large group, including their families. Colonel Ramesh followed behind them, with another group. Shortly afterwards, the BBC and other television stations reported that Nadesan and Pulidevan had been shot dead.¹⁰⁴⁵

¹⁰⁴¹ See expert reports of forensic pathologist; forensic audio-visual specialist; and ballistics specialist.

¹⁰⁴² UN Expert Panel Report, [170]–[171].

¹⁰⁴³ Ibid, [170].

¹⁰⁴⁴ Ibid, [171]. ICEP assumes that the UN Expert Panel made an error in identifying the Defence Secretary as Basil Rajapaksa (and not Gotabaya Rajapaksa as is correctly noted elsewhere in the UN Expert Panel Report).

¹⁰⁴⁵ UN Expert Panel Report, [171].

- 9.14 On the limited information available at that time, the UN Expert Panel believed that the Political Wing leaders intended to surrender to the SFs.¹⁰⁴⁶ However, other than finding that both men died after surrendering, the UN Expert Panel did not discuss events that occurred immediately prior and subsequent to their surrender.
- 9.15 The UN Expert Panel noted that the Sri Lankan Government had, at various times, given contradictory accounts of the manner in which Nadesan and Pulidevan died.¹⁰⁴⁷ First, on 18 May 2009, the Government reported that SFs troops had found what were suspected to be the bodies of Nadesan, Pulidevan and other senior LTTE leaders during ‘mop up operations’ in Karaiyamullivaikkal.¹⁰⁴⁸ A list of senior LTTE leaders reportedly found dead, including Nadesan, Pulidevan and the chief of LTTE Police, Ilango, was uploaded to the Ministry of Defence website on 18 May 2009.¹⁰⁴⁹ The Sri Lankan Army separately reported that the political leaders’ bodies were recovered during ‘final brushing up’ operations.¹⁰⁵⁰ Secondly, an expanded list of identified dead LTTE leaders was uploaded to the Ministry of Defence website on 21 June 2009, attributing responsibility for killing the Political Wing leaders, among others, on 18 May 2009 to troops of the 58th Division.¹⁰⁵¹ Thirdly, it was reported that the Government maintained that ‘these senior LTTE leaders in fact did not raise white flags or give any indication to the SLA soldiers in their vicinity that they intended to surrender, but instead continued fighting and were subsequently killed in the ensuing final battle’.¹⁰⁵² Finally, the SFs claimed that Nadesan and Pulidevan were shot by LTTE forces as they attempted to surrender.¹⁰⁵³ More specifically, the Secretary to the Ministry of Foreign Affairs reportedly stated that he was informed by troops present at the relevant time that the Political Wing leaders were ‘shot by LTTE cadres who learned of their attempt to escape’.¹⁰⁵⁴ In contrast, the LLRC Report did not address reported events concerning the surrender or post-surrender treatment of Nadesan and Pulidevan.
- 9.16 The evidentiary material collected by ICEP is consistent with and builds on the UN Expert Panel’s finding that the two Political Wing leaders surrendered and were killed on 18 May 2009. The analysis that follows has relied predominately on the eye-witness accounts of three former LTTE cadres, and details the events leading up to the surrender and death of the Political Wing leaders.¹⁰⁵⁵ These accounts were taken directly by ICEP. In addition, ICEP has been provided with an eye-witness account alleging that the Political Wing leaders were killed while in SFs’ custody.

1046

Ibid.

1047

Ibid.

1048

Sri Lankan Government, ‘Bodies of Charles Anthony and Three Top LTTE Leaders Found’ (media release), 18 May 2009; Sri Lankan Ministry of Defence, ‘Three Top LTTE Leaders Killed: Bodies Found Abandoned (Updated)’ (media release), 18 May 2009.

1049

Sri Lankan Ministry of Defence, ‘Bodies of 18 Senior LTTE Leaders Positively Identified: Clearing Operations Continue’ (media release), 18 May 2009, http://www.defence.lk/new.asp?fname=20090518_11.

1050

‘Four Senior Tamil Tigers “Dead”’, BBC News, 18 May 2009, http://news.bbc.co.uk/2/hi/south_asia/8054826.stm.

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Sri Lankan Ministry of Defence, ‘Identified LTTE leaders who were Killed during the Last Battle’ (media release), 21 June 2009, http://www.defence.lk/new.asp?fname=20090621_02_TerrList.

1052

US Department of State, ‘Report to Congress on Incidents During the Recent Conflict in Sri Lanka’ (hereafter **US Report to Congress 2009**), 2009, 45.

1053

Gethin Chamberlain and Simon Tisdall, ‘Role of British Diplomats in Tamil Leaders’ Failed Surrender Bid’, *The Guardian*, 23 May 2009, <http://www.guardian.co.uk/world/2009/may/22/sri-lanka-tamil-leaders-shot-surrender>; Andrew Buncombe, ‘Tamil Leaders “Killed as They Tried to Surrender”’, *The Independent*, 20 May 2009, 2.

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Andrew Buncombe, ‘Tamil Leaders “Killed as They Tried to Surrender”’, *The Independent*, 20 May 2009.

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WS-801; WS-802; WS-803.

Events leading up to surrender on 18 May 2009

9.17 A former LTTE cadre interviewed by ICEP stated that he heard that the Political Wing leaders had been discussing a possible surrender for some time prior to the conclusion of the conflict.¹⁰⁵⁶ The witness further recalled that late in the evening of 16 or 17 May 2009 Pulidevan announced to a group (which included LTTE members) that the political leaders were ready to surrender and that a surrender would soon take place.¹⁰⁵⁷ This witness stated that Pulidevan confirmed that the surrender had been arranged with the SFs, and the following conditions of surrender were outlined by Pulidevan:

- The group of surrendeers would be received by SFs officers.
- The group would have to surrender unarmed and raise a white flag.
- The group was required to dispose of all military equipment prior to surrendering.¹⁰⁵⁸

9.18 According to this witness, Pulidevan stated that their safety had been guaranteed by Marie Colvin, Vijay Nambiar and senior SFs officers.¹⁰⁵⁹ This witness' account is generally consistent with the report given by Marie Colvin, a British journalist who was in regular communication with Nadesan and Pulidevan.¹⁰⁶⁰ Colvin acted as an intermediary between the LTTE Political Wing leaders and the UN – more specifically, the UN's special envoy in Colombo, Vijay Nambiar.¹⁰⁶¹

9.19 Colvin stated that she spoke to Nadesan by satellite phone late on 17 May 2009, and Nadesan confirmed at that time that '[w]e are putting down our arms.'¹⁰⁶² Nambiar told her that he would relay the leaders' conditions for surrender to the Sri Lankan Government.¹⁰⁶³ Colvin referred to the specific assurances the Government gave in relation to the surrender of the Political Wing leaders. Assurances were also given to another intermediary on 17 and 18 May 2009, and reportedly included the following:

- On the evening of 17 May 2009, the President's brother and special advisor, Basil Rajapaksa, stated that the President accepted the conditions of the surrender.¹⁰⁶⁴
- On the morning of 18 May 2009, the President confirmed that he was willing to accept the LTTE surrender, those surrendering would get full security, and he had ordered the Secretary of Defence, Gotabaya Rajapaksa, to accept the surrender and protect the surrendeers' lives.¹⁰⁶⁵
- The President's brother and special advisor, Basil Rajapaksa, stated that the Political Wing leaders would be safe if they raised high and waved a white flag and followed a route that was allegedly provided by Rajapaksa to Nadesan.¹⁰⁶⁶

¹⁰⁵⁶ WS-802, [39]–[40].

¹⁰⁵⁷ Ibid, [42].

¹⁰⁵⁸ Ibid, [42].

¹⁰⁵⁹ Ibid, [42].

¹⁰⁶⁰ Marie Colvin, 'Tigers Begged me to Broker Surrender', *Times Online*, 24 May 2009.

¹⁰⁶¹ Ibid.

¹⁰⁶² Ibid.

¹⁰⁶³ Ibid.

¹⁰⁶⁴ Unsigned witness statement of WS-804, [58].

¹⁰⁶⁵ Marie Colvin, 'Tigers Begged me to Broker Surrender', *Times Online*, 24 May 2009; corroborated by unsigned witness statement of WS-804, [77].

¹⁰⁶⁶ Ibid.

- 9.20 On the evening of 17 May 2009, foreign diplomatic staff, including representatives of the United States, Britain and Norway, were informed that an agreement had been reached.¹⁰⁶⁷
- 9.21 The Norwegian Minister, Erik Solheim, around midnight on 17 May 2009, reportedly spoke to Pulidevan, who confirmed that the Political Wing leaders wanted to surrender.¹⁰⁶⁸ According to a newspaper report, a Norwegian official relayed the leaders' desire to surrender to the ICRC and the Sri Lankan Government.¹⁰⁶⁹ Another newspaper reported that Palitha Kohona, then Secretary to the Ministry of Foreign Affairs, sent a text message to the ICRC detailing how the LTTE leaders should surrender.¹⁰⁷⁰ Further to this, the newspaper reported that the UN's special envoy, Vijay Nambiar, confirmed that he had spoken to Palitha Kohona in relation to the surrender.¹⁰⁷¹ Despite the reported acknowledgement of his role in negotiating the surrender,¹⁰⁷² Kohona later claimed he had 'no role in arranging anything'.¹⁰⁷³
- 9.22 According to an intermediary between the Sri Lankan Government and Political Wing leaders, early on the morning of 18 May 2009, Basil Rajapaksa stated, 'we have arranged everything' and asked 'how do we identify those surrendering?'.¹⁰⁷⁴ Basil Rajapaksa was told that those surrendering would raise a white flag, a detail that Basil Rajapaksa committed to telling the President.¹⁰⁷⁵
- 9.23 Witnesses provided information relating to the timeframe prior to their surrender, by referring to the Political Wing leaders being seen in Vellamullivaikkal early in the morning of 17 or 18 May 2009,¹⁰⁷⁶ wearing civilian clothing which consisted of a white shirt and according to some witnesses, a sarong.¹⁰⁷⁷ Some witnesses observed that the Political Wing leaders were not armed.¹⁰⁷⁸ Some witnesses also observed other members of the leaders' group in Vellamullivaikkal, with whom the leaders moved to and across Wadduvakal Bridge to surrender, also wearing civilian clothing.¹⁰⁷⁹
- 9.24 The statement of a second former LTTE cadre, taken by ICEP, detailed events that occurred immediately prior to the Political Wing leaders' surrender on the morning of 18 May 2009. He stated that he moved south towards the Wadduvakal Bridge early on the morning of 18 May 2009 when it was still dark.¹⁰⁸⁰ Before reaching Wadduvakal Bridge at around 4:30am,¹⁰⁸¹ he and his group were stopped and searched by SFs soldiers, before being told

¹⁰⁶⁷ Unsigned witness statement of WS-804, [59].

¹⁰⁶⁸ Andrew Buncombe, 'Tamil Leaders "Killed as They Tried to Surrender"', *The Independent*, 20 May 2009, <http://www.independent.co.uk/news/world/asia/tamil-leaders-killed-as-they-tried-to-surrender-1687790.html>.

¹⁰⁶⁹ Ibid.

¹⁰⁷⁰ Gethin Chamberlain and Simon Tisdall, 'Role of British Diplomats in Tamil Leaders' Failed Surrender Bid', *The Guardian*, 23 May 2009.

¹⁰⁷¹ Ibid.

¹⁰⁷² Andrew Buncombe, 'Tamil Leaders "Killed as They Tried to Surrender"', *The Independent*, 20 May 2009.

¹⁰⁷³ Sarah Dingle, 'Sri Lanka War Crime Allegations Surface', *ABC News*, 7 December 2009; Sarah Dingle, 'Push to Investigate Australia for War Crimes', *ABC News*, 21 February 2011.

¹⁰⁷⁴ Unsigned witness statement of WS-804, [69].

¹⁰⁷⁵ Ibid.

¹⁰⁷⁶ Some witnesses are unsure of the date, others are more definitive that it was 18 May. Taking into account all the available info, including Government announcements made on 18 May, these events most likely took place on 18 May.

¹⁰⁷⁷ WS-801, [80]; WS-805, [23]; WS-802, [44]–[46]; WS-803, [20]–[21].

¹⁰⁷⁸ WS-805, [23]; WS-803, [21].

¹⁰⁷⁹ WS-801, [80]; WS-805, [23]; WS-802, [46]; WS-803, [21].

¹⁰⁸⁰ WS-803, [18].

¹⁰⁸¹ Ibid.

to enter a building situated close to the bridge.¹⁰⁸² The witness observed other people walking across the bridge around this time.¹⁰⁸³

9.25 The building to which some of the civilians and surrendering LTTE cadres were told to move was situated to the east of the A35 Highway and, according to another witness, was surrounded by about 100 SFs soldiers¹⁰⁸⁴ with the building and its roof being severely damaged.¹⁰⁸⁵ The witness referred to in the paragraph above said that he and the group of civilians and cadres remained inside the building for around two hours.¹⁰⁸⁶ He explained that he was 'by the entrance of the building and could see onto the road. After about 45-60 minutes it was dawn and [there was] good visibility.'¹⁰⁸⁷ This same witness described seeing Nadesan, Pulidevan and others who were surrendering to the SFs near the Wadduvakal Bridge and being taken into SFs' custody.¹⁰⁸⁸

9.26 A third former LTTE cadre observed a few SFs soldiers in Wadduvakal at that time, including a senior SFs officer who the witness identified as Brigadier Shavendra Silva,¹⁰⁸⁹ and about 150 uniformed and armed soldiers could be seen on the northern side of the bridge.¹⁰⁹⁰ In Wadduvakal, around 100 civilians in SFs custody were also observed by the witness at a distance from the bridge,¹⁰⁹¹ which is consistent with other eye-witness accounts indicating that a group of civilians had been cleared from the A35 Highway as they were taken over the Wadduvakal Bridge, prior to the Political Wing leaders' surrender to the SFs.¹⁰⁹²

9.27 Four witnesses observed SFs soldiers, including some whom they believed to be senior SFs personnel, and SFs positions, in the Vellamullivaikkal area near Wadduvakal Bridge from early on the morning of 18 May 2009.¹⁰⁹³ One of these witnesses observed soldiers using radios and phones along the northern side of the Wadduvakal Bridge, between the bridge and a large earthen bund.¹⁰⁹⁴ This same witness, who was also the witness who observed Brigadier Shavendra Silva in among the large group of SFs soldiers (see paragraph 9.26 above) saw Brigadier Silva himself using communications equipment.¹⁰⁹⁵ Brigadier Silva appeared to be one of the most senior SFs officers in his vicinity 'as I saw many of the officers would come up to him and talk to him.'¹⁰⁹⁶ A SFs sentry point was located to the west of the earthen bund along the western coast of the Mullivaikkal peninsula.¹⁰⁹⁷

Nadesan and Pulidevan's surrender

9.28 At 5:30am on 18 May 2009, Marie Colvin reported that she spoke to the UN's special envoy, Vijay Nambiar, and told him that the Political Wing leaders had laid down their arms.¹⁰⁹⁸

1082

Ibid.

1083

Ibid.

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WS-802, [50].

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WS-802, [50], [54]; WS-801, [74].

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WS-803, [18].

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Ibid, [19]–[20].

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Ibid, [20]–[27].

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WS-801, [69], [78]–[79]. Note that ICEP has identified the person in the photographs to which the witness refers as Brigadier Shavendra Silva, GOC of the 58th Division.

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Ibid, [75].

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Ibid, [70].

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WS-803, [18]; WS-801, [76].

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WS-801, [75]; WS-805, [25]; WS-802, [49]–[53]; WS-803, [19].

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WS-801, [75], [77].

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Ibid, [77]–[79].

1096

Ibid, [78].

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Ibid, [74].

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Marie Colvin, 'Tigers Begged Me to Broker Surrender', *Times Online*, 24 May 2009.

Nambiar informed Colvin that he had been assured by the Sri Lankan President that the leaders would be safe in surrendering; all that was required was for the surrendering leaders to 'hoist a white flag high'.¹⁰⁹⁹ Nambiar reportedly stated that the President's assurances meant that he would not need to personally witness the surrender.¹¹⁰⁰

- 9.29 ICEP has a copy of an unsigned witness statement indicating that the Government's assurances that the Political Wing leaders would be safe in surrendering were relayed to Nadesan at about 6:30am on 18 May 2009.¹¹⁰¹ According to this witness statement, Nadesan stated that he would lead the way for the first group of surrendees, with the white flag held high and by following the route to the forward defence line which was provided by Basil Rajapaksa.¹¹⁰² Nadesan reportedly told an intermediary: 'We are ready. I'm going to walk out and hoist the white flag.'¹¹⁰³
- 9.30 On the morning of 18 May 2009, just before moving from Vellamullivaikkal to the south for the purpose of surrendering to the SFs, one of the former LTTE cadres, who was with the Political Wing leaders, stated that Nadesan divided a group of 12 persons, all of whom were wearing civilian clothes, into three smaller groups comprised of four persons each.¹¹⁰⁴ According to the witness, the first group included Pulidevan and Nadesan who held a white flag. The second group included the LTTE Police Chief, Ilango, who was also holding a white flag.¹¹⁰⁵ Another witness said the white flag was a long stick that had a piece of white cloth attached at one end.¹¹⁰⁶
- 9.31 The witness further recalled that the three groups of surrendees walked for about five minutes to the A35 Highway which they reached as dawn was breaking.¹¹⁰⁷ This witness did not see any civilians once they arrived at the highway.¹¹⁰⁸ After walking along the A35 Highway for approximately five minutes, behind Nadesan and Pulidevan, this witness observed around 200 SFs officers in the bushes along the southern edge of the Mullivaikkal peninsula, about 150 metres from where he was located.¹¹⁰⁹
- 9.32 According to two eye-witnesses at the scene, a large earthen bund was also visible in the area north of the Wadduvakal Bridge.¹¹¹⁰ From the earthen bund, a witness saw four people, including Nadesan, Pulidevan and Nadesan's wife, slowly walking along the A35 Highway towards Wadduvakal Bridge.¹¹¹¹ This witness, who personally knew Nadesan and Pulidevan, saw a group of SFs officers, including Brigadier Silva,¹¹¹² walk over to meet Nadesan and Pulidevan's group of surrendees.¹¹¹³

1099

Ibid.

1100

Ibid.

1101

Unsigned witness statement of WS-804, [78].

1102

Ibid, [79].

1103

Marie Colvin, 'Tigers Begged Me to Broker Surrender', *Times Online*, 24 May 2009; corroborated by unsigned witness statement of WS-804, [78]–[79].

1104

WS-802, [44].

1105

Ibid, [44], [47].

1106

WS-801, [80].

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WS-802, [48].

1108

Ibid, [48].

1109

Ibid, [49].

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Ibid, [49]; WS-801, [73].

1111

WS-801, [80].

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Ibid, [82].

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Ibid, [81]–[82].

- 9.33 The three former LTTE cadre witnesses are consistent in stating that, upon approaching the Wadduvakal Bridge, the Political Wing leaders and the other members of the first group of surrendeers were approached and surrounded by SFs personnel.¹¹¹⁴ From a position about 25 metres north of this first group of surrendeers,¹¹¹⁵ one of the eye-witnesses observed scores of SFs officers, dressed in Army uniform and armed with rifles, surround the first group and escort them over the Wadduvakal Bridge.¹¹¹⁶ After soldiers surrounded the first group of surrendeers, another witness watched as the three male surrendeers removed their shirts, with Pulidevan seen wearing a white singlet under his shirt.¹¹¹⁷
- 9.34 Two of these witnesses reported hearing Nadesan's wife's raised voice, speaking in Sinhala, a detail that is consistent with Marie Colvin's media report, before the group was led to and across the bridge by SFs soldiers.¹¹¹⁸ SFs officers allegedly held the male surrendeers' hands together behind their back.¹¹¹⁹ One witness observed Brigadier Silva and another senior SFs officer with the group until they left the sight of the witness.¹¹²⁰
- 9.35 Another witness, who appears to have crossed the Wadduvakal Bridge a short time after the Political Wing leaders, stated that she was personally informed by Ramesh at the time of crossing the bridge (when it was daylight) that the Political Wing leadership, including Nadesan and Pulidevan, had already crossed the bridge while carrying a white flag.¹¹²¹ Two of the former LTTE cadres who saw Nadesan and Pulidevan surrender to the SFs indicated that they had not seen the Political Wing leaders since they crossed the Wadduvakal Bridge.¹¹²²
- 9.36 From different vantage points, the three former LTTE cadres stated that a second and third group of surrendeers approached Wadduvakal Bridge a short time after the Political Wing leader's group.¹¹²³ All three witnesses identified the LTTE Police Chief as part of the second group of surrendeers.¹¹²⁴

Events concerning Nadesan and Pulidevan post-surrender

- 9.37 The statement of the second former LTTE cadre taken by ICEP suggests that, after surrendering into SFs custody, Nadesan and Pulidevan were killed.¹¹²⁵ The eye-witness recalled that, after approximately an hour and a half, having moved between 500 and 600 metres south of Wadduvakal Bridge,¹¹²⁶ he

saw a crowd of approximately eight uniformed SFs soldiers gathering alongside some open ground next to the A35 Highway... I could see they were taking photos on their mobile phones. Almost at the same time...I saw that they were photographing several dead bodies which had been laid in a ditch next to the highway... I looked closely inside the ditch for around 20 to 30 seconds...my eyes were immediately drawn to two bodies that I instantly recognised as the bodies of

¹¹¹⁴ Ibid, [82]–[83]; WS-802, [53]; WS-803, [20].

¹¹¹⁵ WS-802, [52].

¹¹¹⁶ Ibid, [53].

¹¹¹⁷ WS-801, [83].

¹¹¹⁸ WS-803, [21]; WS-801, [80]; Marie Colvin, 'Tigers Begged Me to Broker Surrender', *Times Online*, 24 May 2009.

¹¹¹⁹ WS-801, [83].

¹¹²⁰ Ibid, [83].

¹¹²¹ WS-805, [31].

¹¹²² WS-802, [55]; WS-803, [27].

¹¹²³ WS-801, [84]–[85]; WS-802, [44]–[52]; WS-803, [23]–[24].

¹¹²⁴ WS-801, [84]; WS-803, [23].

¹¹²⁵ WS-801, [91]–[92].

¹¹²⁶ Ibid, [90].

Pulidevan and Nadesan... I knew as soon as I looked at their bodies that they were dead. Both men were lying on their backs in the ditch... I could not see any blood on their bodies or nearby.¹¹²⁷

- 9.38 This witness account, and photographs of Nadesan and Pulidevan's bodies which were publicly released, suggest that after being taken into SFs custody and killed, Pulidevan's singlet was removed, and both bodies possibly received burns.¹¹²⁸ Further investigation is warranted into the precise circumstances of the Political Wing leaders' death.
- 9.39 Another witness account provides more information regarding what may have happened to Nadesan and Pulidevan in the time between their surrender and death.¹¹²⁹ The witness stated that he was informed by someone who he believed to be a commando in the SFs, at about 8am on 18 May 2009, that Nadesan, Pulidevan and their group of cadres and civilians had been killed after surrendering to SFs.¹¹³⁰ According to this witness, he was told by the commando that 'the Political Wing had all surrendered, they had accepted tea. They were then beaten. Nadesan's wife begged them to stop as they had surrendered, however they were then all shot by the SF[s] Commandos.'¹¹³¹ Both witness accounts are consistent with media sources that communicated reports that surrendering members of the LTTE, including Nadesan and Pulidevan in one report, were killed around the time of surrendering.¹¹³²
- 9.40 The above accounts are also consistent with allegations made by the former Army Commander, General Sarath Fonseka, in an interview with *The Sunday Leader* in December 2009.¹¹³³ General Fonseka stated he had been told that Basil Rajapaksa conveyed the Political Wing leaders' intention to surrender to the Secretary of Defence, Gotabaya Rajapaksa, who in turn spoke to Brigadier Shavendra Silva, GOC of the 58th Division.¹¹³⁴ According to the former Army Commander, Gotabaya Rajapaksa reportedly ordered Brigadier Silva to kill any LTTE leaders attempting to surrender,¹¹³⁵ an order given in spite of Basil Rajapaksa and Gotabaya Rajapaksa conveying to the former LTTE leaders through foreign intermediaries, that they should surrender with white flags.¹¹³⁶
- 9.41 According to a leaked cable from the US Embassy in Colombo, General Fonseka 'quickly backtracked after heavy criticism from the president and his allies.'¹¹³⁷ Fonseka subsequently clarified his reported statements:

[N]obody carrying white flags attempted surrender in those final days of the war. Therefore all of the LTTE leaders were killed as forces completely took over a

1127

Ibid, [91]–[92].

1128

Ibid, [93] and Annexure G.

1129

Unsigned witness statement of WS-804, [81].

1130

Ibid, [81].

1131

Ibid, [81].

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Emily Wax, 'Fresh Reports, Imagery Contradict Sri Lanka on Civilian No Fire Zone', *Washington Post*, 30 May 2009, at 3; Gethin Chamberlain, 'Surrendering Tamils were Massacred by Sri Lankan Army, says Rights Group', *The Guardian*, 11 June 2009; Andrew Buncombe, 'Tamil leaders 'killed as they tried to surrender'', *The Independent*, 20 May 2009, at 2; Hamish McDonald, 'Dangerous Politics of Betrayal', *Sydney Morning Herald*, 9 January 2010.

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Frederica Jansz, 'Gota Ordered Them To Be Shot' – General Sarath Fonseka', *The Sunday Leader*, 13 December 2009; ICG Report, 7.

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Frederica Jansz, 'Gota Ordered Them To Be Shot' – General Sarath Fonseka', *The Sunday Leader*, 13 December 2009.

1135

Ibid.

1136

Ibid.

1137

'Wikileaks: Fonseka Opens Up Pandora's Box', *Colombo Telegraph*, 15 October 2011, <http://www.colombotelegraph.com/index.php/wikileaks-fonseka-opens-up-pandoras-box/>.

remaining 100m x 100m area of land north of Vellamullivaikkal. Two days after the war ended I learnt through some journalists who were entrenched at the time with then Brigadier Shavendra Silva that an illegal order had been conveyed to General Shavendra Silva by Defence Secretary Gotabaya Rajapaksa. This illegal order was however not carried out at ground level. I take full responsibility for what happened on the ground.¹¹³⁸

9.42 In respect of this retraction, ICEP notes that General Fonseka appears to maintain that he heard from journalists that Gotabaya Rajapaksa did in fact give 'an illegal order' to Brigadier Silva, but that this order was not carried out.

9.43 Further investigation is warranted into whether orders were transmitted from the Sri Lankan President to Gotabaya Rajapaksa as referred to in paragraph 9.40, or from Gotabaya Rajapaksa to Brigadier Silva as alleged by General Fonseka.

(ii) Legal analysis

Murder as a war crime

9.44 The available evidentiary material indicates that Nadesan and Pulidevan and the other members of their group of 12 surrendees had clearly expressed their intention to surrender. It appears that, from the time of their surrender until the time of their deaths, Nadesan and Pulidevan were in the custody of the SFs.

9.45 Circumstantial evidence links the deaths of Nadesan and Pulidevan to the 58th Division, which at the time was commanded by Brigadier Shavendra Silva. For example, the Sri Lankan Ministry of Defence reported that they were killed by 58th Division soldiers,¹¹³⁹ and an eye-witness account places Brigadier Shavendra Silva at Vellamullivaikkal at the time of their surrender, before Brigadier Silva personally escorted the leaders across the Wadduvakal Bridge with other SFs soldiers. This is broadly supported by uncontroversial evidence that Wadduvakal was under the total control of the SFs.¹¹⁴⁰

9.46 It is reasonable to conclude that at the relevant time Nadesan and Pulidevan were persons *hors de combat*, and that they were in the custody of the SFs at the time of their deaths. These facts, if established beyond a reasonable doubt, would support an inference that Nadesan and Pulidevan were killed unlawfully, while in the custody of the SFs. Moreover, there is little doubt that the surrender and subsequent killing of surrendering members of the opposing party would satisfy the contextual elements of a war crime (ie, a nexus with the armed conflict).

9.47 Accordingly, there are reasonable grounds to suspect that one or more SFs soldiers may have committed the war crime of murder under Article 8(2)(c)(i) of the ICC Statute, by killing Nadesan and Pulidevan who were persons *hors de combat* and in the custody of the SFs at

¹¹³⁸ 'White Flag Story Goes to Court', *The Sunday Leader*, 6 May 2010, <http://www.thesundayleader.lk/2010/05/06/white-flag-story-goes-to-court/>. Relevant to General Fonseka's reported statements in respect of the alleged chain of command from Gotabaya Rajapaksa to Shavendra Silva, ICEP has obtained some information that would need to be verified further indicating that the President ordered Gotabaya Rajapaksa to accept the Political Wing leaders' surrender: unsigned witness statement of WS-804, [77].

¹¹³⁹ It is noted that it is not possible to infer solely from the Ministry of Defence's report that the Political Wing leaders were murdered, or killed in the course of hostilities.

¹¹⁴⁰ ICRC, 'Rule 47. Attacks against Persons Hors de Combat' (webpage), http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule47#Fn_70_22; WS-801, [82]–[83]; WS-802, [53]; WS-803, [20]–[21]. ICEP notes that all three witnesses who observed the Political Wing leaders being taken into the SFs' custody were familiar with the Political Wing leadership, as they were former LTTE cadres: WS-801, [11]–[46]; WS-802, [11]–[13], [28]–[35]; WS-803, [22].

the time of their death. Although not analysed in detail here, the killing of Nadesan and Pulidevan may also amount to the crime against humanity of murder.

Incident 2: Killing of Ramesh

(i) *Evidentiary material*

Background

9.48 Colonel Ramesh was the former Eastern Military Commander of the LTTE.¹¹⁴¹ The UN Expert Panel stated:

[A]s the SLA [Sri Lankan Army] closed in on the group [comprising Nadesan, Pulidevan and reportedly a group of around 300 civilians] in their final hideout, Nadesan and Pulidevan, and possibly Colonel Ramesh, were prepared to surrender unconditionally.¹¹⁴²

9.49 The UN Expert Panel found:

Around 6.30a.m. on 18 May 2009, Nadesan and Pulidevan left their hide-out to walk towards the area held by the 58th Division, accompanied by a large group, including their families. Colonel Ramesh followed behind them [Nadesan and Pulidevan], with another group.¹¹⁴³

However, it made no findings in relation to subsequent events concerning Ramesh.

9.50 ICEP's investigation has uncovered new information, detailed below, suggesting that Ramesh likely surrendered to the SFs among a large group of civilians on the morning of 18 May 2009, sometime after Nadesan and Pulidevan and their group of 12 had surrendered and the road and bridge were reopened for those trying to cross to the Government controlled area.

9.51 This evidentiary material contradicts various reports made by the Sri Lanka Ministry of Defence that the bodies of Ramesh and other LTTE leaders were found by the SFs after 'clearing operations' on the morning of 18 May 2009.¹¹⁴⁴ These reports have been reproduced in national and international media alongside other reports and suggest a different end to the conflict and the fate of the former LTTE leaders.¹¹⁴⁵ According to CA Chandraprema, 'eastern commander Ramesh' and other LTTE cadres were killed in a confrontation with the 53rd Division that also killed 'LTTE front liners Nadesan, Pulidevan, and Illango, the LTTE 'police chief'.'¹¹⁴⁶

¹¹⁴¹ See section 5.

¹¹⁴² UN Expert Panel Report, [170].

¹¹⁴³ Ibid, [171].

¹¹⁴⁴ Sri Lankan Ministry of Defence media releases indicated variously that Ramesh's body was found with Nadesan, Pulidevan and Charles Anthony. See, eg, Ministry of Defence, 'Three Top Leaders...' (media release), 18 May 2009.

¹¹⁴⁵ Matthew Weaver and Gethin Chamberlain, 'Sri Lanka Declares End to War with Tamil Tigers', *The Guardian*, 19 May 2009, 4; 'Four Senior Tamil Tigers "Dead"', BBC News, 18 May 2009, 2; Ministry of Defence, 'Bodies of Charles Anthony and Three Top LTTE Leaders Found' (media release), *News Line*, 18 May 2009; Shamindra Ferdinando, 'Butchers Slaughtered', *The Island*, 19 May 2009; Gethin Chamberlain, 'Surrendering Tamils were Massacred by Sri Lankan army, Says Rights Group', *The Guardian*, 11 June 2009; Alex Spillius and Emanuel Stoakes, 'Sri Lankan Army Commanders "Assassinated Surrendering Tamils"', *The Telegraph*, 18 Dec 2011.

¹¹⁴⁶ C. A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 487–8.

Ramesh's surrender to the SFs

- 9.52 On or before 17 or 18 May 2009, three witnesses observed that Ramesh had laid down his arms and changed into civilian clothing, which according to witnesses consisted of a white or off-white coloured shirt and blue-black chequered sarong.¹¹⁴⁷ One witness observed that Ramesh was not armed, and nor were the other members of the group with which he moved towards Wadduvakal Bridge.¹¹⁴⁸
- 9.53 During his interrogation, which is detailed from paragraph 9.57 below, Ramesh stated that he left the 'refugee camp', presumed by ICEP to be the Vellamullivaikkal area of NFZ-3 in which civilians and cadres had concentrated at the end of the conflict, at 4:30am on 17 May 2009.¹¹⁴⁹ Vellamullivaikkal was located near NFZ-3, and it would have been necessary for Ramesh, and others surrendering, to pass through Vellamullivaikkal in order to cross the Wadduvakal Bridge.
- 9.54 Witness accounts place Ramesh in the Vellamullivaikkal area north of Wadduvakal Bridge on 17 or 18 May, prior to his surrender to the SFs.¹¹⁵⁰ In the early afternoon of 17 May, a senior NGO official who was Ramesh's friend saw him sitting near a Palmyra tree with a wound to his back.¹¹⁵¹ Ramesh waited in this area until early morning on 18 May when he moved closer to the bridge.¹¹⁵² Around this time, Ramesh joined relatives who were also walking south but they waited for the sun to rise before crossing the bridge.¹¹⁵³ A witness who started crossing Wadduvakal Bridge with Ramesh at around 6am stated that the bridge was tightly packed with civilians and so the journey across the bridge took between one and 1.5 hours to complete.¹¹⁵⁴ During the journey, and through two SFs holding areas in Wadduvakal, Ramesh held a young child in his arms.¹¹⁵⁵ The evidentiary material indicates that Ramesh did not reach Wadduvakal before 7am, which was approximately 1.5 hours after the Political Wing leaders' surrender.

Ramesh in SFs custody

- 9.55 According to a witness who crossed Wadduvakal Bridge with Ramesh, Ramesh moved through a first, and second, holding area under SFs' control.¹¹⁵⁶ In the second holding area, Ramesh sat with relatives under a Palmyra tree.¹¹⁵⁷ At around 4pm on 18 May, a member of the Karuna Group known to an eye-witness as Adeal (also known as Adaralson) was observed to be accompanied by SFs officers.¹¹⁵⁸ The witness recalled that, by reference to a notebook that he carried with him, Adeal pointed out people in the holding area to the SFs.¹¹⁵⁹ Adeal pointed out Ramesh to the SFs at about 5pm. The eye-witness then watched as Ramesh and other LTTE cadres who had been identified by Adeal were taken into a

1147 WS-805, [27]; WS-806, [160]; WS-807, [8].

1148 WS-805, [30]–[34].

1149 ICEP Video 5, 'Ramesh New', available at: <http://www.youtube.com/watch?v=Uow2yA9MQNs&feature=related> (viewed on 12 September 2013 and captured by ICEP).

1150 WS-806, [160]–[161].

1151 Ibid, [160].

1152 This is inferred from the statement of WS-806, [160]–[161], where the witness outlined that he saw Ramesh before crossing the Wadduvakal bridge in the afternoon on 17 May 2009, and the statement of WS-805, [27]–[29], that Ramesh joined relatives and crossed the bridge just after sunrise on 18 May 2009.

1153 WS-805, [27].

1154 Ibid, [23], [29]–[30], [33].

1155 Ibid, [30]; WS-807, [8].

1156 Ibid, [33]–[36].

1157 Ibid, [36]–[37].

1158 Ibid, [36]–[37], [40].

1159 Ibid, [41].

Palmyra tree jungle by Adeal and SFs officers.¹¹⁶⁰ This was the last time that the witness saw Ramesh alive.¹¹⁶¹ One of the LTTE members also identified by Adeal at this time and led into the jungle was the senior LTTE leader, Lieutenant Colonel Krishnapillai Pirabaharan (nom de guerre: Piraba).¹¹⁶²

- 9.56 Further investigation is warranted into events that took place between the time that Ramesh was taken into SFs custody on 18 May, and his interrogation on 22 May which is detailed below.

Ramesh's interrogation while in SFs custody

- 9.57 Photographs and videos provided to ICEP indicate that Ramesh was interrogated after being taken into SFs' custody. This evidentiary material suggests that Ramesh was held in SFs' custody from 18 May to 22 May 2009, when he was allegedly killed. Witnesses who knew Ramesh have confirmed that the person depicted in the photographs and videos detailed below is the same person they identified as Ramesh when he was crossing the Wadduvakal Bridge and taken into SFs custody.¹¹⁶³
- 9.58 Photographic and video material, a small sample of which is available in the public domain, depict Ramesh alive on 22 May 2009, inside what appears to be an armoured personnel carrier (APC).¹¹⁶⁴ In a series of photographs collected by ICEP, Ramesh is shown first in civilian clothing, as described by witnesses, and then pictured in military-style clothing.¹¹⁶⁵ An independent forensic audio-visual specialist commissioned by ICEP has analysed the metadata of these photographs, which indicates that they were taken on or about 22 May 2009 between 10:54am and 11:36am using the same camcorder.¹¹⁶⁶
- 9.59 ICEP has reviewed a publicly available video clip that purports to record the interrogation of Ramesh, wearing camouflage pants and in the APC. During the interrogation, the interrogator confirmed that the date of the interrogation is 22 May 2009.¹¹⁶⁷ This video clip also depicts a person off-camera peeling off a bandage on the back of Ramesh's right shoulder, exposing the wound underneath, before the bandage is patted down onto Ramesh's skin.¹¹⁶⁸ The reliability of this footage is corroborated by the statement of a witness who saw Ramesh in Karaiyamullivaikal on or around 8 May 2009, and observed that Ramesh was wounded on his shoulder blade and that the wound was covered by a large white gauze and tape bandage.¹¹⁶⁹
- 9.60 A separate video clip obtained by ICEP and not known to be in the public domain shows Ramesh wearing camouflaged pants and changing into a green military-style shirt, which is provided to him by men sitting next to Ramesh in the APC,¹¹⁷⁰ presumed to be SFs soldiers.

¹¹⁶⁰ Ibid, [42]–[45].

¹¹⁶¹ Ibid, [45].

¹¹⁶² Ibid, [42]; WS-808, [25].

¹¹⁶³ WS-805, [46]–[57]; WS-807, [8]–[16].

¹¹⁶⁴ See expert forensic pathology report commissioned by ICEP, 15–16; ICEP photographs DSC06622, DSC06623, DSC06624, DSC06625, DSC06626, DSC06627, DSC06629, DSC06630, DSC06631, DSC06632, DSC06633, DSC06634, DSC06635, DSC06636; and ICEP Video 4.

¹¹⁶⁵ See Expert forensic pathology report commissioned by ICEP, 16.

¹¹⁶⁶ Expert forensic audio-visual report commissioned by ICEP, [44] and Appendix 10–12.

¹¹⁶⁷ ICEP Video 5, 'Ramesh New', available at: <http://www.youtube.com/watch?v=Uow2yA9MQNs&feature=related> (viewed on 12 September 2013 and captured by ICEP).

¹¹⁶⁸ Ibid.

¹¹⁶⁹ WS-805, [14].

¹¹⁷⁰ ICEP Video 4.

Loud engine sounds can be heard in the background.¹¹⁷¹ An independent forensic pathologist stated that the injury visible on Ramesh's right posterior shoulder could have been caused by a gunshot wound or a shrapnel injury.¹¹⁷² An independent forensic audio-visual specialist stated that this video clip appeared to have been captured at 11:33:45am to 11:34:00am on 22 May 2009.¹¹⁷³

9.61 After about eight minutes, Ramesh appears to have moved from the APC to a building where he was interrogated about the names of LTTE commanders in Batticaloa, military operations in which he had previously participated and about his family members.¹¹⁷⁴ This interrogation was recorded in three separate video clips in which:

- Ramesh identified himself to the interrogator by his full name;¹¹⁷⁵ and
- the interrogator introduced in English 'Army personnel' to Ramesh who were presumably present off-camera.¹¹⁷⁶

9.62 An independent forensic audio-visual specialist stated that these clips appear to have been captured between 11:41:58am and 11:53:45am on 22 May 2009.¹¹⁷⁷

Ramesh's death in SFs custody

9.63 A further series of photographs obtained by ICEP, a small sample of which are in the public domain, appear to show Ramesh's dead body.¹¹⁷⁸ Ramesh's body is dressed in military-style clothing as depicted in the video described above at paragraph 9.60.¹¹⁷⁹ There is blood on his face and apparent swelling of his face associated with a stellate injury on the left jaw below the ear.¹¹⁸⁰ While the details of the wound are concealed by the presence of blood, analysis of the photos by a forensic pathologist indicates that the injury appears to have occurred around the time of death and as a result of 'a penetrating injury, a sharp force injury or possibly a blunt force injury'.¹¹⁸¹

9.64 The content and metadata of a series of photographs and videos of Ramesh being interrogated and then dead suggest that they were taken in or near the same building, constructed of red mud brick.¹¹⁸² The photographs depicting Ramesh dead on the ground next to the mud brick building appear to have been taken at 2:25pm on 22 May 2009.¹¹⁸³

9.65 Photographs which have been examined by the independent forensic pathologist engaged by ICEP suggest that Ramesh's body was moved after death.¹¹⁸⁴ Photographs taken at

¹¹⁷¹ ICEP Video 4.

¹¹⁷² Expert forensic pathology report commissioned by ICEP, 15.

¹¹⁷³ Dr Porter Report, Appendix, 15.

¹¹⁷⁴ ICEP Videos 1–3.

¹¹⁷⁵ ICEP Video 1.

¹¹⁷⁶ ICEP Video 2.

¹¹⁷⁷ Expert forensic audio-visual report commissioned by ICEP, Appendix Series 9, 14–15.

¹¹⁷⁸ Expert forensic pathology report commissioned by ICEP, 15; ICEP photographs DSC06637, DSC06638, DSC06639, DSC06640, DSC06641, DSC06642, DSC06643, DSC06644, DSC06645, DSC06646, DSC06647, DSC06648, DSC06649, DSC06650, DSC06651, DSC0052.

¹¹⁷⁹ Ibid.

¹¹⁸⁰ Ibid.

¹¹⁸¹ Ibid.

¹¹⁸² ICEP Videos 1–3; ICEP photographs DSC06637, DSC06638.

¹¹⁸³ Expert forensic audio-visual report commissioned by ICEP, Appendix 12; ICEP photographs DSC06637, DSC06638.

¹¹⁸⁴ Expert forensic pathology report commissioned by ICEP, 16; ICEP photographs DSC06637, DSC06638, DSC06639, DSC06640, DSC06641, DSC06642, DSC06643, DSC06644, DSC06645, DSC06646, DSC06647, DSC06648, DSC06649, DSC06650, DSC06651, DSC06652; Dr Porter's Expert Report, Appendix at 12–14 for time photographs were taken.

2:25pm show Ramesh's body with his arms below his head against a background of a mud brick building,¹¹⁸⁵ and in photographs taken from 2:26pm onwards the background has changed to a grassy area and Ramesh's arms are positioned above his head,¹¹⁸⁶ indicating that his body has been moved.¹¹⁸⁷ After the body was apparently moved, one photograph shows an individual in military-style clothing standing near Ramesh's body.¹¹⁸⁸ A series of photographs depict Ramesh's body becoming progressively covered with sticks and small wooden logs, and in the same series of photographs, a burning woodpile.¹¹⁸⁹ The woodpile appears to be in the same location as depicted in a photograph with an individual in military-style uniform standing over the body of Ramesh.¹¹⁹⁰ An individual in military-style clothing is depicted near the smouldering remains of the woodpile.¹¹⁹¹ Forensic audio-visual analysis indicates that it is highly likely that these photographs were taken on the same camcorder between 02:25:01pm and 03:03:42pm on the 22 May 2009.¹¹⁹² The most logical inference from an analysis of these photographs is that Ramesh's body was subsequently burned.

- 9.66 Noting that the metadata of photographs and videos is relative to the time and date settings of the recording device that captured the scenes, the photographs and videos corroborate witness accounts provided to ICEP. The metadata of photographs and videos depicting Ramesh indicates that they were taken on the same day within an approximate four hour time frame.¹¹⁹³

(ii) Legal analysis

Murder as a war crime

Causal connection between the perpetrator's conduct and Ramesh's death

- 9.67 While further investigation is required to determine the precise cause of Ramesh's death,¹¹⁹⁴ it is reasonable to conclude that Ramesh was in SF's custody from 18 May to 22 May 2009, and that Ramesh sustained injuries to his head, which appear to have occurred around the time of death.¹¹⁹⁵
- 9.68 Photographic and video material indicates that Ramesh was killed in the interrogation site, and within eight minutes, his body was moved a short distance before being set on fire. Audio/visual analysis of ICEP's evidentiary material indicates that Ramesh was interrogated, killed and his body burned within a four-hour time-frame. This supports an inference that Ramesh was in the custody of the SFs at the time of his death, that SFs personnel caused

¹¹⁸⁵ ICEP photographs DSC06637, DSC06663; Dr Porter's Expert Report, Appendix at 12 for time photographs were taken.

¹¹⁸⁶ ICEP photographs DSC06639, DSC06640, DSC06641, DSC06642, DSC06643, DSC06644, DSC06645, DSC06646, DSC06647, DSC06648, DSC06649, DSC06650, DSC06651, DSC06652; Dr Porter's Expert Report, Appendix at 12–14 for time photographs were taken.

¹¹⁸⁷ Expert forensic pathology report commissioned by ICEP, 16

¹¹⁸⁸ ICEP photograph DSC06648.

¹¹⁸⁹ ICEP photographs DSC06648, DSC06649, DSC06650, DSC06651, DSC06652, DSC06653, DSC06654, DSC06655, DSC06656, DSC06657, DSC06658, DSC06659, DSC06650, DSC06661; Expert forensic pathology report commissioned by ICEP, 16–7.

¹¹⁹⁰ ICEP photographs DSC06648, DSC06656, DSC06657, DSC06658, DSC06661.

¹¹⁹¹ ICEP photograph DSC06661.

¹¹⁹² Expert forensic audio-visual report commissioned by ICEP, [44] and Appendix Series 9, 12–14; and ICEP photographs DSC06637, DSC06638, DSC06639, DSC06640, DSC06641, DSC06642, DSC06643, DSC06644, DSC06645, DSC06646, DSC06647, DSC06648, DSC06649, DSC06650, DSC06651, DSC06652, DSC06653, DSC06654, DSC06655, DSC06656, DSC06657, DSC06658, DSC06659, DSC06660, DSC06661.

¹¹⁹³ Expert forensic audio-visual report commissioned by ICEP, [47].

¹¹⁹⁴ Expert forensic pathology report commissioned by ICEP, 16.

¹¹⁹⁵ See Expert forensic pathology report commissioned by ICEP, 16.

the serious head injuries that caused his death, and that the movement and subsequent burning of Ramesh's body was an attempt to conceal evidence of possible criminal conduct.

Civilian or member of an armed group placed hors de combat at the time of death

- 9.69 The available evidentiary material indicates that immediately prior to his surrender and at the time he was taken into SFs' custody, Ramesh was unarmed and dressed in civilian clothing. He was carrying a young child as he crossed Wadduvakal Bridge with a large group of civilians who intended to surrender to the SFs in Wadduvakal. It is unclear why Ramesh removed his civilian clothes and dressed himself in military-style clothing, which was provided to Ramesh by men who were themselves wearing military-style clothing, and who are presumed to be SFs soldiers. One possibility is that he was dressed in military clothing to bolster subsequent claims that he was killed while fighting.
- 9.70 Unless contrary evidentiary material comes to light in respect of Ramesh's status at the time of his death, it is reasonable to conclude that Ramesh had laid down his arms by the time he surrendered on 18 May 2009 and was in the custody of the SFs at the time of his death, such that he was *hors de combat*.¹¹⁹⁶ On this basis, the Government's account of the death of Ramesh while he was actively participating in hostilities is inconsistent with ICEP's evidentiary material.

Nexus between conduct and the armed conflict

- 9.71 It is reasonable to conclude that the perpetrator(s) who killed Ramesh acted in furtherance of or, at the very least, under the guise of the Sri Lankan Government's aims with respect to the armed conflict, namely to completely destroy the LTTE.¹¹⁹⁷ Although it seems that at the time of his death, active hostilities had ceased, it is arguable that on this date IHL would have still applied to the treatment of detainees such as Ramesh.¹¹⁹⁸ Given how close in time Ramesh's death was to the final day of active hostilities (within 3-4 days), given some military operations were still occurring, given he remained in SFs custody at this time, and given his role during the conflict, it is reasonable to conclude that a sufficient nexus can be made out.

Establishing intent and knowledge

- 9.72 Further investigation is warranted in order to ascertain whether it is possible to identify specific perpetrator(s) who might bear criminal responsibility for the alleged events analysed above, and whether they had the requisite intent to commit murder, and knowledge of the material elements of the alleged crime.

Conclusion

- 9.73 There are reasonable grounds to suspect that Ramesh was killed by one or more SFs soldiers, while in SFs' custody. Accordingly, subject to further investigation, there are reasonable grounds to suspect the war crime of murder under Article 8(2)(c)(i) of the ICC Statute, was committed by members of the SFs who killed Ramesh, a person who appeared

¹¹⁹⁶ See ICRC, 'Rule 47. Attacks against Persons Hors de Combat' (webpage), http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule47#Fn_70_22.

¹¹⁹⁷ See ICC Elements of Crimes, Art 8(2)(c)(i)-1(4); *Lubanga*, (ICC-01/04-01/06), Pre Trial Chamber 1, Decision on the confirmation of charges, 29 January 2007, [288]; *Katanga*, Decision on the Confirmation of the Charges, 30 September 2008, [380]; and *Prosecutor v Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No ICTY-96-23-A, 12 June 2002), [58].

¹¹⁹⁸ See *Tadic (Judgment)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II) 7 May 1997, [70] on how to determine the end of an armed conflict and the applicability of IHL.

to be *hors de combat* at the time of his death. Although not analysed in detail here, the killing of Ramesh may also amount to the crime against humanity of murder.

Incident 3: Killing of Isaipriya

(i) Evidentiary material

Background

- 9.74 Isaipriya was a well-known Tamil personality who worked for a Tamil television station as a newsreader and actor.¹¹⁹⁹ UK Channel 4 reported that a former colleague of Isaipriya stated that Isaipriya was a member of the LTTE and worked for the LTTE's press and communications wing.¹²⁰⁰ The witness account of a person who personally knew Isaipriya from 2005 indicates that she was married to an LTTE cadre who was killed in the hostilities during the final months of the conflict.¹²⁰¹ This witness account also indicates that Isaipriya's young son also died about a month before the conflict ended.¹²⁰² On 15 May 2009, this witness saw Isaipriya in a bunker between Karaiyamullivaikkal and Vellamullivaikkal.¹²⁰³ The witness described Isaipriya as wearing civilian clothing, unarmed, underweight and visibly upset.¹²⁰⁴
- 9.75 The Sri Lankan Ministry of Defence reported that 'Lt. Col. Issei Piriya', allegedly a member of the LTTE's Communications/Publicity Wing, was killed by troops of the 53rd Division on 18 May 2009.¹²⁰⁵ Channel 4 has reported that the Sri Lankan High Commission claimed that she was 'engaged in a hostile operation against the Sri Lanka Security Forces when she met her end'.¹²⁰⁶
- 9.76 The UN Expert Panel referred to video footage released by UK Channel 4 in December 2010, which shows the bodies of naked and executed persons.¹²⁰⁷ Among them is reportedly the body of a woman identified as the popular Tamil newsreader, Isaipriya.¹²⁰⁸ The extended video shows the faces of soldiers and shows others filming the scene with cell phones. However, the UN Expert Panel did not make findings in relation to the circumstances of Isaipriya's death or her treatment.¹²⁰⁹

Isaipriya's detention in SFs custody

- 9.77 New video footage that was publicly released by UK Channel 4 has been analysed by ICEP's independent forensic audio-visual specialist. The video depicts a young woman in the custody of armed and uniformed Sri Lankan Army soldiers.¹²¹⁰ Channel 4 has verified

¹¹⁹⁹ WS-809, [9]; WS-810, [17]; WS-805, [68].

¹²⁰⁰ Channel 4, 'Sri Lanka "War Crimes" Video: Woman's Body Identified', 8 December 2010, <http://www.channel4.com/news/sri-lanka-war-crimes-video-womans-body-identified>.

¹²⁰¹ WS-810, [17].

¹²⁰² Ibid.

¹²⁰³ Ibid.

¹²⁰⁴ Ibid.

¹²⁰⁵ Sri Lankan Ministry of Defence, 'Identified LTTE Leaders who Were Killed during the Last Battle' (media release), 21 June 2009.

¹²⁰⁶ Channel 4, 'Sri Lanka "War Crimes" Video: Woman's Body Identified', 8 December 2010, <http://www.channel4.com/news/sri-lanka-war-crimes-video-womans-body-identified>; see also UN Expert Panel Report, [149].

¹²⁰⁷ UN Expert Panel Report, [149].

¹²⁰⁸ Ibid, [149].

¹²⁰⁹ Ibid, [149].

¹²¹⁰ Channel 4 News, 'Fate of Tamil Propagandist: New Sri Lanka Evidence – Video', 31 October 2013, <http://www.channel4.com/news/fate-of-tamil-actress-chilling-new-evidence-from-sri-lanka> [accessed 11 November 2013].

that the young woman depicted in the video is Isaipriya.¹²¹¹ The footage appears to have been taken along the Nanthikadal Lagoon given that the water in the background appears to be still.¹²¹² The muddy shores of the area east of Wadduvakal town directly opposite the Mullivaikkal peninsula can be seen in the footage.¹²¹³ Isaipriya is depicted sitting in mud while her upper body and breasts are exposed, and she wears a pair of light brown coloured trousers.¹²¹⁴ A soldier appears to touch her right breast as he holds her back upright so that she is directly facing the camera. Three soldiers in Army uniform approach Isaipriya with a large white cloth that is draped across her shoulder as she is pulled out of the mud and led towards the camera. One soldier keeps hold of her right arm and left shoulder. Isaipriya is showing her teeth, and appears to be grimacing.¹²¹⁵ In the background of the footage, sounds that appear to be gunshots can be heard.¹²¹⁶ The words ‘Prabhakaran’s daughter’ and ‘No, it’s not me’ can be heard during the clip.

The death of Isaipriya

- 9.78 Another series of photographs and video footage, some of which were independently obtained by ICEP and others which were publicly released by UK Channel 4, shows Isaipriya’s dead body. One photograph released by Channel 4 depicts a young woman identified as Isaipriya lying on the ground with another young woman who also appears to be dead.¹²¹⁷ There is a white cloth placed over her body. According to Channel 4, the photograph was taken at 3:17pm on 18 May 2009, which is consistent with the Sri Lankan Government’s account of when Isaipriya was killed.
- 9.79 A video clip released by Channel 4 suggests that Isaipriya’s body was moved after death to a muddy flat where several other individuals allegedly died.¹²¹⁸ The young woman in the video has her bloodied shirt lifted to expose both breasts. A white cloth covers her stomach and waist. There also appears to be blood on Isaipriya’s face and her left breast.
- 9.80 Consistent with the video clip described above, ICEP has collected additional photographs that depict a scene with seven naked or partly clad individuals,¹²¹⁹ one of whom is Isaipriya lying on her back. Six of the individuals have ligatures, and five have blindfolds around their faces.¹²²⁰ None of these individuals are wearing military-style uniforms.¹²²¹ Independent analysis by a forensic pathologist engaged by ICEP indicates that blood patterns are consistent with the death of persons depicted in the photographs as occurring at the scene, or somewhat less likely, that the bodies were moved to this place soon after death.¹²²² According to this forensic pathologist, Isaipriya may have had her hands bound behind her back.¹²²³ She appears to have blood across her face. Her shirt is bloodied and is bunched at

1211

Ibid.

1212

Ibid.

1213

Ibid.

1214

Ibid.

1215

Ibid.

1216

Ibid.

1217

See video report which featured the photographs on Channel 4 website, ‘Sri Lanka “War Crimes” Video: Woman’s Body Identified’, 8 December 2010, <http://www.channel4.com/news/sri-lanka-war-crimes-video-womans-body-identified>.

1218

Ibid.

1219

Dr Christopher Lawrence Expert Report, 4; ICEP photographs DSC00378, IMG0472A.

1220

Dr Christopher Lawrence Expert Report, 4–6; ICEP photographs DSC00378, DSC00381.

1221

Dr Christopher Lawrence Expert Report, 6.

1222

Expert forensic pathology report commissioned by ICEP, 6–7.

1223

ICEP photograph DSC00378; Expert forensic pathology report commissioned by ICEP, 5.

her neck, exposing her right breast.¹²²⁴ She is wearing light brown coloured trousers, similar to those depicted in the video described above.¹²²⁵ A white cloth that could be the same cloth depicted in the Channel 4 video described above, loosely placed over her stomach and waist, covering her genitals.¹²²⁶ Her underwear appears to have been completely removed from her left leg and rests on her right leg adjacent to her trousers, which have been pulled down to her knees.¹²²⁷

- 9.81 The scene also shows that two of the bodies have been placed in superficial holes in the ground, which, according to ICEP's forensic pathologist, look like superficial graves.¹²²⁸ Further to this, the positioning of some of the bodies suggests that they were moved after death.¹²²⁹

(i) Legal analysis

Murder as a war crime

Causal connection between the perpetrator's conduct and Isaipriya's death

- 9.82 While further investigation is required to determine the cause of Isaipriya's death,¹²³⁰ there is circumstantial evidence linking the conduct of SFs personnel to Isaipriya's death. Photographs and videos indicate that at the time of her death, she was partially covered by clothing, potentially had her hands bound behind her back, and was killed in close proximity to others who had been blindfolded, bound and also killed¹²³¹ a scene that has been characterised as akin to an execution-style homicide.¹²³² Isaipriya was likely to have been in the custody of the SFs prior to the time of her death on 18 May 2009. Moreover, the Sri Lankan Ministry of Defence attributed the killing of Isaipriya directly to soldiers of the 53rd Division.

Civilians or members of an armed group placed hors de combat at the time of death

- 9.83 Whether classified as a civilian or a fighter *hors de combat*,¹²³³ Isaipriya appeared to be in the SFs custody prior to her death and as such would be protected by IHL against attack. Moreover, it is reasonable to conclude that the perpetrator or perpetrators who may be responsible for Isaipriya's death were aware of the factual circumstances that established her status.

Nexus between conduct and the armed conflict

- 9.84 Isaipriya was taken into SFs' custody as hostilities continued in the vicinity of where Isaipriya was held; she was a high-profile Tamil newsreader who worked for the LTTE's media wing, and the LTTE were the opposing party in the conflict. It is reasonable to conclude that the nexus element would be satisfied.¹²³⁴

¹²²⁴ ICEP photographs DSC00378, IMG0472A.

¹²²⁵ ICEP photograph DSC00378.

¹²²⁶ ICEP photographs DSC00378, IMG0472A.

¹²²⁷ Ibid.

¹²²⁸ Expert forensic pathology report commissioned by ICEP, 4; ICEP photographs DSC00378, DSC00381.

¹²²⁹ Expert forensic pathology report commissioned by ICEP, 4, 6; ICEP photographs DSC00379, DSC00383, DSC00378.

¹²³⁰ See expert forensic pathology report commissioned by ICEP, 16.

¹²³¹ Expert ballistics report commissioned by ICEP, 1–2.

¹²³² See expert ballistics report commissioned by ICEP, 1–2.

¹²³³ Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (December 2008) 90 *International Review of the Red Cross* 872, 1006–7.

¹²³⁴ See ICC Elements of Crimes, Art 8(2)(c)(i)-1(5).

Establishing intent and knowledge

- 9.85 Further investigation is warranted in order to ascertain whether it is possible to identify specific perpetrator(s) who might bear criminal responsibility for these events.

Conclusion

- 9.86 There are reasonable grounds to suspect that one or more SFs soldiers may have committed the war crime of murder under Article 8(2)(c)(i) of the ICC Statute, by killing Isaipriya. Although not analysed in detail here, the killing of Isaipriya may also amount to the crime against humanity of murder.

Incident 4: Killing of Balachandran

(i) Evidentiary material

Background

- 9.87 In March 2012, UK Channel 4 featured previously unreleased photographs and video footage in its documentary, 'Sri Lanka's Killing Fields: War Crimes Unpunished'. This material depicted Balachandran, and others suspected to be his bodyguards, as dead.
- 9.88 On 19 February 2013, additional photographs, reportedly depicting Balachandran alive in SFs custody, were publicly released.¹²³⁵ These photographs were included in a feature documentary called 'No Fire Zone: The Killing Fields of Sri Lanka', which premiered in Geneva in March 2013.¹²³⁶ In response to these recent media reports President Rajapaksa denied that the Army killed Balachandran. He reportedly stated, 'Had it happened, I would have known. It is obvious that if somebody [from the armed forces] had done that, I must take responsibility. We completely deny it. It can't be.'¹²³⁷

Balachandran's death

- 9.89 Two photographs publicly released in February 2013, which depict Balachandran alive, also indicate that Balachandran was taken into Army custody. In both photographs, Balachandran appears to be in a sandbag bunker, wearing brown and black coloured shorts without a shirt.¹²³⁸ In one photograph, he is depicted with food and a drink.¹²³⁹ In the foreground of two of the photographs, the arm of an individual in khaki clothing can be observed.¹²⁴⁰
- 9.90 This evidentiary material is consistent with an additional series of photographs, which were published in the media, and which appear to depict events subsequent to Balachandran being taken into custody. Metadata indicates these photographs were taken on or about 19

¹²³⁵ Callum Macrae, 'The Killing of a Young Boy', *The Hindu*, 19 February 2013, <http://www.thehindu.com/opinion/op-ed/the-killing-of-a-young-boy/art4428792.ece>. Callum Macrae was a member of the UK Channel 4 team which produced two documentaries entitled: 'Sri Lanka's Killing Fields'; and 'Sri Lanka's Killing Fields: War Crimes Unpunished'.

¹²³⁶ The feature documentary is called 'No Fire Zone: Sri Lanka's Killing Fields': see Callum Macrae, 'The Killing of a Young Boy', *The Hindu*, 19 February 2013, <http://www.thehindu.com/opinion/op-ed/the-killing-of-a-young-boy/art4428792.ece>. Members of Macrae's team on the feature documentary are also understood to have worked on Channel 4's documentaries on Sri Lanka.

¹²³⁷ R. K. Radhakrishnan, 'Rajapaksa Denies Army Killed Balachandran', 1 March 2013, <http://www.thehindu.com/news/international/south-asia/rajapaksa-denies-army-killed-balachandran/art4466282.ece>.

¹²³⁸ See photographs 1 and 2 in Callum Macrae, 'The Killing of a Young Boy', *The Hindu*, 19 February 2013, available at: <http://www.thehindu.com/opinion/op-ed/the-killing-of-a-young-boy/art4428792.ece>.

¹²³⁹ See photograph 2 in *ibid*.

¹²⁴⁰ *Ibid*.

May 2009 between 12:50pm and 12:53pm using a compact digital camera.¹²⁴¹ In these photographs, soldiers can be observed.¹²⁴² In three photographs in which the young man depicted is likely deceased,¹²⁴³ analysis by an independent forensic pathologist commissioned by ICEP indicates that Balachandran has five gunshot wounds in the chest and abdomen.¹²⁴⁴ One of the gunshot wounds shows surrounding soot, indicating that it was a contact or near-contact range gunshot wound.¹²⁴⁵ This analysis is consistent with the findings of another forensic pathologist, Professor Derrick Pounder, who was engaged by Channel 4 to examine photographic material relating to Balachandran's death. Professor Pounder noted the following:

There is a speckling (on the skin) from propellant tattooing, indicating that the distance of the muzzle of the weapon to the boy's chest was two to three feet or less. He could have reached out with his hand and touched the gun that killed him.¹²⁴⁶

- 9.91 On the basis of photographs and the distinctive speckling around one of the gunshot wounds, Professor Pounder also noted that after the first shot was fired at Balachandran, and he fell backwards, he was shot four more times.¹²⁴⁷ According to ICEP's forensic pathologist, a photograph depicting Balachandran, with a flash reflection on the skin of the abdomen, suggests that the body might have been washed after death.¹²⁴⁸
- 9.92 Digital image analysis indicates that the same camera was used to capture photographs of Balachandran alive in SFs custody and another photograph that depicts Balachandran's dead body.¹²⁴⁹ These photographs were captured within a two-hour timeframe, on 19 May 2009.¹²⁵⁰ This independent analysis is consistent with a media report claiming that Balachandran surrendered with several bodyguards to the 53rd Division near Nanthikadal Lagoon at 7:30am on 19 May 2009.¹²⁵¹ If this media report is proved correct, it would support an inference that, in relation to the photographs referred to in paragraph 9.89 above, the arm of the individual in khaki clothing belonged to a member of the SFs. From this, it is reasonable to infer that Balachandran was held in SFs custody prior to his death.

(ii) Legal analysis

Murder as a war crime

Causal connection between the perpetrator's conduct and Balachandran's death

- 9.93 Photographs and a video collected by ICEP and subsequently analysed by forensic experts indicate that there is strong circumstantial evidence linking the conduct of SFs personnel to

¹²⁴¹ Expert forensic audio-visual report commissioned by ICEP, 10.

¹²⁴² Expert forensic pathology report commissioned by ICEP, 12; ICEP photographs DSC05598, DSC05599, DSC05603, DSC05604, DSC05605, DSC05606, DSC05607, DSC06608, DSC06609, DSC06610, DSC06611, DSC06612, DSC06613, DSC06614.

¹²⁴³ Expert forensic pathology report commissioned by ICEP, 12.

¹²⁴⁴ ICEP photographs DSC05598, DSC05599, DSC05606; and Expert forensic pathology report commissioned by ICEP, 12.

¹²⁴⁵ Ibid.

¹²⁴⁶ Callum Macrae, 'The Killing of a Young Boy', *The Hindu*, 19 February 2013, <http://www.thehindu.com/opinion/op-ed/the-killing-of-a-young-boy/art4428792.ece>.

¹²⁴⁷ Ibid.

¹²⁴⁸ ICEP photographs DSC05598, DSC05599, DSC05606; expert forensic pathology report commissioned by ICEP, 12-13.

¹²⁴⁹ See Callum Macrae, 'The Killing of a Young Boy', *The Hindu*, 19 February 2013, <http://www.thehindu.com/opinion/op-ed/the-killing-of-a-young-boy/art4428792.ece>.

¹²⁵⁰ Ibid.

¹²⁵¹ 'Major General Kamal Gunaratne Had Murdered Balachandran on Gotabhaya's Order', Lanka News Web, 14 June 2012.

Balachandran's death: Balachandran was in SFs custody on 19 May 2009; Balachandran received five gunshot wounds to the chest and abdomen around the time of his death, one of which appeared to be a contact or near-contact range gunshot wound suggesting an execution-style homicide,¹²⁵² and SFs soldiers were at the location where Balachandran and six other men are depicted dead, quite soon after the time of death. Accordingly, there are reasonable grounds to suspect that Balachandran was killed by, or with the involvement of, SFs soldiers on 19 May.

Civilian taking no active part in hostilities at the time of his death

- 9.94 On the basis of photographs and videos collected by ICEP, it is clear that Balachandran, a 12-year-old boy who was dressed in civilian shorts, was a civilian at the time he was taken into SFs custody and remained so at the time of his death. It is also reasonable to conclude that the perpetrator or perpetrators in whose custody Balachandran was from 19 May 2009, were aware of the factual circumstances that established Balachandran was a civilian child at the time of his death.

Nexus between conduct and the armed conflict

- 9.95 Balachandran was taken into SFs custody as hostilities continued in the vicinity of where Balachandran was held; he was the youngest son of the leader of the opposing party to the conflict, LTTE Supreme Leader, Prabhakaran. It is reasonable to conclude that the nexus element would be satisfied.¹²⁵³

Establishing intent and knowledge

- 9.96 Although further investigation is warranted to identify a specific perpetrator who might bear criminal responsibility for Balachandran's death, the manner in which Balachandran was killed provides reasonable grounds to suspect that such a perpetrator intended to cause death.

Conclusion

- 9.97 There are reasonable grounds to suspect that one or more SFs soldiers committed the war crime of murder under Article 8(2)(c)(i) of the ICC Statute, by killing Balachandran who was a civilian taking no active part in hostilities when he was allegedly in SFs custody at the time of his death. Although not analysed in detail here, the killing of Balachandran may also amount to the crime against humanity of murder.

D. Further investigation

- 9.98 Further investigation should be undertaken to ascertain the complete circumstances surrounding the death of Nadesan, Pulidevan, Ramesh, Isaipriya and Balachandran. In particular, investigation into events that occurred between the time they were taken into SFs' custody and death; and to identify the relevant perpetrators.

¹²⁵² Expert forensic pathology report commissioned by ICEP, 13.
¹²⁵³ See ICC Elements of Crimes, Art 8(2)(c)(i)-1(5).

10 USING, CONSCRIPTING OR ENLISTING CHILDREN

A. Summary

- 10.1 The available evidentiary material shows it is reasonable to conclude that:
- the LTTE conscripted and enlisted children under the age of 18;
 - the LTTE may have engaged in conscripting or enlisting children under the age of 15;
 - the Karuna Group, a para-military group, engaged in conscripting and enlisting children under the age of 18 and possibly children under the age of 15; and
 - conscription of children seems to have occurred despite an LTTE written policy suggesting such practices were unacceptable.
- 10.2 The conscription or enlistment of children is prohibited under customary international law and is a war crime in the ICC Statute.¹²⁵⁴ The ICC has held that ‘enlisting’ and ‘conscripting’ are two forms of recruitment, with ‘conscripting’ referring to forced recruitment and ‘enlisting’ referring to a voluntary act.¹²⁵⁵ In this report, ICEP adopts the ICC’s definitions of ‘enlisting’ and ‘conscripting’, and examines witness accounts using this terminology based on their description of events. ICEP uses the term ‘recruiting’ more generally where the specific type of recruitment is unclear, noting that both enlistment and conscription constitute offences.
- 10.3 The age limit for enlisting or conscripting varies under the different sources of international law. Under international human rights law, the minimum age is 15 years for enlistment into States’ armed forces and 18 years for compulsory recruitment, whereas the minimum age for all recruitment by armed groups is 18 years. For customary IHL and international criminal law, the minimum age for any enlistment and conscription is 15 years.¹²⁵⁶
- 10.4 Witness accounts available to ICEP provided sufficient information to examine one incident involving possible child conscription during ICEP’s primary investigation period (the final months of the conflict), an incident at Valayanmadam Church. The incident at Valayanmadam Church could amount to the war crime of conscripting children or the war crime of cruel treatment. In addition, other international norms prohibiting the recruitment of children may have been breached during the course of the incident at Valayanmadam Church.
- 10.5 Further investigation should be undertaken to ascertain whether the crimes of conscripting children, or of cruel treatment were committed by the LTTE under customary international law or the ICC Statute. ICEP has identified gaps in information with respect to the incident at Valayanmadam Church; as well as information that would be useful more generally in establishing other incidents that could amount to the war crime of conscription or the war crime of cruel treatment.

¹²⁵⁴ Special Court of Sierra Leone, Appeals Chamber, Decision on preliminary motion based on lack of jurisdiction (child recruitment), May 2004; ICC Statute, art 8(2)(e)(vii).

¹²⁵⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber 1, Decision on the Confirmation of Charges, 29.1.2007, [246]–[247].

¹²⁵⁶ See section 8, Legal Framework.

B. Evidentiary material analysis

(i) Background

- 10.6 Between the period of April 2001 and the end of October 2006, the United Nations Children's Fund (**UNICEF**) verified 5,794 cases of child recruitment by the LTTE.¹²⁵⁷ By 31 October 2006, 1,598 were believed to be still with the LTTE, of which 649 remained under 18 at that time.¹²⁵⁸ This figure only represents cases reported to UNICEF. Evidentiary material (discussed below in paragraph 10.8 in more detail) suggests that Colonel Karuna was involved in child recruitment both while he was an LTTE commander and after he split from the group in early 2004. The evidentiary material discussed below also suggests that the LTTE continued to recruit children after Karuna split from the group.
- 10.7 According to a senior LTTE cadre, before March 2004, there were a few cadres under the age of 18 years who volunteered for the LTTE; according to this witness, a few cadres were as young as 16 years.¹²⁵⁹ This witness also stated that at the time of Karuna's defection from the LTTE (in 2004), there were about 150 LTTE cadres aged 15 and 16 years old, who had been 'recruited' by Karuna when they were 14 or 15 years old.¹²⁶⁰ The witness stated that these children were returned to their parents and UNICEF was notified; however, the witness does not specify when they were returned.¹²⁶¹ It is unclear whether the apparent discrepancy (a few versus 150) in numbers of cadres around 16 years of age in March/April 2004 is because the witness is referring to voluntary recruitment in one instance and forced recruitment in the other.
- 10.8 Evidentiary material – including the Report of the Secretary-General on children and armed conflict, a witness account, and a HRW report – suggests that after his split from the LTTE, Karuna continued to recruit children under the age of 18 into the Karuna Group.¹²⁶² According to the 2006 Report of the Secretary-General, '[a]s of 31 October 2006, UNICEF had received reports of 164 children being recruited by the Karuna faction.'¹²⁶³ The witness referred to above asserted that Karuna continued to conscript children – the witness said he saw them among Karuna's fighters.¹²⁶⁴ HRW reported that the Karuna group abducted and conscripted children.¹²⁶⁵ The witness, a senior LTTE member, saw at least five cadres, whom he estimated to be aged 14 or 15 years, fighting for the Karuna Group.¹²⁶⁶
- 10.9 In addition to allegations of child conscription or enlistment by Karuna, evidentiary material shows that the LTTE also increasingly engaged in this practice as the war progressed.

¹²⁵⁷ Report of the Secretary-General on children and armed conflict in Sri Lanka, 20 December 2006, S/2006/1006, [16].

¹²⁵⁸ Ibid.

¹²⁵⁹ Unsigned witness statement of WS-1201, [22]. ICEP has been informed that the witness has signed an identical document to the one in ICEP's possession.

¹²⁶⁰ WS-1201, [2].

¹²⁶¹ Ibid.

¹²⁶² Report of the Secretary-General on children and armed conflict in Sri Lanka, 20 December 2006, S/2006/1006, [24]; WS-1201, [4]; HRW, *Complicit in Crime: State Collusion in Abductions and Child Recruitment by the Karuna Group* (2007), at 3–10, <http://www.hrw.org/en/reports/2007/01/23/complicit-crime-0> [accessed 24 June 2013].

¹²⁶³ Report of the Secretary-General on children and armed conflict in Sri Lanka, 20 December 2006, S/2006/1006, [24].

¹²⁶⁴ WS-1201, [4].

¹²⁶⁵ HRW, *Complicit in Crime: State Collusion in Abductions and Child Recruitment by the Karuna Group* (2007), 3–10, <http://www.hrw.org/en/reports/2007/01/23/complicit-crime-0> [accessed 24 June 2013].

¹²⁶⁶ WS-1201, [4].

According to the UN Expert Panel, the LTTE mainly relied on ‘forced recruitment’ (understood by ICEP to mean conscription) to maintain its forces.¹²⁶⁷ It stated:

While previously the LTTE took one child per family for its forces, as the war progressed, the policy intensified and was enforced with brutality, often recruiting several children from the same family, including boys and girls as young as 14.¹²⁶⁸

10.10 The UN Expert Panel noted that parents actively resisted the increasing ‘LTTE recruitment’ and took measures such as hiding their children in secret locations or forcing them into early arranged marriages.¹²⁶⁹ It stated, ‘LTTE cadre [sic] would beat relatives or parents, sometimes severely, if they tried to resist the recruitment.’¹²⁷⁰ UNICEF verified and documented 397 cases of ‘child recruitment’ including 147 girls, by the LTTE, between 1 January and 19 May 2009.¹²⁷¹ Although the 2009 Secretary-General Report on children and armed conflict in Sri Lanka noted a decrease in the numbers of child recruitment cases reported, as will be discussed below, this may not be because actual numbers decreased, but rather because reporting decreased.¹²⁷²

(ii) Policy and practice

10.11 It was widely known that during the conflict the LTTE practised conscription generally.¹²⁷³ Under this policy, the LTTE required each Tamil family to contribute one member to the LTTE’s cause.¹²⁷⁴ One witness, a senior LTTE member, explained that the LTTE’s policy of conscription only applied to civilians over the age of 18 years,¹²⁷⁵ while other witnesses have stated that LTTE forces included children aged under 18 years.¹²⁷⁶ A senior local official of an NGO, whose statement was taken directly by ICEP, has also alleged that conscripted soldiers could be released if their birth documentation was provided to the LTTE to prove that they were under the age of 18.¹²⁷⁷ Both the HRW report and the UN Expert Panel address the existence of a conscription policy; however, neither HRW nor the UN Expert Panel stated that this policy was confined to people aged over 18 years and both described the LTTE conscripting children.¹²⁷⁸ Neither HRW nor the UN Expert Panel provided an exact start date for the policy of conscription.¹²⁷⁹

¹²⁶⁷ UN Expert Panel Report, [68].

¹²⁶⁸ Ibid, [68], [177](d).

¹²⁶⁹ Ibid, [98], fn 52: ‘early marriage was perceived to protect girls and boys from LTTE recruitment, as the LTTE preferred to recruit unmarried youth.’

¹²⁷⁰ Ibid, [98].

¹²⁷¹ Ibid, [98], fn. 51.

¹²⁷² Report of the Secretary-General on children and armed conflict in Sri Lanka, 25 June 2009, S/2009/325, [12]–[13].

¹²⁷³ This is discussed in HRW, *Living in Fear: Child Soldiers and the Tamil Tigers in Sri Lanka* (2004), <http://www.hrw.org/reports/2004/11/10/living-fear-0>; HRW, *Besieged, Displaced, and Detained: The Plight of Civilians in Sri Lanka’s Vanni Region* (2008), <http://www.hrw.org/reports/2008/12/22/besieged-displaced-and-detained-0>, 2, 11; HRW, *Trapped and Mistreated: LTTE Abuses against Civilians in the Vanni* (2008), <http://www.hrw.org/reports/2008/12/15/trapped-and-mistreated> [accessed 24 June 2013], 5–10; Amnesty International, *Sri Lanka’s Assault on Dissent* (2013), <http://www.amnestyusa.org/sites/default/files/asa370032013en.pdf> [accessed 20 June 2013], 25.

¹²⁷⁴ WS-1202, [35]; WS-1203, [39]; WS-1204, [143]; WS-1201, [22]. All these witness statements were likely to have been before other inquiries.

¹²⁷⁵ WS-1201, [2], [22].

¹²⁷⁶ Unsigned summary of statement of WS-1205, [131]; WS-1204, [143]; WS-1203, [39]; WS-1206, [76].

¹²⁷⁷ WS-1206, [76].

¹²⁷⁸ UN Expert Panel Report, [68] and [177](d); HRW, *Complicit in Crime: State Collusion in Abductions and Child Recruitment by the Karuna Group* (2007), <http://www.hrw.org/en/reports/2007/01/23/complicit-crime-0> (visited 24 June 2013), 74.

¹²⁷⁹ The HRW report implies that the policy began sometime before 2002. See HRW, *Complicit in Crime: State Collusion in Abductions and Child Recruitment by the Karuna Group* (2007), <http://www.hrw.org/en/reports/2007/01/23/complicit-crime-0> [accessed 24 June 2013], 74. The UN Expert Panel

- 10.12 The LTTE consistently made commitments to cease child recruitment and to release all children from its armed forces. Such commitments were made in 1998 to the Special Representative for children affected by armed conflict; to UNICEF in 2002; and to the Executive Director of UNICEF and under the Action Plan for children affected by war in 2003.¹²⁸⁰ In 2006, the LTTE enacted the Child Protection Act 2006, which outlawed 'enlisting of children under 17 years in Armed Forces, [and made] participation of under 18 year olds in armed combat illegal.'¹²⁸¹
- 10.13 Furthermore, according to a 2006 report by the LTTE Peace Secretariat, *Children and Armed Conflict in the North Eastern Part of the Island of Sri Lanka (LTTE Report)*, the LTTE policy was to return 'all underage children back to their families or to enrol them in the Education and Skill Development Centre ... if they refuse to go back to their families. At ESDC, these youths continue with their education or are placed in some vocational training program.'¹²⁸² While this may not have been the case in practice (to be discussed later in this section), the LTTE had a policy against 'underage' recruitment, at least in 2006, the time the LTTE Report and the Child Protection Act were published.
- 10.14 Although the LTTE Report also stated that 'the LTTE shares [the] ideals' of the 'Optional Protocol on Children in Armed Conflict',¹²⁸³ the LTTE Child Protection Act 2006 is inconsistent with the Optional Protocol. This protocol states that '[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.'¹²⁸⁴ The Child Protection Act 2006 permitted enlisting children who were 17 years.
- 10.15 Despite the LTTE policy against child enlistment and conscription, reports of the Security Council Working Group on Children and Armed Conflict show practice to the contrary (**the Working Group**). In 2007, the Working Group stated, 'Despite the commitment by the LTTE to release all children within its ranks, only a few children have been released to date. Besides, the pattern of abduction, recruitment and use of children had increased over the recent period.'¹²⁸⁵
- 10.16 In 2008, the Working Group continued to express concern that the LTTE 'continued to recruit and use children... and failed to release all the children present in its ranks', although it did note there were signs of a decrease in cases reported to the United Nations task force on monitoring and reporting.¹²⁸⁶ There was no Working Group report on Sri Lanka in 2009. That child recruitment continued casts doubt on the effectiveness of the LTTE's stated policy against enlistment and conscription of children.¹²⁸⁷

does not provide any information on the potential start date of this policy thus making it unclear when exactly this policy was first implemented.

¹²⁸⁰ Report of the Secretary-General on children and armed conflict in Sri Lanka, 20 December 2006, S/2006/1006, [11].

¹²⁸¹ Ibid, and reported identically in Tamilnet, 'Tamil Nadu Legislature enacts Child Protection Act', 25 October 2006, <http://www.tamilnet.com/art.html?catid=13&artid=20025> [accessed 31 October 2013].

¹²⁸² Child Protection Authority of LTTE Peace Secretariat, 'Children and Armed conflict in the Northeastern Part of the Island of Sri Lanka', August 2006, http://www.crin.org/docs/lte_cac.pdf, 7.

¹²⁸³ Ibid.

¹²⁸⁴ Art 4, Optional Protocol on the Rights of the Child on the Involvement of Children in Armed Conflict.

¹²⁸⁵ Security Council Working Group on Children and Armed Conflict, 'Conclusions on Children and Armed Conflict in Sri Lanka', 13 June 2007, S/AC.51/2007/9, [5].

¹²⁸⁶ Ibid, [2(f)].

¹²⁸⁷ Child Protection Authority of LTTE Peace Secretariat, 'Children and Armed conflict in the Northeastern Part of the Island of Sri Lanka', August 2006, http://www.crin.org/docs/lte_cac.pdf, 7.

- 10.17 The 2009 Report of the Secretary-General on children and armed conflict in Sri Lanka stated, 'families reported to UNICEF that they were facing harassment and intimidation by LTTE not to report child recruitment'.¹²⁸⁸ Furthermore, there were 'grave concerns that, in the last months, LTTE has forcibly recruited a much larger number of children, allegedly some as young as 14 years of age' which could not be verified because of limited access and increased insecurity in the Vanni at that time.¹²⁸⁹
- 10.18 Witness accounts, most of which were likely to have been before the UN Expert Panel, point to the greatest deterioration of the LTTE's stated policy against recruiting children under the age of 18 as occurring in 2009. An NGO official stated that in the final months of the war, 'the LTTE organisational structures had completely broken down and rules were usually unenforceable'.¹²⁹⁰ According to the senior LTTE member:
- I know, from my conversations with the Political Wing in the Vanni, that when things became really desperate in April and May 2010 [it is assumed the witness is referring to April and May 2009] that the recruitment policy changed. One of the changes was that more were needed and expected to fight. Accordingly, those 16 and above were recruited either voluntarily or otherwise.¹²⁹¹
- 10.19 A senior local official of an international agency who worked in the Vanni towards the end of the war heard from some families that, after February 2009, '*the LTTE started to recruit those aged from 16 years*'.¹²⁹² The official received this information through the course of working at the international agency.
- 10.20 The difficulty in obtaining accurate reports, which was referred to in paragraph 10.17, tends to limit the extent to which an assessment can be made about the status of the LTTE recruitment policy towards the end of the war.
- 10.21 While it seems highly probable that children under the age of 18 were conscripted and enlisted, further investigation is needed into the question whether and, if so, the extent to which the LTTE recruited (either by conscripting or enlisting) children under the age of 15. The 2006 Report of the Secretary-General on children and armed conflict in Sri Lanka stated that the average age of child recruitment cases reported to UNICEF since 2004 was 16 years (in 2001, the average age of child recruitment reported was even younger – 14 years).¹²⁹³ If this was the average, it is highly probable that there were some cases of children under 15 being recruited during this period.
- 10.22 Notably, the LTTE Report concedes that the enlistment or conscription of children under the age of 18 or even 15 is possible:

A problem faced by the LTTE is that often children seeking to join them misrepresent their ages in order to be able to get into full training and combat. Many children and adults are missing their birth certificates or other documents because of a quarter

¹²⁸⁸ Report of the Secretary-General on children and armed conflict in Sri Lanka, 25 June 2009, S/2009/325, [13].

¹²⁸⁹ Ibid.

¹²⁹⁰ WS-1203, [39]; see also WS-1201, [31].

¹²⁹¹ WS-1201, [25].

¹²⁹² WS-1204, [143].

¹²⁹³ Report of the Secretary-General on children and armed conflict in Sri Lanka, 20 December 2006, S/2006/1006, [11].

century of turmoil, which makes determining age difficult. If such misrepresentation is found out, the LTTE releases these children.¹²⁹⁴

- 10.23 A number of witnesses,¹²⁹⁵ including members of the LTTE, and an official of an international agency, stated that they have never seen the LTTE recruit children.¹²⁹⁶ The senior LTTE member stated, even towards the final months of the war: 'I certainly have never heard of any LTTE policy that anyone under the age of 16 was to be forcibly recruited or allowed to volunteer.'¹²⁹⁷ While LTTE policy may not have allowed for child recruitment, and while some witnesses themselves never saw child recruitment practices, the overwhelming majority of evidentiary material shows there are reasonable grounds to suspect that children were forcibly recruited into the LTTE.
- 10.24 The Sri Lankan Government has alleged that the LTTE conscripted children.¹²⁹⁸ The LLRC asserted: 'Conscription of children was one of the worst forms of crimes committed by the LTTE during the time of the conflict.'¹²⁹⁹ More recently, the Government produced a documentary accusing the LTTE of a range of crimes, including the crime of recruiting children under the age of 18.¹³⁰⁰ The documentary includes interviews with witnesses to an alleged incident of conscription at Valayanmadam Church. One witness claims his 14-year-old sister was '*forcibly recruited*' by an LTTE cadre.¹³⁰¹ The incident at Valayanmadam Church is discussed below.

(iii) Incident at Valayanmadam Church

- 10.25 The UN Panel of Experts found that, on one occasion in mid-April 2009, LTTE cadres, led by the former Trincomalee Political Wing leader known as Ezhilan, conscripted hundreds of young¹³⁰² people from Valayanmadam Church and put them on buses to Mullivaikkal.¹³⁰³
- 10.26 A senior local official of an international agency, a direct eyewitness, stated that these young people appeared to be aged between 15 and 35 years.¹³⁰⁴ Another direct eyewitness, a local official of an international agency, estimated the young people to be aged between 14 and 25 years.¹³⁰⁵ The three other direct eyewitnesses were unable specifically to recall their ages but identified the people as 'young'.¹³⁰⁶ At the time, hundreds of youths were seeking

¹²⁹⁴ Child Protection Authority of LTTE Peace Secretariat, 'Children and Armed conflict in the Northeastern Part of the Island of Sri Lanka', August 2006, http://www.crin.org/docs/ltte_cac.pdf, 7–8.

¹²⁹⁵ Whose statements are all likely to have been before other inquiries.

¹²⁹⁶ WS-1203, [39] (noting that 17-year-olds were recruited); WS-1207, [23]; summary of witness statement WS-1205, [131]–[132]; WS-1208, [46] (defining a child as under 15); WS-1201, [25] (defining a child as under 16); WS-1209, [31].

¹²⁹⁷ WS-1201, [25].

¹²⁹⁸ Transcript of Representations made by Gotabaya Rajapaksa at the Lessons Learnt and Reconciliation Commission, 17 August 2010, at 1.

¹²⁹⁹ LLRC Report, [5.79].

¹³⁰⁰ Sri Lankan Ministry of Defence, *Ruthless*, (February 2012)

http://www.colombopage.com/archive_12/Feb08_1328714647CH.php [accessed 8 July 2013], 8, 10 (a documentary on LTTE atrocities). It is worth noting that these allegations were made without reference to domestic or international law and so it is not clear which laws the Government is referring to when it alleges crimes were committed. This is relevant given the varying age threshold for the international crime of forced recruitment.

¹³⁰¹ ICEP has been unable to independently verify the accounts in this documentary. Nonetheless, in Part B of this section, ICEP has considered allegations regarding the alleged incident at Valayanmadan Church based on the witness statements it has received.

¹³⁰² The UN Expert Panel did not specify the ages of the 'young' people involved in this incident.

¹³⁰³ UN Expert Panel Report, [113].

¹³⁰⁴ WS-1204, [147].

¹³⁰⁵ WS-1210, [119].

¹³⁰⁶ WS-1211, [11]; WS-1212, [213].

asylum in the church with the priests.¹³⁰⁷ According to one of the local officials of an international agency that was present:

[A]bout 500 armed LTTE cadres came to the church led by Ezhilan, the former Trincomalee Political Wing Leader... the LTTE fired into the air. The LTTE then advanced into the church, beating the parents back with sticks and PVC pipes. They took all the youths and put them on big buses and took them to the Mullivaikal area where they had training camps. ... [The youths] were very upset and crying and begging for help.¹³⁰⁸

10.27 A senior official of an international agency who was present, saw about 25 LTTE cadres armed with AK-47s, in groups of five, who appeared to be led by 'the former Trincomalee Political Wing Head' at the front of the church compound.¹³⁰⁹ He also saw Ilamparthy, also known as Anchinayer, the former Political Wing Head for Jaffna District.¹³¹⁰ The official was later told by those present at the church that the priests came out of the church to speak with the LTTE.¹³¹¹ Ezhilan apparently wanted to search for deserters.¹³¹² The priests refused to grant the LTTE permission to enter the church but the LTTE forced their way into the compound.¹³¹³ The witness then reported hearing gunshots.¹³¹⁴ According to him and another witness, hundreds of people were running in all directions.¹³¹⁵ Then, according to the first witness, 'a short time later, a number of vans and pickups came to the church compound and started to load up civilians from inside.'¹³¹⁶ This witness recalled that these vehicles made several trips, picking up young men and women.¹³¹⁷

C. International legal framework

(i) *The prohibition of recruitment of children*

10.28 Customary IHL prohibits the recruitment of children below the age of 15 during both international and NIACs.¹³¹⁸ In addition, the compulsory recruitment of children under 18 is prohibited by the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (the Optional Protocol of CRC)*¹³¹⁹ and the *Worst Forms of Child Labour Convention (No. 182)*.¹³²⁰

10.29 Moreover, the Optional Protocol sets out a strict prohibition for armed groups. Article 4 states: 'Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.'¹³²¹ While

¹³⁰⁷ WS-1210, [119]; WS-1212, [212].

¹³⁰⁸ WS-1210, [119].

¹³⁰⁹ WS-1204, [146].

¹³¹⁰ Ibid.

¹³¹¹ Ibid.

¹³¹² Ibid.

¹³¹³ Ibid.

¹³¹⁴ Ibid.

¹³¹⁵ Ibid; WS-1212, [212].

¹³¹⁶ WS-1204, [147].

¹³¹⁷ Ibid.

¹³¹⁸ Rule 136, CIHL Study.

¹³¹⁹ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted May 25, 2000, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), entered into force February 12, 2002. Sri Lanka ratified the protocol on September 8, 2000.

¹³²⁰ Arts 2, 3(a), International Labour Organization (ILO), Worst Forms of Child Labour Convention, C182, 17 June 1999, http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C182 [accessed 3 July 2013]. Sri Lanka ratified the Convention on 1 March 2001.

¹³²¹ Art 4, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted May 25, 2000, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), entered into force February 12, 2002. Sri Lanka ratified the protocol on September 8, 2000.

there is a general agreement that this provision does not create a legally binding obligation on armed groups,¹³²² there is growing consensus that non-state actors are expected to comply with international human rights law and their conduct will be evaluated accordingly, in particular when an armed group exercises territorial control.¹³²³

- 10.30 UN organs, including the Security Council, routinely request non-state actors to respect human rights law. Specifically in respect of the recruitment of children, UN Security Council Resolution 1612 (2005):

Strongly condemns the recruitment and use of child soldiers by parties to armed conflict in violation of international obligations applicable to them and all other violations and abuses committed against children in situations of armed conflict.¹³²⁴

- 10.31 The UN Working Group on Children and Armed Conflict repeatedly condemned the leadership of the LTTE for its 'continuous recruitment and use of child soldiers.'¹³²⁵

- 10.32 Finally, under the *Worst Forms of Child Labour Convention* (No. 182), the Sri Lankan government is required to take measures to prevent the engagement of children in the worst forms of child labour (which includes child conscription), remove them from these circumstances, and assist their rehabilitation and social reintegration.¹³²⁶ Further, it obliges the Sri Lankan Government to 'take immediate and effective measures to secure the prohibition and elimination of the worst forms of labour [ie, including child conscription] as a matter of urgency.'¹³²⁷ In 2006, the Sri Lankan Penal Code was amended to bring it into conformity with this Convention. At the relevant time, then, forcible or compulsory recruitment of children for use in armed conflict is a crime under Sri Lankan domestic legislation carrying a maximum penalty of 20 years' imprisonment.¹³²⁸

(ii) Age limit

- 10.33 Enlisting or conscripting children in NIACs is prohibited by customary IHL, the ICC Statute, and other international conventions.¹³²⁹ However, as can be seen above, the age limit on the prohibition is not uniform.

¹³²² See, eg, ICRC, 'Treaties and States Parties to Such Treaties', <http://www.icrc.org/ihl/INTRO/595>, [accessed 25 September 2013]; UNICEF, 'Guide to the Optional Protocol on the Involvement of Children in Armed Conflict', 2003, 17, http://www.unicef.org/publications/files/option_protocol_conflict.pdf, [accessed 25 September 2013].

¹³²³ See, eg, A Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations', *International Review of the Red Cross*, 88(863) 2006, at 495–508.

¹³²⁴ UN Security Council Resolution 1612 (2005), [1]. See also UN Security Council Resolution 1539 (2004), [1].

¹³²⁵ UN Working Group on Children and Armed Conflict, 'Conclusions on Children and Armed Conflict in Sri Lanka', 2007, UN Doc. S/AC.51/2007/9, [10(b)]; 'Conclusions', 2008, UN Doc./S/AC.51/2008/11, [5(e)].

¹³²⁶ Arts 6, 7(2)a, 7(2)b, International Labour Organization (ILO), *Worst Forms of Child Labour Convention*, C182, 17 June 1999, http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C182 [accessed 3 July 2013].

¹³²⁷ Art 1, International Labour Organization (ILO), *Worst Forms of Child Labour Convention*, C182, 17 June 1999, http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C182 [accessed 3 July 2013].

¹³²⁸ Sri Lankan Penal Code, section 358 A, amended in 2006. See s 7, *Penal Code (Amendment) Act* (No. 16 of 2006), http://www.commonlii.org/lk/legis/num_act/pca16o2006213/s7.html [accessed 9 July 2013]. The word 'child' is not defined in the Code. References to children in other provisions of the Sri Lankan Penal Code are of limited assistance as the age at which a person is considered a child differs depending on the provision. Consequently, the LTTE could also be in contravention of the Sri Lankan Penal Code depending on the age limitation.

¹³²⁹ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted May 25, 2000, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49), U.N. Doc. A/54/49, Vol. III (2000), entered into force February 12, 2002, 7; Arts 2, 3(a), International Labour Organization (ILO), *Worst Forms of Child Labour Convention*, C182, 17 June 1999, available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C182 [accessed 3 July 2013]; Arts 2, 22, Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, adopted on 1 July 1990, entered into force on 29 November 1999 CAB/LEG/24.9/49 (1990), <http://www.africa->

- 10.34 Under international human rights law, the age limit for compulsory recruitment by States is generally 18 years. Several states disagreed with the age limit of 15 years provided for in Article 38 of the Child Rights Convention.¹³³⁰ Under the Optional Protocol of CRC, States must: ensure that children under the age of 18 are not ‘compulsorily recruited’¹³³¹ into their armed forces; and, take all feasible measures to ensure that they do not take an active part in hostilities,¹³³² and that only children beyond the age of 15 years are voluntarily enlisted.¹³³³ Upon ratification of the Optional Protocol, Sri Lanka made a declaration stating, ‘the minimum age for voluntary recruitment into national armed forces is 18 years.’¹³³⁴ In addition, the Worst Forms of Child Labour Convention (No. 182) also prohibits the forced recruitment of children under 18.¹³³⁵
- 10.35 For armed groups, the rule under international human rights law is stricter in the sense that recruitment of children under 18 is prohibited in general.¹³³⁶ The UN Secretary-General noted in his 2006 report on children in armed conflict in Sri Lanka that the LTTE 2006 Child Protection Act ‘is in conflict’ with the Optional Protocol to the Child Rights Convention.¹³³⁷ Similarly, the Working Group used the age limit of 18.¹³³⁸
- 10.36 According to the Paris Principles on the Involvement of Children in Armed Conflict (2007):
- A child associated with an armed force or armed group refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes.¹³³⁹
- 10.37 Conversely, under customary IHL, the prohibition on child recruitment applies to individuals under 15 years.¹³⁴⁰ Similarly, Article 8(2)(e)(vii) of the ICC Statute stipulates that a perpetrator can only be held culpable of the war crime of conscripting or enlisting children if the perpetrator knew or should have known that such person was or persons were under the age of 15 years.¹³⁴¹
- 10.38 In conclusion, under international human rights law, the minimum age is 15 years for enlistment into States’ armed forces and 18 years for compulsory recruitment and

[union.org/Official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf](http://www.un.org/Official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf) [accessed 3 July 2013].

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Rule 136, CIHL Study (commentary).

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Art 2, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

1332

Ibid, art 1.

1333

Ibid, art 3.

1334

Declaration made by Sri Lanka upon ratification of the Optional Protocol, Status of Multilateral Treaties Deposited with the Secretary-General, available at:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en [accessed 5 December 2013].

1335

Art 10, International Labour Organization (ILO), Worst Forms of Child Labour Convention, C182, 17 June 1999, http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C182 [accessed 3 July 2013]. Sri Lanka ratified the Convention on March 1, 2001.

1336

Art 4 of the Optional Protocol to the Convention of the Child on the Involvement of Children in Armed Conflict. On the obligations of non-state actors under human rights law, see above paragraph 10.29.

1337

Report of the Secretary General on children and armed conflict in Sri Lanka, 2006, UN Doc. S/2006/1006, [11], fn 7.

1338

UN Working Group on Children and Armed Conflict, ‘Conclusions on Children and Armed Conflict in Sri Lanka’, 2007, UN Doc. S/AC.51/2007/9, [10(c)]; ‘Conclusions’, 2008, UN Doc./S/AC.51/2008/11, [5(c)].

1339

UNICEF, Paris Principles, <http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf> [accessed 31 October 2013], [2.1].

1340

Additional Protocol II, Art 4(3)(c); Rule 136, CIHL Study.

1341

ICC Elements of Crimes, Art 8(2)(e)(vii); Element 3, page 39. Furthermore, Additional Protocol II also puts the minimum age for recruitment at 15 in article 4(3)(c), however Sri Lanka is not a party to this Protocol.

recruitment by armed groups, whereas for customary IHL and international criminal law, the minimum age is 15 years. Therefore, for the war crime of enlisting or conscripting children, the age limit is as per international criminal law, 15 years.¹³⁴²

(iii) Enlisting or conscripting as a war crime

10.39 Under the ICC Statute, the enlistment or conscription of children under the age of 15 is a war crime.¹³⁴³ The ICC Trial Chamber held that both conscripting and enlisting children are offences independently of whether such children were later ‘used’ to actively participate in hostilities.¹³⁴⁴ In the context of child recruitment, the ICC Trial Chamber stated that ‘the consent of a child to his or her recruitment does not provide an accused with a valid defence.’¹³⁴⁵

(iv) Enlisting or conscription as cruel treatment

10.40 Cruel treatment is prohibited by common Article 3 and human rights treaties.¹³⁴⁶ It is also a war crime under Article 8(2)(c)(i) of the ICC Statute.

10.41 Further to its findings relating to credible allegations of child conscription, the UN Expert Panel found that the ‘forced recruitment’ of children as young as 14 could also amount to cruel treatment:

This forced recruitment, as well as the separation of young people from their families, when recruits had a high likelihood of dying in the final battles, could also amount to cruel treatment as a violation of Common Article 3.¹³⁴⁷

10.42 ICEP will not consider the Valayanmadam Church incident in the context of the war crime of cruel treatment. However, further investigation may reveal that the Valayanmadam Church incident amounted to the war crime of cruel treatment in addition to, or quite apart from, the war crime of child conscription or enlistment being committed.

D. Legal analysis

10.43 The following legal analysis has been conducted in relation to the incident at Valayanmadam Church.

(i) Conscription of children as a war crime

10.44 The elements of the offence as outlined in the ICC Elements of Crimes,¹³⁴⁸ are addressed below.

Conscripted or enlisted one or more persons into an armed force or group

10.45 Witness accounts referring to the Valayanmadam Church incident support a reasonable suspicion that the LTTE forcibly removed young people from their families for the purpose of

¹³⁴² Office of the Special Representative of the Secretary General for Children and Armed Conflict (website), <http://childrenandarmedconflict.un.org/effects-of-conflict/the-most-grave-violations/child-soldiers/> [accessed 31 October 2013].

¹³⁴³ Art 8(2)(e)(vii) of the ICC Statute. See also art 4, Statute for the Special Court of Sierra Leone.

¹³⁴⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber 1, Judgment pursuant to Art 74 of the Statute, 14 March 2012, [609].

¹³⁴⁵ *Ibid*, [617].

¹³⁴⁶ Convention Against Torture, art 16.

¹³⁴⁷ Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011, [240].

¹³⁴⁸ ICC Elements of Crimes, Art 8(2)(e)(vii).

conscripting into its armed group. This incident provides reasonable grounds to suspect that the first element of the war crime of child conscription would likely be established.¹³⁴⁹

Any such person was under 15

- 10.46 The analysis of the second element, that some or even one of the children was or were under the age of 15 years,¹³⁵⁰ invariably involves a difficult evidentiary assessment.¹³⁵¹ All five direct eyewitnesses describe the people abducted and conscripted as ‘young’. One official of an international agency gave an age estimate of between 14-25 years.¹³⁵² Witness accounts indicate that it is highly possible that children under the age of 15 were conscripted. In other words, there are credible allegations that children under the age of 15 were conscripted, however, the evidentiary material available is inconclusive, and so further investigation is warranted on this issue.

The perpetrator knew or should have known any such person was under 15

- 10.47 Nothing in the witness accounts ICEP has analysed suggests that the LTTE cadres sought to ascertain the ages of the young people they were conscripting. Rather, the descriptions of the incident suggest that the conscription was physically aggressive, violent and indiscriminate.
- 10.48 One witness estimated that the forcibly removed people were between the ages of 14 and 25 years old. This suggests that some of the conscripts looked young, an observation which should have been made by the LTTE cadres as well and should have put them on notice that there was a possibility that children under the age of 15 years were among those forcibly removed at Valayanmadam Church. Given there were children who looked young in the group, it is possible that the LTTE cadres did not act with due consideration or diligence in verifying the ages of those who looked young that it was allegedly conscripting into its armed forces. It is therefore reasonable to conclude that the LTTE cadres knew or should have known that within the groups of conscripts, one or some were under 15 years of age.

In the context of an armed conflict and aware of the factual circumstances establishing the conflict

- 10.49 The ICTY, International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone have held that the nexus requirement is established if the alleged violations were closely related to the armed conflict.¹³⁵³ The Valayanmadam Church incident allegedly occurred in the final stages of the Sri Lankan conflict. The alleged perpetrators of suspected child conscription were LTTE cadres, including the former Trincomalee Political Wing Leader. The people being conscripted were presumably being conscripted to contribute to

¹³⁴⁹ In addition to proving a nexus between the crime and a non-international armed conflict and the perpetrator's awareness of the factual circumstances that established the existence of such a conflict, the war crime of child conscription requires the proving of three elements: (i) the perpetrator conscripted one or more persons into an armed force or group; (ii) such person or persons were under the age of 15 years; and (iii) the perpetrator knew or should have known that such person or persons were under the age of 15 years: Art 8(2)(e)(vii), Elements of Crimes.

¹³⁵⁰ Art 8(2)(e)(vii), Elements of Crimes.

¹³⁵¹ See for example the assessment by the ICC Trial Chamber in *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber 1, Judgment pursuant to Article 74 of the Statute, 14 March 2012, [641-819].

¹³⁵² WS-1210, [119].

¹³⁵³ *Prosecutor v Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No ICTY-96-23-A, 12 June 2002), [57]–[59]; *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (the RUF accused) (Trial judgment), Case No. SCSL-04-15-T, Special Court for Sierra Leone, 2 March 2009, [100]; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor (Appeal Judgement)*, ICTR-96-3-A, International Criminal Tribunal for Rwanda (ICTR), 26 May 2003, [569]–[570].

the LTTE war effort. It is reasonable to conclude that the alleged conscription of children was closely related to the hostilities of the Sri Lankan conflict and the perpetrators would have been aware of the factual circumstances establishing this conflict.¹³⁵⁴

Conclusion

- 10.50 The UN Expert Panel concluded that credible allegations point to a violation of the prohibition on the '*forced recruitment*' of children under the age of 15 by the LTTE.¹³⁵⁵ It is possible that members of the LTTE contravened Article 8(2)(e)(vii) of the ICC Statute. However, the witness accounts analysed by ICEP do not conclusively indicate that any children under the age of 15 years were among those who were conscripted at Valayanmadam Church.¹³⁵⁶ As such, further investigation is warranted to determine whether the incident amounts to the war crime of child conscription pursuant to the ICC Statute, which requires one or some of the children to be under 15 years.

E. Further investigation

- 10.51 Further investigation should be undertaken to ascertain whether the war crimes of conscripting or enlisting children (and/or of cruel treatment) were committed by the LTTE. There are some gaps in the current available information in relation to the incident at Valaynamadan Church – in particular, the precise age of the children enlisted or conscripted. Furthermore, in relation to the conscription and enlistment of children more generally, further investigation should also be conducted into the recruitment policy of the LTTE and the recruitment practice of the LTTE and how and when these changed.

¹³⁵⁴

Ibid.

¹³⁵⁵

Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011, [240].

¹³⁵⁶

Art 8(2)(e)(vii), ICC Elements of Crimes requires only that there has been one person under 15 years conscripted for the crime (potentially) to have been committed.

11 RAPE AND OTHER FORMS OF SEXUAL VIOLENCE

A. Summary

11.1 The available evidentiary material shows it is reasonable to conclude that:

- rape and sexual violence were perpetrated during the final months of the conflict;
- rape and sexual violence occurred during the screening process, at IDP camps, at government hospitals, during interrogation and against LTTE cadres;
- sexual mutilation may have occurred during the conflict;
- these violations were perpetrated by people in various official roles; and
- the incidents of rape and sexual violence would amount to war crimes or crimes against humanity.

11.2 Rape and sexual violence are prohibited under IHL, international human rights law and international criminal law, predominantly through the prohibition of torture and cruel, inhuman and degrading treatment. Rape and sexual violence are explicitly listed as war crimes in NIACs and crimes against humanity by the ICC Statute. The definitions and elements of these crimes are discussed in more detail in part B(iii) of this section.

11.3 Witness accounts available to ICEP provided mainly second-hand information of these alleged crimes. As a result of the scarcity of direct evidentiary material in relation to these crimes, ICEP has not been able to analyse any specific incidents of rape or sexual violence. Nonetheless, the evidentiary material suggests there are reasonable grounds to suspect that the war crimes of rape and sexual violence were committed during the final stages of the conflict and that rape and sexual violence as crimes against humanity were committed.

11.4 Further investigation should be undertaken to ascertain whether rape or sexual violence were committed by members of the SFs or by Sri Lankan Government employees. ICEP has examined the available evidentiary material and has identified areas for further investigation.

B. Evidentiary material analysis

(i) *Background*

11.5 The UN Expert Panel found credible allegations that SFs members committed rape and sexual violence against Tamil civilians and against suspected LTTE cadres.¹³⁵⁷ It found credible allegations that rape and sexual violence occurred during the screening of civilians leaving areas of conflict¹³⁵⁸ and in IDP camps.¹³⁵⁹ One witness account taken by ICEP provides information on rape and sexual violence that may have been carried out during interrogations and another account, which was likely to have been before other inquiries,

¹³⁵⁷ Sexual violence is an act of a sexual nature committed by force or threat of force or coercion or by taking advantage of a coercive environment. Acts of sexual violence can range from forced public nakedness, mutilation of the genitals or breasts and rape. See Special Rapporteur, 'Final Report on Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict', UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, [21].

¹³⁵⁸ UN Expert Panel Report, [148], [152]–[153].

¹³⁵⁹ Ibid, [228].

refers to incidents of rape and sexual violence that were also likely to have occurred in at least one Government hospital, Kilinochchi Hospital.

11.6 In February 2013, HRW published an extensive report documenting allegations of rape and sexual violence committed by the SFs against men and women in state custody between 2006 and 2012. The report documents 75 cases of rape on men, women and boys.¹³⁶⁰ Most witness accounts examined in full by ICEP or taken by ICEP, which refer to rape and sexual violence, are limited to rape and sexual violence against female Tamil civilians and LTTE cadres, although ICEP has obtained information alleging sexual violence committed against men. Other than the accounts in the HRW report, most witness accounts of rape and sexual violence examined in full by ICEP or taken by ICEP are second-hand. The relative paucity of evidentiary material collected by ICEP so far demonstrates the inherent difficulty of obtaining evidentiary material of such crimes.

11.7 Several witnesses interviewed by ICEP appeared unwilling to discuss rape or sexual violence when asked about these issues but were willing to discuss other forms of mistreatment. The UN Expert Panel stated:

Rape and sexual violence against Tamil women during the final stages of the armed conflict and, in its aftermath, are greatly under-reported. Cultural sensitivities and associated stigma often prevented victims from reporting such crimes, even to their relatives.¹³⁶¹

11.8 The UN Expert Panel found credible allegations that rape and sexual abuse may have been committed by the Army and CID and the TID on women and girls, especially suspected LTTE cadres, in military custody prior to execution or in detention facilities.¹³⁶² The UN Expert Panel also found that rape may have taken place during interrogations by the CID or the TID.¹³⁶³

11.9 The HRW report found that rape and sexual violence were 'not just a local occurrence or the action of rogue security personnel, but a practice that was known or that should have been known by senior officials.'¹³⁶⁴ The report found that '[s]exual violence, as with other serious abuses committed by Sri Lankan security forces, was committed against a backdrop of deeply entrenched impunity.'¹³⁶⁵ HRW concluded that rape and other sexual violence 'was a widespread and systematic practice',¹³⁶⁶ committed by 'a range of Sri Lankan security organizations – the military, military intelligence, the police, the last including the CID and TID.'¹³⁶⁷

(ii) Sri Lankan Government response

11.10 The Sri Lankan Government has thus far denied allegations of rape and sexual violence inside Government-controlled areas, claiming the allegations are fabricated or the product of an LTTE propaganda campaign to spread a false image of the SFs among Tamil

¹³⁶⁰ HRW, "'We Will teach You a Lesson': Sexual Violence against Tamils by Sri Lankan Security Forces' (hereafter **Sexual Violence Against Tamils**), February 2013, 2.

¹³⁶¹ UN Expert Panel Report, [152].

¹³⁶² Ibid, [214].

¹³⁶³ Ibid, [220].

¹³⁶⁴ HRW, *Sexual Violence Against Tamils*, 4.

¹³⁶⁵ Ibid, 18.

¹³⁶⁶ Ibid, 29.

¹³⁶⁷ Ibid, 29–30.

civilians.¹³⁶⁸ In May 2009 the Government openly challenged media reports of the allegations, going so far as to deport the crew of a reporting team from the UK television station Channel 4 (**Channel 4**), who were filming at a camp in Vavuniya where allegations of rape were raised.¹³⁶⁹

- 11.11 The Government has down played allegations of rape and sexual violence at IDP camps. When a foreign journalist raised allegations with Professor Rajiva Wijesinha, who was at the time the Permanent Secretary to the Ministry of Disaster Management and Human Rights, Prof Wijesinha responded, 'We received a report that a soldier went into a tent at 11pm and came out at 3am. It could have been sex for pleasure, it could have been sex for favours, or it could have been a discussion on Ancient Greek philosophy, we don't know.'¹³⁷⁰
- 11.12 The Sri Lankan High Commissioner to India, Prasad Kariyawasam, responded to HRW's report on torture and sexual violence by claiming there was no evidence to substantiate its claims. He stated, "Until we do a proper inquiry, we have to believe that these are all sob stories for the sake of obtaining asylum or refugee status in a developed country."¹³⁷¹ He went on to label HRW's report 'a well-timed effort' to discredit Sri Lanka.¹³⁷²
- 11.13 Rape and sexual violence are largely ignored by the LLRC although it does refer to rape and sexual violence in the context of discussing the authenticity of footage broadcast by Channel 4, and in passing when referring to the human rights issues arising in former conflict areas.¹³⁷³ Despite the significant number of reports of rape and sexual violence obtained by the UN Expert Panel and HRW,¹³⁷⁴ the LLRC does not engage in any sustained examination of these allegations.

(iii) Incidents

IDP camps

- 11.14 The UN Expert Panel found credible allegations of rape in IDP camps and noted that the military warned victims against reporting such abuse to police or humanitarian agencies.¹³⁷⁵ The UN Expert Panel stated that the 'Government [of Sri Lanka] failed to take measures to alter camp conditions that created an enabling environment for gender based violence.'¹³⁷⁶ HRW also documented incidents of rape and sexual violence at IDP camps and a camp environment that was conducive to the commission of these acts. It stated:

There was an absence of privacy, and soldiers and police would infringe on the privacy of women by watching them when they bathed or used the toilet. Women

¹³⁶⁸ See, eg, Gotabaya Rajapakse, quoted in *Business Today*, June 2009 edition; http://www.businesstoday.lk/cover_page.php?art=891&hl=rape [accessed 21 June 2013]; HRW, 'Sri Lanka: Rape of Tamil Detainees: Politically Motivated Sexual Assaults', 26 February 2013, <http://www.hrw.org/news/2013/02/26/sri-lanka-rape-tamil-detainees> [visited 3 July 2013].

¹³⁶⁹ Nick Paton Walsh, 'Journalist who Reported on Internment Camps in Sri Lanka Tells his Story', *The Guardian*, 10 May 2009, <http://www.guardian.co.uk/world/2009/may/10/channel-4-sri-lanka>.

¹³⁷⁰ Gethin Chamberlin, 'Sri Lankan Guards "Sexually Abused Girls" in Tamil Refugee Camp', *The Observer*, 20 December 2009, <http://www.guardian.co.uk/world/2009/dec/20/tamil-tigers-sri-lanka-refugees> (accessed 4 September 2013).

¹³⁷¹ Ben Doherty, 'Sri Lanka Accused of Human Rights Abuses', *Sydney Morning Herald*, 26 February 2013, available at <http://www.smh.com.au/world/sri-lanka-accused-of-human-rights-abuses-20130226-2f4de.html> [accessed 4 July 2013].

¹³⁷² Nita Bhalla, Reuters, 'Sri Lanka Security Forces Rape, Torture Tamil Detainees: Group', 26 February 2013, available at <http://mobile.reuters.com/art/idUSBRE91P08G20130226?irpc=932> [accessed 4 July 2013].

¹³⁷³ LLRC Report, [5.108].

¹³⁷⁴ HRW, Sexual Violence Against Tamils; UN Expert Panel Report.

¹³⁷⁵ UN Expert Panel Report, [153].

¹³⁷⁶ Ibid, [228].

and girls were forced to bathe at dawn or after dusk which exposed them to further opportunistic abuse.¹³⁷⁷

- 11.15 The account of a local employee of an international agency witness who provided some information directly to ICEP observed soldiers making lewd comments in Sinhala and standing very close to bathing women and making fun of those women.¹³⁷⁸ This accords with the findings of HRW regarding the type of conduct sometimes displayed by soldiers at camp bathing areas. The account of a woman interviewed by HRW provides details of this opportunistic abuse: 'One evening when I was returning after a bath with some others, suddenly a group of soldiers appeared. Some of the girls managed to scream and run away. I was raped.'¹³⁷⁹
- 11.16 The UN Expert Panel noted:
- Menik Farm and other IDP sites were closed camps, guarded by the military and surrounded by barbed wire. Essentially, the entire Vanni IDP population was detained and not allowed to leave...
- At Menik Farm, severe restrictions prevented international organizations from doing protection work or speaking to the IDPs in private.¹³⁸⁰
- 11.17 The local employee of an international agency mentioned above regularly visited Menik Farm between January and May 2009, in the course of his duties.¹³⁸¹ This person recalled going with other people who worked for the agency who would speak to many distressed civilians who described rape by Army soldiers occurring to members of other families.¹³⁸²
- 11.18 This witness, when speaking directly with ICEP, described being told of girls and women being 'sexually assaulted and/or raped' at Menik Farm in several contexts: as they bathed in the river at the camp; as they collected fire wood in the jungle; and in an instance during the night when a woman was without male relatives.¹³⁸³
- 11.19 In addition, this same witness directly told ICEP that he had observed 10 to 12 young females being taken by the CID and TID to 'particular buildings within isolated areas of the camps for the purpose of 'investigation'.¹³⁸⁴ The person believed that 'the women taken for questioning would have been sexually assaulted or raped.'¹³⁸⁵ He was also told by a person close to victims of reportedly similar incidents that this type of conduct occurred in these huts, but those victims themselves were unwilling to speak about what occurred. The witness was told by people at the camps that girls were generally taken for questioning at night-time, and returned during the day.¹³⁸⁶

¹³⁷⁷ HRW, *Sexual Violence against Tamils*, 37.

¹³⁷⁸ WS-1101, [16], Addendum, [26]–[28]. The main part of this witness's statement is likely to have been before other inquiries, however the addendum was provided directly to ICEP.

¹³⁷⁹ HRW, *Sexual Violence against Tamils*, 37.

¹³⁸⁰ UN Expert Panel Report, [155]–[156].

¹³⁸¹ WS-1101, [4], [11]–[12].

¹³⁸² Ibid, [12]–[13], Addendum, [10].

¹³⁸³ Ibid, Addendum, [19]–[20].

¹³⁸⁴ Ibid, Addendum, [20].

¹³⁸⁵ Ibid, Addendum, [24].

¹³⁸⁶ Ibid, Addendum, [20], [24].

- 11.20 Three witnesses (one of whose statement was taken directly by ICEP), who were detained at Menik Farm, heard stories that young women and girls were raped at the camp.¹³⁸⁷ One of these witnesses was detained from May to June 2009 and during this time saw camp guards harass young girls, make sexually inappropriate comments and touch the girls inappropriately against their will.¹³⁸⁸ Another witness detained at Menik Farm for several months from May 2009 described Army soldiers taking young, pretty Tamil girls for overnight interrogations. He explained that while there were a few reports of rape, 'generally the girls would just be crying and refuse to say what had happened to them.'¹³⁸⁹
- 11.21 ICEP has also examined a witness account from a senior local official of an international agency who was told by a senior employee of the NGO, CARITAS – HUDEC, that nearly 15 girls were raped and killed by the SFs in a short period of time in a camp.¹³⁹⁰
- 11.22 Another witness, whose statement was likely to have been before other inquiries and who was detained at a camp from May 2009, described camp discussions about the discovery of two girls' bodies near the river where detainees bathed. The girls' bodies reportedly had bite marks.¹³⁹¹ Similar to the accounts provided by HRW, this witness also described SFs officers sitting in trees near the river, watching women change and bathe.¹³⁹²
- 11.23 The UN Expert Panel found that some women were forced to perform sexual acts in exchange for food, shelter or assistance.¹³⁹³ It also noted that unaccompanied minors and women without male relatives were particularly vulnerable at these sites.¹³⁹⁴

Government hospitals

- 11.24 A witness account of a local teacher provides indirect accounts of rape and sexual violence occurring at Kilinochchi Hospital.¹³⁹⁵ This witness reported being told of two young Tamil women being transferred to, and forcibly kept at, the hospital where they were repeatedly raped by members of the SFs.¹³⁹⁶ This account is consistent with an account reported by the Sri Lankan organisation, University Teachers for Human Rights (**UTHR**). UTHR described the ordeal of two Tamil civilian girls who surrendered along with others to the Sri Lankan Army in February 2009, and were then taken to Kilinochchi Hospital.¹³⁹⁷ The girls were reportedly kept with 50 other girls in the doctors' quarters by day, and by night, were taken to a larger building used as a guest house for Sri Lankan Army officers.¹³⁹⁸ The ground floor of the guest house was the officers' mess hall. The girls were taken upstairs and sexually

¹³⁸⁷ WS-1102, [62] (detained between May and July 2009); WS-1103, [129] (detained May and June 2009); WS-1104, [409] (detained between May 2009 and November 2009).

¹³⁸⁸ WS-1103, [129].

¹³⁸⁹ WS-1104, [409].

¹³⁹⁰ WS-1105, [126]. The witness was detained at an IDP camp in early 2009.

¹³⁹¹ WS-1106, [104].

¹³⁹² Ibid, [107].

¹³⁹³ UN Expert Panel Report, [161].

¹³⁹⁴ Ibid, [156], & [227]–[230].

¹³⁹⁵ This witness statement was likely to have been before other inquiries although to ICEP's knowledge was not considered in any publicly available report.

¹³⁹⁶ WS-1104, [201]–[202]. Note that the witness states that he was told this information by someone else. WS-1104 states, 'I have always trusted [the source of the information]. However, I was not completely sure if I could believe him when he told me this story' [204]. Further investigation is required to determine if this comment relates to the credibility of the account, difficulty reporting and talking about rape and sexual violence in Sri Lanka, or if there are other reasons for this doubt.

¹³⁹⁷ University Teachers for Human Rights, Special Report No. 34, Let Them Speak Part 2: From Kilinochchi to Puthukkudiyiruppu, 13 December 2009, [2.10] http://www.uthr.org/SpecialReports/Special%20rep34/Uthr-sp_rp34part2.htm [accessed 18 July 2013].

¹³⁹⁸ Ibid.

abused.¹³⁹⁹ The girls reportedly understood ‘they were [being] rotated’, and were told that girls who had finished their stint were sent to IDP camps.¹⁴⁰⁰ According to UTHR, these two girls managed to escape and describe their experience to the LTTE, which found them and released them to be reunited with their families.¹⁴⁰¹

Interrogation

- 11.25 The UN Expert Panel found that ‘rape ... may have taken place during interrogations.’¹⁴⁰² It also recognised that a deliberate lack of transparency on the part of the Sri Lankan Government had resulted in there being very little information on conditions at separate LTTE ‘surrendee’ sites. The UN Expert Panel stated that these circumstances ‘rendered alleged LTTE cadre[s] highly vulnerable to violations such as rape ... which could be committed with impunity.’¹⁴⁰³
- 11.26 HRW reported that rape and sexual violence were frequently used by the SFs as torture and interrogation techniques intended to obtain confessions and information.¹⁴⁰⁴ These incidents of abuse did ‘not appear limited to particular areas or detention centers, but appear to have occurred in all places that suspected LTTE members and supporters were subject to custodial abuse.’¹⁴⁰⁵ HRW also noted that perpetrators of rape and sexual violence belonged to various branches of the SFs, and ‘[f]requently members of more than one state agency would work together.’¹⁴⁰⁶
- 11.27 ICEP has directly taken a new witness account from an individual who was detained at TID Headquarters in 2008. The witness observed members of other divisions of the SFs – namely, the Navy, Army, CID, Colombo Crime Division (**CCD**), National Intelligence Bureau (**NIB**) and the Sri Lankan Intelligence Service (**SIS**) – visiting the TID facility. She reported that the officers from these various divisions would call women into private rooms to ask them sexual questions, with the TID’s knowledge and permission. This witness heard reports that these officers of the SFs had been ‘sexually abusing [these] women’.¹⁴⁰⁷

Female LTTE cadres

- 11.28 The UN Expert Panel found that ‘rapes of suspected LTTE cadre[s] are also reported to have occurred, when they were in the custody of the Sri Lankan police (CID and TID) or the SLA.’¹⁴⁰⁸
- 11.29 ICEP has obtained photographs depicting females who may have been subjected to sexual violence and are understood to be new evidentiary material.¹⁴⁰⁹ The photographs show the partially clad bodies of four women who by the scant clothing attached to their bodies appear to be LTTE cadres, identified by their green camouflage jackets or checked shirts, which were the typical uniforms of female LTTE fighters. In most of the photographs, the women are lying on their backs with their breasts and genitals exposed, and their legs

1399

Ibid.

1400

Ibid.

1401

Ibid.

1402

UN Expert Panel Report, [220].

1403

Ibid, [167].

1404

HRW, *Sexual Violence against Tamils*, 29.

1405

Ibid, 30.

1406

Ibid, 30.

1407

WS-1106, [74].

1408

UN Expert Panel Report, [153].

1409

ICEP photograph series 2: DSC00479, DSC00480, DSC00483; ICEP photograph series 4: LTTE DSC0079, LTTE DSC0081, LTTE DSC0085, LTTE DSC0087, LTTE DSC0090.

spread apart.¹⁴¹⁰ Analysis by an independent forensic pathologist engaged by ICEP indicates that the women were most likely deceased.¹⁴¹¹ Metadata encoded in the photographs has been examined by an independent forensic audio-visual specialist engaged by ICEP, who considered that some of the photographs were taken in November 2007,¹⁴¹² and others were taken in January 2009.¹⁴¹³

11.30 One witness, whose statement was taken by ICEP, was told directly by a senior SFs officer that he had personally participated with his officers in the gang rape of female LTTE who had surrendered.¹⁴¹⁴ The SFs officer also described to the witness that after they raped each woman, they killed them by tying one of their legs to a tree and the other to a tractor which was driven away from the tree, causing the woman's body to be torn apart.¹⁴¹⁵

11.31 The UN Expert Panel specifically referred to video footage broadcast by Channel 4, which shows the naked bodies of dead (or nearly dead) women who appear to have been raped or sexually abused. One video shows Army soldiers loading naked female bodies onto a truck, in what the UN Expert Panel described as 'a highly disrespectful manner'.¹⁴¹⁶ At one point in the video, an Army soldier stomped on the leg of one of the women, who appeared to be moving. The UN Expert Panel stated:

The Channel 4 video and photographs of what appear to be dead female cadre, including video footage in which the naked bodies of women are deliberately exposed, accompanied by lurid comments by SLA soldiers, raising a strong inference that rape or sexual violence may have occurred prior to or after execution.¹⁴¹⁷

11.32 As mentioned earlier in this section, the Sri Lankan Government has challenged the authenticity of the Channel 4 video footage, alleging that the images were falsified and the incidents staged or electronically constructed.¹⁴¹⁸ In apparent response, the Ministry of Defence released its own documentary, *Lies Agreed Upon*.¹⁴¹⁹

11.33 The LLRC also expressed significant doubts about the integrity of the Channel 4 footage, and recommended the Government institute an independent investigation to establish the truth or otherwise of the allegations arising from the footage.¹⁴²⁰ It stated, if 'the footage reflects evidence of real incidents... of possible rape victims, it would be necessary to investigate and prosecute offenders as these are clearly illegal acts'.¹⁴²¹ To date, there is no indication that the Government has adopted either of these recommendations.

¹⁴¹⁰ ICEP photographs DSC00480, DSC00483, LTTE DSC0079, LTTE DSC0081, LTTE DSC0085, LTTE DSC0087, LTTE DSC0090.

¹⁴¹¹ Statement of Dr Christopher Hamilton Lawrence, 7, 9.

¹⁴¹² Expert forensic audio-visual report commissioned by ICEP, 14 February 2013; ICEP photograph series 4: LTTE DSC0079, LTTE DSC0081, LTTE DSC0085, LTTE DSC0087, LTTE DSC0090, 7.

¹⁴¹³ Expert forensic audio-visual report commissioned by ICEP, 14 February 2013; ICEP photograph series 2: DSC00479, DSC00480, DSC00483, 6.

¹⁴¹⁴ WS-1108, [136]–[137].

¹⁴¹⁵ Ibid.

¹⁴¹⁶ UN Expert Panel Report, [153].

¹⁴¹⁷ Ibid, [214].

¹⁴¹⁸ LLRC Report, [4.364].

¹⁴¹⁹ Ministry of Defence, Announcement, http://www.defence.lk/new.asp?fname=20110801_LAUvdo [accessed 21 June 2013].

¹⁴²⁰ LLRC Report, [4.375]; 337 [9.39].

¹⁴²¹ Ibid, [4.376(a)]; [9.40(a)].

Sexual mutilation

- 11.34 A local employee of an international agency¹⁴²² identified the mortuary at a Government Hospital as the holding place of large numbers of bodies of deceased and mutilated Tamil women in February and March 2009.¹⁴²³ He observed at least 200 bodies, of mainly Tamil women and young girls, on three or four occasions when he visited the facility during this period.¹⁴²⁴ He reported that many of the bodies of the women were naked and bore physical evidence of rape and sexual mutilation, with knife wounds in the nature of long slashes, bite marks or deep scratches on the breasts, and vaginal mutilation by knives, bottles and sticks.¹⁴²⁵ The bodies also typically bore signs of gunshot wounds to the forehead, which appeared to have been inflicted at close range due to the lack of peripheral damage.¹⁴²⁶ While the identity of these women, the circumstances of their death, and the identity of the suspected perpetrators are not known, this description of their bodies before or after death is indicative of sexual violence and therefore warrants further investigation.
- 11.35 Further, this witness observed in an area beyond the hospital, and on six or seven occasions in February to April 2009, back hoes digging large trenches in the ground into which trucks would tip their cargo, consisting of many naked bodies, most of which were young females.¹⁴²⁷ On the basis of this account, further investigation is needed to ascertain how bodies came to be stored and buried in or around this hospital.
- 11.36 The UN Expert Panel does not make specific findings in relation to the mutilation of genitals and breasts (sexual mutilation). However, the Panel did find that there were credible allegations and violations pointing to the commission of mutilation generally by persons acting on behalf of the Government of Sri Lanka and the LTTE.¹⁴²⁸

C. International legal framework

(i) Rape

- 11.37 Rape is prohibited under both customary IHL¹⁴²⁹ and common Article 3,¹⁴³⁰ as well as Article 4 of AP II. International human rights law prohibits rape mainly through the prohibition of torture and cruel, inhuman or degrading treatment or punishment.¹⁴³¹ International criminal tribunals have also prosecuted rape as a form of torture where the additional elements of torture exist.¹⁴³²

¹⁴²² This witness's statement has been relied on earlier in this section of the report and most of the statement was likely to have been before other inquiries although the witness did provide additional information directly to ICEP.

¹⁴²³ WS-1101, [19].

¹⁴²⁴ Ibid, [22]–[26].

¹⁴²⁵ Ibid, [35], Addendum, [34].

¹⁴²⁶ WS-1101, [29].

¹⁴²⁷ Ibid, [36].

¹⁴²⁸ UN Expert Panel Report, [247]–[248].

¹⁴²⁹ Rule 93, CIHL Study.

¹⁴³⁰ Although common Article 3 of the Geneva Conventions does not explicitly mention rape, it prohibits 'violence to life and person', including 'cruel treatment and torture', and 'outrages upon personal dignity, in particular humiliating and degrading treatment'. The latter expression includes any form of sexual violence.

¹⁴³¹ Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment, UN Doc. A/HRC/7/3, 2008, para.36; *Rosendo Cantú et al. v. Mexico*, Judgment of the Inter-American Court of Human Rights, 31 August 2010, [118]. See also section 12 on Torture and other forms of cruel treatment.

¹⁴³² *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, para. 597; *Prosecutor v Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No ICTY-96-23-A, 12 June 2002), [150]–[152].

11.38 The ICC Statute includes rape as a crime against humanity,¹⁴³³ as well as a war crime in NIACs.¹⁴³⁴ According to the ICC Elements of Crimes, rape is defined as follows:

The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.¹⁴³⁵

Furthermore,

[t]he invasion was committed by force, or by threat of force or coercion such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.¹⁴³⁶

11.39 The legal definition of rape accepted by the ICTY and ICTR has evolved over time. While the early jurisprudence focused on coercion or force or threat of force,¹⁴³⁷ in the case of *Kunarac and others*,¹⁴³⁸ the Trial Chamber concluded on the basis of the definition of rape in various legal systems that it

understands that the actus reus of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.¹⁴³⁹

11.40 Confirming this approach, the Appeals Chamber recognised that force or the threat of force provides clear evidence of non-consent, but neither is an element *per se* of rape, thus there is no requirement of resistance on the part of the victim.¹⁴⁴⁰ Moreover, most cases of rape as a war crime or a crime against humanity will be committed in coercive circumstances where genuine consent is not possible.¹⁴⁴¹

11.41 Hence there seem to be two definitions, one focusing on the lack of consent and one focusing on coercion, or force or threat of force, or taking advantage of a coercive environment. Some commentators believe that the two definitions are equivalent in substance ‘for, ‘coercion, or force, or threat of force’ in essence imply or mean ‘lack of consent’’.¹⁴⁴² However, other commentators distinguish the two approaches with the non-consensual approach being considered as the broader approach.¹⁴⁴³ Critics of the second approach argue that an inquiry into consent is unreal and decontextualised since rape as a crime against humanity or as a war crime in an armed conflict is almost always committed in

¹⁴³³

Art 7(1)(g).

¹⁴³⁴

Art 8(2)(e)(vi).

¹⁴³⁵

Art 7(1)(g)-1, [1]; Art 8(2)(e)(vi)-1, [1], ‘Elements of Crimes of the Rome Statute’ (hereafter, ‘**Elements**’), Doc No. ICC-ASP/A/3/(part II-B).

¹⁴³⁶

Art 7(1)(g)-1, para. 2; Art 8(2)(e)(vi)-1, [2], Elements.

¹⁴³⁷

Akayesu (ICTR-96-4-T), Trial Chamber, 2 September 1998, para. 598; Delalić and others (IT-96-21-T), Trial Chamber, 16 November 1998, § 479.

¹⁴³⁸

Prosecutor v Kunarac (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No ICTY-96-23-T, 22 February 2001).

¹⁴³⁹

Ibid [460].

¹⁴⁴⁰

Ibid [128]–[129].

¹⁴⁴¹

Ibid [130].

¹⁴⁴²

A. Cassese and Gaeta et al, *Cassese’s International Criminal Law*, (Oxford University Press, 2013), 97, fn 33.

¹⁴⁴³

R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, (Cambridge, 2010), 255.

a coercive environment.¹⁴⁴⁴ The ICC Elements of Crime definition falls between the two approaches.¹⁴⁴⁵ Moreover, the ICC Rules of Procedure and Evidence include rules on consent in cases of sexual violence.¹⁴⁴⁶ In its analysis of the information before it, ICEP considers whether there was either an element of coercion, force or threat of force, or taking advantage of a coercive environment and/or whether there was an element of non-consent.

(ii) Sexual violence

11.42 Broader than rape, any form of sexual violence is prohibited under both customary IHL¹⁴⁴⁷ and common Article 3.¹⁴⁴⁸ International human rights law prohibits sexual violence mainly through the prohibition of torture and cruel, inhuman or degrading treatment or punishment.¹⁴⁴⁹ According to the Inter-American Court of Human Rights,

sexual violence consists of actions with a sexual nature committed with a person without their consent, which besides including the physical invasion of the human body, may include acts that do not imply penetration or even any physical contact whatsoever.¹⁴⁵⁰

Examples of sexual violence include forced nudity¹⁴⁵¹ or virginity tests.¹⁴⁵²

11.43 The UN Special Rapporteur on systematic rape, sexual slavery, and slavery-like practices in armed conflict characterised sexual violence as encompassing ‘any violence, physical or psychological, carried out throughout sexual means or by targeting sexuality’ and includes situations where one person is forced to perform sexual acts or harm another person in a sexual manner.¹⁴⁵³

11.44 Acts of sexual violence may constitute war crimes or crimes against humanity. Sexual violence as such was not included in the ICTY and ICTR Statutes. Nonetheless, both tribunals confirmed in their case law that sexual violence can constitute the crime against humanity of ‘other inhumane acts’¹⁴⁵⁴ and the war crime of violations of the common

¹⁴⁴⁴ C. MacKinnon, ‘Defining Rape Internationally : a Comment on *Akayesu*’ (2005-4) *Columbia Journal of International Law* 940.

¹⁴⁴⁵ R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, (Cambridge, 2010), 254–255.

¹⁴⁴⁶ ICC Rules of Procedure and Evidence, rule 70, ‘Principles of Evidence in Cases of Sexual Violence’:

“In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent;

(b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;

(c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;

(d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.”

¹⁴⁴⁷ Rule 93, CIHL Study.

¹⁴⁴⁸ Although common Art 3 of the Geneva Conventions does not explicitly mention sexual violence, it prohibits ‘violence to life and person’, including ‘cruel treatment and torture’, and ‘outrages upon personal dignity, in particular humiliating and degrading treatment’. The latter expression includes any form of sexual violence.

¹⁴⁴⁹ Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment, UN Doc. A/HRC/7/3, 2008, para.35. See also section 10 on Torture and other forms of cruel treatment.

¹⁴⁵⁰ *Miguel Castro-Castro Prison v. Peru*, Judgment of the Inter-American Court of Human Rights, 25 November 2006, [306].

¹⁴⁵¹ *Ibid*, [305]–[308].

¹⁴⁵² *Salmanoğlu and Polattaş v. Turkey*, Judgment of the European Court of Human Rights, 17 March 2009, [96].

¹⁴⁵³ Special Rapporteur, *Final Report on Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, [21]. Sexual violence can include such acts as forcing a person to strip naked in public, mutilating a person’s genitals, or slicing off a woman’s breasts.

¹⁴⁵⁴ *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, para. 688; *Kvočka* (ICTY-98-30-T), Trial Chamber, 2 November 2001, [208]–[209].

Article 3 prohibitions of ‘outrages upon personal dignity’ and ‘cruel treatment’.¹⁴⁵⁵ Covering a broad range of gender-based offences such as rape, sexual slavery, molestation, sexual mutilation, forced marriage, forced abortion, enforced prostitution, forced pregnancy and enforced sterilisation,¹⁴⁵⁶ sexual violence was defined as any act of a sexual nature that is committed on a person under circumstances that are coercive.¹⁴⁵⁷ Moreover, sexual violence can cover conduct that does not involve physical conduct, such as forced nudity in public.¹⁴⁵⁸ The ICC Statute explicitly included sexual violence as both a crime against humanity,¹⁴⁵⁹ and a war crime.¹⁴⁶⁰

- 11.45 The ICC Elements of Crimes define ‘sexual violence’ as where a perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.¹⁴⁶¹
- 11.46 For sexual violence to amount to a crime against humanity or a war crime, the conduct must be of comparable gravity to other offences.¹⁴⁶²

D. Legal analysis

(i) **Rape and sexual violence as war crimes or crimes against humanity**

- 11.47 The ICC Elements of Crimes list the elements required to establish the war crime or crime against humanity of rape and the war crime or crime against humanity of sexual violence in a NIAC before the ICC. As discussed above, there is no settled definition of rape under international law, and so ICEP will also take into account elements that are not expressly included in the ICC Elements of Crimes. The elements for the underlying offences of rape and sexual violence, which are addressed below, are the same for both war crimes and crimes against humanity, however, as discussed throughout this report, the contextual elements differ.
- 11.48 Evidentiary material obtained by ICEP relating to alleged incidents of rape during the conflict indicates many incidents where the elements are likely to be satisfied.

Penetration (rape)

- 11.49 ICEP has obtained numerous second-hand witness accounts of rape at IDP camps, and photographs of deceased female LTTE fighters, which make it reasonable to conclude that

¹⁴⁵⁵ *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, para. 688; *Prosecutor v Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No ICTY-96-23-T, 22 February 2001), [773]–[774].

¹⁴⁵⁶ *Kvočka* (ICTY-98-30-T), Trial Chamber, 2 November 2001, para. 180.

¹⁴⁵⁷ *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, para. 688; *Kvočka* (ICTY-98-30-T), Trial Chamber, 2 November 2001, paras. 188 and 559.

¹⁴⁵⁸ *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, para. 688; *Brđanin* (ICTY-99-36-T), Trial Chamber, September 2004, [1013].

¹⁴⁵⁹ Art 7(1)(g).

¹⁴⁶⁰ Art 8(2)(e)(vi).

¹⁴⁶¹ Art 7(1)(g)-6, [1]; Art 8(2)(e)(vi)-6, [1], ‘Elements’.

¹⁴⁶² For sexual violence as a crime against humanity, the conduct must be of comparable gravity to the other offences listed in Art 7(1)(g), namely rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization, see ICC Elements, Art 7(1)(g)-6, [2]. For sexual violence as a war crime, the conduct must be of a gravity comparable to that of a serious violation of art 3 common to the four Geneva Conventions, see ICC Elements Art 8(2)(e)(vi)-6, [2].

they may have been raped, and a witness account describing naked female bodies in the mortuary of Vavuniya Hospital with sticks and bottles inserted in some of the women's vaginas.¹⁴⁶³

Threat of force or taking advantage of a coercive environment or non-consent (rape)

- 11.50 The photographs sighted by ICEP and witness accounts suggest rape took place by force or threat of force and in most cases appeared to occur violently, which make it reasonable to conclude that there was non-consent. Furthermore, the allegations relating to rape in IDP camps and during interrogation are illustrative of rape taking place in a coercive environment as victims were either detained or in the total control of the SFs. However, as already mentioned, further investigation would be required in order to ascertain more precisely what occurred in many of the cases identified.

Act of a sexual nature (sexual violence)

- 11.51 Information and witness accounts obtained by ICEP describe many forms of sexual violence occurring during the conflict and in the period immediately afterwards. For example, it is reasonable to conclude from photographs referred to above, which depict deceased female LTTE cadres, that the women in question were subjected to sexual violence before or after their deaths. Witness accounts also described SFs officers inappropriately touching women and girls at IDP camps.¹⁴⁶⁴

Threat of force or taking advantage of a coercive environment or non-consent (sexual violence)

- 11.52 Accounts of sexual violence are described as occurring either by the direct use of force, or in the midst of highly coercive environments, where the victims were detained, or otherwise under the total control of the SFs.

Gravity (sexual violence)

- 11.53 Sexual violence under Article 8(2)(e)(vi) of the ICC Statute also requires that the conduct be of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions, and that the perpetrator was aware of the gravity of their conduct. Considering some of the examples outlined above, it is reasonable to conclude that the conduct of soldiers recounted by witnesses was indeed comparable to this standard. It is reasonable to conclude that this element would be satisfied for other allegations of rape or sexual violence in addition to the ones recounted already. However, this would still need to be established on a case-by-case basis.

In the context of an armed conflict (war crime of rape and sexual violence)

- 11.54 There is a clear link between the allegations of rape and sexual violence obtained or sighted by ICEP relating to incidents alleged to have occurred during the conflict period and in the period immediately afterwards. Victims included individuals detained by the Government at IDP camps as a result of the conflict and LTTE cadres directly engaged in the conflict. If these factors or others relating the alleged crime to the conflict can be proven, it is reasonable to conclude that this element will be satisfied.

¹⁴⁶³
¹⁴⁶⁴

WS-1101, [34].
WS-1103, [129].

Widespread or systematic attack directed against any civilian population (crime against humanity of rape and sexual violence)

11.55 section 7 of this report asserts that it is reasonable to conclude that both a widespread and a systematic attack were directed against the civilian population by the Sri Lankan Government. Depending on the duration of such an attack, and the timing of the incidents, witness accounts obtained by ICEP alleging incidents of rape and sexual violence may constitute crimes against humanity, if they were part of the attack on the civilian population.

Act formed part of attack (crime against humanity of rape and sexual violence)

11.56 ICEP's assessment of the evidentiary material before it is that rape and sexual violence were pervasive and there are reasonable grounds to suspect that they formed part of this broader attack.¹⁴⁶⁵ It is reasonable to conclude that if members of the SFs can be proven to have committed rape or sexual violence, they were aware that such crimes formed part of a widespread or systematic attack against a civilian population. This can be inferred from, among other things, evidentiary material that rape and sexual violence were perpetrated by people with various levels of seniority and in numerous divisions of the SFs. Additionally, senior members of the Sri Lankan Government appeared to dismiss or downplay serious allegations relating to rape and sexual violence, and the LLRC largely ignored the allegations. As such, knowledge of an attack against civilians might also be inferred from the perpetrators' potential confidence that they would enjoy impunity.¹⁴⁶⁶

11.57 While there are reasonable grounds to suspect that allegations of rape and sexual violence were widely known, there is little evidence of any steps having been taken internally to stop these offences. HRW reported in early 2013 that to date there has 'only been a handful of prosecutions' of SFs officers for alleged rape,¹⁴⁶⁷ and 'impunity for serious human rights violations, including torture and rape, by state security forces is endemic in Sri Lanka.'¹⁴⁶⁸ It also noted, 'The Sri Lankan Government's response to allegations of sexual violence by security forces has been crude and disdainful.'¹⁴⁶⁹ There are reasonable grounds to suspect that senior SFs officers were either aware of widespread rape and sexual violence or ought to have been aware.

Conclusion

11.58 There are reasonable grounds to suspect that rape and sexual violence as both war crimes and crimes against humanity were committed by members of the SFs.

E. Further investigation

11.59 Further investigation should be undertaken to ascertain more detail in relation to cases of rape and sexual violence as war crimes or crimes against humanity allegedly committed by members of the SFs or Government employees. Furthermore, investigation should be undertaken to determine the steps (if any) that were taken internally to stop these offences and potential perpetrators of these crimes.

¹⁴⁶⁵ Evidentiary material includes witness accounts, the UN Expert Panel Report and INGO reports.

¹⁴⁶⁶ See reasoning in the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, 25 January 2005, 95, [360], http://www.un.org/news/dh/sudan/com_inq_darfur.pdf [accessed 24 July 2013].

¹⁴⁶⁷ HRW, *Sexual Violence Against Tamils*, 8.

¹⁴⁶⁸ *Ibid.*, 45.

¹⁴⁶⁹ *Ibid.*, 43.

12 TORTURE AND OTHER FORMS OF CRUEL TREATMENT

A. Summary

12.1 The available evidentiary material shows it is reasonable to conclude that:

- suspected LTTE members, LTTE sympathisers and critics of the Sri Lankan Government were subjected to torture or cruel treatment by the SFs;
- acts of torture and cruel treatment also occurred during CID and TID interrogations at IDP camps and in police custody;
- a deliberate lack of transparency at LTTE surrendee sites made suspected LTTE cadres highly vulnerable to mistreatment, including acts of torture; and
- torture was a prevalent practice among the SFs, possibly carried out in circumstances where superior officers either knew, or ought to have known, the practice was occurring.

12.2 Torture is prohibited under IHL, international human rights law and international criminal law. Under international criminal law, torture can be committed as a war crime, as a crime against humanity or as a discrete crime. The definition of torture differs slightly for each of these crimes, as will be discussed in sub-section C of this section. There are reasonable grounds to suspect that torture was committed in all these forms during the final stages of the conflict in Sri Lanka.

12.3 If the evidentiary material does not satisfy the threshold for torture, there is a possibility that the incidents discussed below would amount to the war crime of cruel treatment. Unlike torture as a war crime, the war crime of cruel treatment does not require proof of the infliction of severe pain or suffering for a particular purpose.¹⁴⁷⁰

12.4 Further investigation should be undertaken to determine whether alleged acts of torture or cruel treatment committed by the SFs and, more broadly, by the Sri Lankan Government amount to discrete crimes, war crimes, or crimes against humanity. The current investigation has focused on one specific incident; however, as is noted in ICEP's legal analysis, further investigation is required in respect of this incident. In addition, further investigation is required in respect of other alleged incidents, and in particular regarding who was responsible for these alleged crimes.

B. Evidentiary material analysis

(i) **Background**

12.5 The UN Expert Panel found credible allegations that the SFs subjected suspected LTTE members and sympathisers, as well as critics of the Government, to torture. In particular, it found credible allegations that suspected LTTE members were tortured while in military custody and prior to execution.¹⁴⁷¹ In addition, according to the UN Expert Panel, other individuals were tortured: during interrogations by the CID and TID at IDP camps, including

¹⁴⁷⁰
¹⁴⁷¹ See for example, ICC Elements of Crime. UN Expert Panel Report, [150].

Menik Farm;¹⁴⁷² in police custody,¹⁴⁷³ and as part of clandestine operations undertaken by the Government.¹⁴⁷⁴

- 12.6 The UN Expert Panel noted that, due to a deliberate lack of transparency by the Government, very little was known of the conditions and treatment of detainees at separate LTTE ‘surrendee’ sites, where suspected LTTE cadres were highly vulnerable to mistreatment, including torture.¹⁴⁷⁵ ICEP has obtained two first-hand accounts of torture at screening checkpoints and separate LTTE ‘surrendee’ facilities.¹⁴⁷⁶
- 12.7 The UN Expert Panel concluded that ‘reports of torture and cruel, inhuman and degrading treatment or punishment by the state authorities have been persistent and widespread [and] have not been investigated promptly and impartially by the State.’¹⁴⁷⁷
- 12.8 Despite extensive reporting of the incidents of torture, the LLRC did not address allegations of torture.¹⁴⁷⁸ In contrast to the allegations of torture, having visited detention facilities, the LLRC stated, ‘the Commission notes with appreciation the caring attitude of the authorities towards the inmates at these centers.’¹⁴⁷⁹ Similarly, after visiting rehabilitation facilities, the LLRC remarked that it ‘was impressed by the professional and caring manner in which the programmes are being conducted.’¹⁴⁸⁰ While in some instances this may certainly be correct, it has also been noted in an NGO report that there is potential medical complicity in the perpetration of torture in Sri Lanka with doctors potentially being ‘intimidated by government officials and prison officers, as these authorities are often present during medical examinations, and doctors were targeted when they came forward as key witnesses in the final stages of the conflict.’¹⁴⁸¹
- 12.9 Witness accounts relied on in this section, some of which were taken directly by ICEP, include a first-hand account of torture in police custody during the conflict,¹⁴⁸² and second-hand accounts of torture and beatings at IDP camps.¹⁴⁸³

(ii) Incidents

Torture in police custody

- 12.10 ICEP has taken a first-hand witness account from a Tamil civilian who was not a member of the LTTE, who described being arrested and detained in 2008 by the Terrorist Investigation Department (TID), a specialised division of the Sri Lankan Police, after he wrote and published articles critical of the Government.¹⁴⁸⁴ While in TID custody, this witness described being repeatedly punched and kicked while handcuffed, beaten with a wooden stick and metal ruler and suspended from a wooden stick placed between his legs.¹⁴⁸⁵ The

¹⁴⁷²

Ibid, [163].

¹⁴⁷³

Ibid, [361].

¹⁴⁷⁴

Ibid, [63], [176(e)].

¹⁴⁷⁵

Ibid, [167].

¹⁴⁷⁶

WS-1001, [13]–[14] (likely to have been before other inquiries); WS-1002, [66], [78], [84] (unique ICEP statement).

¹⁴⁷⁷

UN Expert Panel Report, [361].

¹⁴⁷⁸

Ibid.

¹⁴⁷⁹

LLRC Report, [5.60].

¹⁴⁸⁰

Ibid, [5.50].

¹⁴⁸¹

Medact Report, ‘Preventing Torture – The Role of Physicians and Their Professional Organisations: Principles and Practice’, 2011.

¹⁴⁸²

WS-1003, [59]–[64], [75], [92].

¹⁴⁸³

WS-1004, [61]; WS-1005, [128].

¹⁴⁸⁴

WS-1003, [31].

¹⁴⁸⁵

Ibid, [59] [62]–[63], [75]–[76].

witness also described being subjected to sleep deprivation for up to 10 days at a time, by being taken into different rooms where he was either tortured, or forced to watch other detainees being tortured.¹⁴⁸⁶ He reported being questioned regarding his involvement with the LTTE and was eventually forced to sign a false confession.¹⁴⁸⁷ He described this treatment as causing him ‘an incredible amount of pain.’¹⁴⁸⁸ He recounted that TID officers also threatened to arrest members of his family if he did not ‘co-operate’.¹⁴⁸⁹

12.11 Another Tamil civilian who was not a member of the LTTE was also detained by the TID around the same time and described being interrogated and beaten.¹⁴⁹⁰ The witness recalled hearing the other detained person screaming out in pain,¹⁴⁹¹ and saw injuries resembling burn marks on his arm and hand shortly thereafter.¹⁴⁹²

12.12 After making a complaint in respect of his torture,¹⁴⁹³ the first witness mentioned above was further tortured by TID officers:

After my court appearance, I was forced by the TID to stand with a pile of books on my head and was beat [sic] on the head with force until blood came out of my ears. Whilst torturing me, I remember the TID officers saying that I would not be able to stay alive for much longer.¹⁴⁹⁴

12.13 This witness described being tortured by many TID officers, and named several of the key perpetrators.¹⁴⁹⁵ This included an officer-in-charge of a unit within the TID, who told the witness that he had orders from a senior Government official to kill him.¹⁴⁹⁶

12.14 The UN Expert Panel found that torture by Police and other Government organs was widespread, persistent and accepted as an interrogation practice in Sri Lanka.¹⁴⁹⁷ It noted that Sri Lankan law provided little protection, with torture and summary execution the leading causes of death in police custody.¹⁴⁹⁸ Many people accused of having an association with the LTTE were charged under the *Prevention of Terrorism Act*, which placed the onus on the accused to prove that a confession was coerced, thereby increasing the likelihood that officers could resort to abusive interrogation practices to obtain confessions.¹⁴⁹⁹ The UN Expert Panel also found that many police officers have remained in their positions despite being accused of committing acts of torture or where they have been accused of threatening, and in some instances accused of killing, witnesses.

Torture at screening sites

12.15 The UN Expert Panel reported that, after leaving the Vanni, survivors of the conflict entered Government-controlled areas where the Army generally strip-searched them for weapons and explosives, and confiscated items such as mobile phones and laptops.¹⁵⁰⁰ People were

¹⁴⁸⁶ Ibid, [59], [62]–[63], [75]–[76].

¹⁴⁸⁷ Ibid, [76], [80], [81].

¹⁴⁸⁸ Ibid, [75].

¹⁴⁸⁹ Ibid, [80].

¹⁴⁹⁰ WS-1006, [63].

¹⁴⁹¹ Ibid, [50], [57].

¹⁴⁹² Ibid, [76].

¹⁴⁹³ WS-1003, [83], [90].

¹⁴⁹⁴ Ibid, [92].

¹⁴⁹⁵ Ibid, [75].

¹⁴⁹⁶ Ibid, [82]. The witness names the individual who allegedly gave these orders.

¹⁴⁹⁷ UN Expert Panel Report, [361].

¹⁴⁹⁸ Ibid.

¹⁴⁹⁹ Ibid, [358].

¹⁵⁰⁰ Ibid, [144].

then transferred to Government-controlled initial screening sites at Kilinochchi, Pulmoddai, Padaviya, and a secondary screening site at Omanthai.¹⁵⁰¹ An essential part of the screening process was separating those with suspected links to the LTTE from civilians. Announcements were made directing those involved with the LTTE, even if only for one day, to declare themselves to the SFs. The SFs also recruited former LTTE cadres to identify LTTE members among surrendering civilians.¹⁵⁰² While the UN Expert Panel stated that 'the screening process resulted in cases of executions, disappearances, and rape and sexual violence,'¹⁵⁰³ it did not discuss torture generally during screenings.

- 12.16 ICEP has obtained two first-hand witness accounts from individuals who described being tortured or subject to cruel treatment at the Omanthai checkpoint.¹⁵⁰⁴ One witness, whose statement was likely to have been before other inquiries, explained that after arriving at Omanthai checkpoint on 17 May 2009, he told the SFs that LTTE cadres had been among his students at a university in the Vanni.¹⁵⁰⁵ He was then separated from his family and taken to a large registration area for LTTE.¹⁵⁰⁶ While being questioned about his connection with the LTTE, he claimed to have been punched and kicked very hard in his face and stomach.¹⁵⁰⁷ He was then taken to a large-scale detention and interrogation facility nearby.¹⁵⁰⁸ He recalled being tied to a post with his hands behind his back by SFs officers and having a baby bottle full of petrol forced into his mouth.¹⁵⁰⁹ He stated:

As soon as the bottle was in my mouth, I realised that it contained petrol and it was burning my mouth so I spat it out and it fell to the floor. [The soldier] was very angry and he screamed that if I did that again, he would make me drink the whole bottle... I was gagging and choking from the fuel and felt very sick. However, I did not spit the bottle out as I was fearful he would make me drink the petrol which I knew would kill me. I was made to stand there with the bottle in my mouth for about four hours.¹⁵¹⁰

- 12.17 The witness said, 'My mouth was all blistered and swollen from the petrol which made my already bad state even worse.'¹⁵¹¹
- 12.18 Another witness, who spoke directly with ICEP, described being subjected to what could amount to cruel treatment. He recalled being separated from civilians at the Omanthai checkpoint, after acknowledging to the SFs that he was an LTTE cadre.¹⁵¹² The witness was then strip-searched, and SFs officers slapped and punched his face and arms, and pushed him to the ground and kicked him. He described other LTTE cadres being treated the same way.¹⁵¹³

Torture at IDP camps

- 12.19 ICEP has several witness accounts of the TID and CID operating at IDP camps. Two witnesses who provided information directly to ICEP described the CID and TID taking

¹⁵⁰¹ Ibid, [144]–[146].

¹⁵⁰² Ibid, [144]–[145], [164].

¹⁵⁰³ Ibid, [148].

¹⁵⁰⁴ One of these witness statements was likely to have been before other inquiries and the second one is unique to ICEP.

¹⁵⁰⁵ WS-1001, [365].

¹⁵⁰⁶ Ibid, [365]–[367].

¹⁵⁰⁷ Ibid, [371]–[372].

¹⁵⁰⁸ Ibid, [375], [380], [389].

¹⁵⁰⁹ Ibid, [391]–[392].

¹⁵¹⁰ Ibid.

¹⁵¹¹ Ibid, [396].

¹⁵¹² WS-1007, [32].

¹⁵¹³ Ibid.

people into huts and tents at camps, including Menik Farm.¹⁵¹⁴ One of these witnesses saw 'young Tamils being taken into CID or TID tents' who he believes were beaten.¹⁵¹⁵ The UN Expert Panel found credible allegations of torture at Menik Farm IDP camp.¹⁵¹⁶ It reported that the CID and TID maintained 'units' within Menik Farm, and the sounds of beating and screams could be heard from interrogation tents.¹⁵¹⁷

12.20 According to the UN Expert Panel, some individuals were taken away from Menik Farm and never seen again.¹⁵¹⁸ A witness account provided directly to ICEP also described the CID or TID taking individuals to locations outside of the IDP camps.¹⁵¹⁹ The witness stated that several of his friends were taken to the 'fourth floor in Colombo', which the witness described as 'a torture facility run by the TID.'¹⁵²⁰ Another witness stated that intelligence officials would visit Menik Farm to determine if any detainees were LTTE members.¹⁵²¹ Suspected LTTE members were sent to another camp, where this witness heard reports that they were tortured.¹⁵²²

12.21 ICEP also has a new first-hand witness account from a local employee of an NGO, which described members of the paramilitary groups Karuna Group and the Eelam People's Democratic Party (EPDP) walking around the Chettikulam IDP Camp with Army soldiers.¹⁵²³ Other witnesses, whose accounts were likely to have been before other inquiries, also recall members of the Karuna Group working at Menik Farm.¹⁵²⁴ One of these witnesses described seeing members of the Karuna Group, accompanied by Army soldiers, identifying people at shelters in Menik Farm, and dragging them into armoured vehicles.¹⁵²⁵ The witness stated that these people 'would not be seen again'.¹⁵²⁶

C. International legal framework

(i) Torture

12.22 The prohibition of torture is well established in international law. It is an absolute, non-derogable prohibition in numerous human rights treaties,¹⁵²⁷ and is prohibited under common Article 3. The prohibition of torture is also recognised as a rule of customary international law,¹⁵²⁸ amounting to a *jus cogens* norm.¹⁵²⁹

12.23 Both under customary international law and the ICC Statute, torture is a war crime in a NIAC¹⁵³⁰ and is a crime against humanity.¹⁵³¹ Moreover, torture is a discrete crime under the 1984 *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or*

¹⁵¹⁴ WS-1008, Addendum, [23]; WS-1004, [61] (detained in mid-2009).

¹⁵¹⁵ WS-1004, [61].

¹⁵¹⁶ UN Expert Panel Report, [163].

¹⁵¹⁷ Ibid.

¹⁵¹⁸ Ibid.

¹⁵¹⁹ WS-1008, Addendum.

¹⁵²⁰ Ibid, Addendum, [23].

¹⁵²¹ WS-1005, [128].

¹⁵²² Ibid, [128] (detained in mid 2009).

¹⁵²³ WS-1009, [197], [199].

¹⁵²⁴ WS-1005, [133]; WS-1001, [411].

¹⁵²⁵ WS-1001, [411].

¹⁵²⁶ Ibid.

¹⁵²⁷ See, eg, Art 7, ICCPR and Art 2, CAT.

¹⁵²⁸ Rule 90, CIHL Study.

¹⁵²⁹ Furundžija (ICTY-95-17-TC), Trial Chamber, 10 December 1998, para.153; Al-Adsani v. the United Kingdom, Judgment of the European Court of Human Rights of 21 November 2001, para. 61.

¹⁵³⁰ ICC Statute, art 8(2)(c)(i).

¹⁵³¹ ICC Statute, art 7(1)(f).

Punishment (CAT). Sri Lanka acceded to CAT in 1994 and it has an obligation under Article 4 of CAT to criminalise torture under its domestic law.

12.24 Under the CAT, torture

means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁵³²

12.25 The definition in the CAT served as the starting point for defining torture as a crime against humanity and a war crime. The elements of intentional infliction of severe pain or suffering on a person, whether physical or mental, became accepted as the core definition for torture as a war crime¹⁵³³ and as a crime against humanity,¹⁵³⁴ but differences in the definitions exist.

12.26 As in the CAT, torture as a crime against humanity excludes ‘pain or suffering arising only from’ or ‘inherent in or incidental to, lawful sanctions,’¹⁵³⁵ which is understood as referring to both domestic and international law.¹⁵³⁶

12.27 As a war crime, torture requires a nexus with an armed conflict¹⁵³⁷ and as a crime against humanity, torture must be part of a widespread or systematic attack. In contrast, as a discrete crime, torture can occur at any time and does not have to form part of a widespread or systematic attack directed against any civilian population.

12.28 The CAT definition sets out the requirement that the ‘pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’ On the basis of the structural differences between international human rights law and international criminal law, the ICTY eventually dropped this link between the act of torture and a public official.¹⁵³⁸ The ICC Statute and Elements of Crime adopted the same approach.¹⁵³⁹

12.29 Under the CAT definition, the act must be committed with a specific purpose. Although the list of purposes is not exhaustive, it must be narrowly interpreted.¹⁵⁴⁰ The ICTY adopted the purpose criterion as part of the customary law definition of the crime of torture.¹⁵⁴¹ Many commentators believe that the purpose criterion distinguishes torture from other cruel,

¹⁵³² Art 1, CAT.

¹⁵³³ ICC Elements of Crime, art 8(2)(c)(i)-4, para.1.

¹⁵³⁴ Art 7(2)(e), ICC Statute; ICC Elements of Crime art 7(1)(f) [1].

¹⁵³⁵ Art 7(2)(e), ICC Statute; ICC Elements of Crime Art 7(1)(f) [3].

¹⁵³⁶ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture. A Commentary*, (OUP, 2008), at 83–84.

¹⁵³⁷ *Prosecutor v Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No ICTY-96-23-T, 22 February 2001), [487].

¹⁵³⁸ *Ibid* [488]–[497].

¹⁵³⁹ Art 7(2)(e) ICC Statute; ICC Elements of Crimes arts 7(1)(f), 8(2)(c)(i)-4.

¹⁵⁴⁰ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture. A Commentary*, (OUP, 2008), 75.

¹⁵⁴¹ See for example *Furundžija* (ICTY-95-17-TC), Trial Chamber, 10 December 1998, [161].

inhuman and degrading treatment.¹⁵⁴² However, other authorities, in particular the European Court of Human Rights, insist on the severity of the pain inflicted as the distinguishing criterion.¹⁵⁴³ Under the ICC Statute and the ICC Elements of Crime, purpose is required for torture as a war crime,¹⁵⁴⁴ but not for torture as a crime against humanity.¹⁵⁴⁵ Since it is not clear whether purpose forms part of the customary law definition of torture as a crime against humanity,¹⁵⁴⁶ ICEP will consider this element.

12.30 For torture as a crime against humanity, the ICC Statute and the ICC Elements of Crime added the additional requirement that the victim must be in the 'custody or control' of the perpetrator.¹⁵⁴⁷ Since torture usually entails such control, this requirement should not be difficult to prove.¹⁵⁴⁸

12.31 As discussed above, unlike torture as a crime against humanity under the ICC Statute, the war crime of torture under the ICC Statute requires the act to be committed with a purpose in line with the definition set out in CAT.¹⁵⁴⁹ Moreover, as a war crime, the conduct must be inflicted upon persons who 'were either hors de combat, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.'¹⁵⁵⁰ In contrast to torture as a discrete crime and torture as a crime against humanity, the war crime of torture must have a nexus to the armed conflict.¹⁵⁵¹

(ii) Cruel treatment

12.32 If the purpose requirement cannot be established, the conduct could still amount to the war crime of cruel treatment, which is defined identically to the war crime of torture except that there is no need for the treatment to be inflicted with a specific purpose.¹⁵⁵²

D. Legal analysis

12.33 In respect of the crimes of torture and cruel treatment, ICEP will predominantly look at one incident, outlined in the section above addressing torture in police custody (see paragraphs 12.10 - 12.14). ICEP will, however, make reference to other witness accounts where relevant to the legal analysis.

(i) Torture as a war crime

12.34 The elements required to establish the war crime of torture as set out in the ICC Elements of Crimes¹⁵⁵³ are addressed below in relation to a specific incident. A witness account taken by

¹⁵⁴² Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture. A Commentary*, (OUP, 2008), 74.

¹⁵⁴³ See for example *Saadi v. Italy*, Judgment of the European Court of Human Rights (Grand Chamber) of 23 February 2008, [134]–[136]. For an overview of the discussion on the distinction of torture from other cruel, inhuman and degrading treatment on the basis of purpose and severity under both human rights law and international criminal law, see Nigel S. Rodley with Matt Pollard, *The Treatment of Prisoners under International Law*, 3rd edition, (OUP, 2009), 85–124.

¹⁵⁴⁴ ICC Elements of Crime, art 8(2)(c)(i)-4, para.2.

¹⁵⁴⁵ Art 7(2)(e), ICC Statute; ICC Elements of Crimes, art 7(1)(f), fn 14: 'it is understood that hat no specific purpose need be proved for this crime.'

¹⁵⁴⁶ R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to Internationals Criminal Law and Procedure*, (Cambridge, 2010), 252.

¹⁵⁴⁷ Art 7(2)(e), ICC Statute; ICC Elements of Crime, art 7(1)(f) [2].

¹⁵⁴⁸ *Ibid.*

¹⁵⁴⁹ ICC Elements of Crime, art 8(2)(c)(i)-4, [2].

¹⁵⁵⁰ *Ibid.*, [3].

¹⁵⁵¹ *Ibid.*, [5].

¹⁵⁵² *Ibid.*, art 8(2)(c)(i)-3.

¹⁵⁵³ *Ibid.*, art 8(2)(c)(i)-4.

ICEP provides reasonable grounds to suspect that torture as a war crime was committed. This witness has also provided ICEP with medico-legal reports identifying a number of contusions and areas of tenderness on his body shortly after some of the alleged incidents of torture. A second witness statement provided to ICEP also describes some of the events that took place.

Severe physical or mental pain or suffering

- 12.35 The witness described several incidents during his detention at TID headquarters where he was subjected to a degree of physical and mental pain or suffering that would likely satisfy the threshold of ‘severe’. This included being held in stress positions, kicked, punched in the face while being handcuffed, suspended on a wooden stick placed between his legs, beaten with metal implements, deprived of sleep, and forced to watch other prisoners being tortured.¹⁵⁵⁴ This treatment often continued for hours and the witness suffers ongoing pain as a result.¹⁵⁵⁵ These various descriptions of the treatment the victim endured make it reasonable to conclude that this element of the war crime would be satisfied.

Infliction of pain or suffering for particular purposes

- 12.36 The witness’s description of the pain and suffering he received suggests that it was done with the purpose of eliciting information. The witness recalled, ‘I remember seeing a baton which made me very fearful... I recall that when I asked for some water, one of the officers said words to the effect of if you tell us the truth you will get everything you ask for’.¹⁵⁵⁶ The witness also stated, ‘They asked me about my financial accounts, documents and photographs on my laptop... When I did not give them the answers they wanted, they continued to assault and torture me.’¹⁵⁵⁷
- 12.37 It also appears the pain and suffering was inflicted to obtain a confession that the victim was a member of the LTTE. He recalled being told by the accused, ‘we can take your handcuffs off when you tell us about the relationship between you and the Tigers.’¹⁵⁵⁸ The witness commented that ‘they also started to use other forms of torture. I think the TID officers were becoming frustrated that I was not confessing to being a Tiger.’¹⁵⁵⁹ It is reasonable to conclude that the pain and suffering inflicted upon the victim was done for the purpose of forcing a confession or eliciting information from him.

The victim was hors de combat or a civilian and the perpetrator(s) were aware of this status

- 12.38 According to the witness, he was a business owner and was not a member of the LTTE. He alleged the perpetrators should have been aware of this as he was arrested from his civilian place of work and alleges he consistently told the perpetrators that he was not a member of the LTTE. In any event, even if the alleged perpetrators had reason to believe that he was a member of the LTTE, the witness was *hors de combat* as he was in detention, therefore it is reasonable to conclude that this element of the crime would be satisfied.

¹⁵⁵⁴ WS-1003, [58]–[63], [75]–[76].

¹⁵⁵⁵ Ibid, [58], [63].

¹⁵⁵⁶ Ibid, [59].

¹⁵⁵⁷ Ibid, [85].

¹⁵⁵⁸ Ibid, [59].

¹⁵⁵⁹ Ibid, [76].

In the context of an armed conflict and the perpetrators were aware of the factual circumstances establishing the conflict

12.39 In this case, it is reasonable to conclude that a nexus would be found between the perpetrator's conduct and the armed conflict. Although the conduct took place at some distance from the combat zone, the alleged torture took place during the conflict period, and appeared to have been for the purposes of forcing a confession and obtaining information regarding the opposing party to the conflict.

Conclusion

12.40 The assessment of the incident above is based on the witness' description of events, as well as a medico-legal report identifying a number of contusions and areas of tenderness on his body soon after several alleged incidents of torture or cruel treatment by TID officers. There are reasonable grounds to suspect that the war crime of torture was committed. The witness has provided ICEP with the names of the two principal alleged perpetrators.¹⁵⁶⁰

12.41 ICEP also has evidentiary material from other witnesses who claim to have been subjected to acts of torture that could amount to torture as a war crime. Another witness whose account is detailed in the above analysis, was also allegedly detained by the TID and described being interrogated and beaten.¹⁵⁶¹

(ii) Cruel treatment as a war crime

12.42 The elements of cruel treatment as a war crime in the ICC Elements of Crimes¹⁵⁶² are the same as for torture as a war crime, except there is no requirement that the pain or suffering be inflicted for a particular purpose. Although in paragraphs 12.36-12.37 ICEP has discussed the alleged purposes of the perpetrator, if this is not proven, but the other elements are, there are reasonable grounds to suspect that this would amount to the war crime of cruel treatment.

12.43 There are also other incidents (see paragraphs 12.15 - 12.21), which have been drawn to ICEP's attention by witnesses that suggest the commission of the war crime of cruel treatment. For example, one witness alleged that a SFs officer at the Omanthai checkpoint forced a baby bottle full of petrol into his mouth while he was tied to a post with his hands behind his back.¹⁵⁶³ Another witness described how at the Omanthai checkpoint he was strip searched by SFs, slapped and punched on his arms and face and was pushed to the ground and kicked.¹⁵⁶⁴ These will be relevant to consider in the context of cruel treatment as a war crime, if they do not satisfy the purpose element for the war crime of torture.

(iii) Torture as a crime against humanity

12.44 As discussed above, it is not settled whether or not torture as a crime against humanity under customary international law requires the treatment to be inflicted upon a person for a specific purpose. Hence, ICEP will take into account the requirement of purpose although it is not included in the ICC Elements of Crime. The elements required for the crime against

¹⁵⁶⁰ Ibid, [75].
¹⁵⁶¹ WS-1006, [63].
¹⁵⁶² ICC Elements of Crimes, art 8(2)(c)(i)-3.
¹⁵⁶³ WS-1001, [391].
¹⁵⁶⁴ WS-1007, [32].

humanity of torture are addressed below in relation to the witness account provided directly to ICEP described in paragraphs 12.10 - 12.14, and analysed in paragraphs 12.35 - 12.37.

Severe pain or mental suffering

12.45 See paragraphs 12.35.

Infliction of pain or suffering for particular purposes

12.46 See paragraphs 12.36 - 12.37.

In the custody or control of the perpetrator(s)

12.47 The witness was in the custody and control of the alleged perpetrators as he claims to have been detained at the TID headquarters.

Pain was not a result of lawful sanctions

12.48 There is no information to suggest that the person was lawfully detained and even if he was, his alleged treatment was not inherent in or incidental to lawful sanctions.

Widespread or systematic attack

12.49 Annex II of this report asserts that both a widespread and a systematic attack are likely to have been directed against the civilian population by the Sri Lankan Government. There are reasonable grounds to suspect that the witness account obtained by ICEP relating to his alleged torture in 2008 would constitute a crime against humanity, if this incident was part of the attack on the civilian population.

The acts formed part of attack

12.50 Based on ICEP's assessment of the evidentiary material before it, it is reasonable to conclude that the alleged torture of this witness formed part of this broader attack.¹⁵⁶⁵ It is also reasonable to conclude that various members of the TID and CID were involved in this alleged incident of torture and that the perpetrators were aware that such crimes formed part of a widespread or systematic attack directed against a civilian population. This can be inferred from, among other things, the suggestion by the witness that that the torture was perpetrated by people of various levels of seniority in the SFs. Furthermore, knowledge of an attack against civilians might also be inferred from the perpetrators' confidence that they would enjoy impunity.¹⁵⁶⁶ For example, the witness claimed that when a relative enquired where he was being taken on the occasion of his arrest, one of the SFs laughed and gave the relative a hand written note, which allegedly read 'passport office'.¹⁵⁶⁷ If this incident occurred as claimed, the apparent disregard for the liberty of the witness and the way in which his intended whereabouts were falsely communicated raises an inference that the perpetrators were unconcerned about the legality of their conduct.

Conclusion

12.51 ICEP's assessment of this evidentiary material indicates that there are reasonable grounds to suspect that torture as a crime against humanity was committed.

¹⁵⁶⁵ Evidentiary material includes witness accounts, the UN Expert Panel Report and INGO reports.

¹⁵⁶⁶ See reasoning in the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, 25 January 2005, 95, [360], http://www.un.org/news/dh/sudan/com_inq_darfur.pdf [accessed 24 July 2013].

¹⁵⁶⁷ WS-1003, [55].

(iv) Torture under the Convention against Torture

12.52 The elements required to establish torture under CAT are addressed below.

Severe pain or suffering

12.53 The evidentiary material collected by ICEP indicates that there are reasonable grounds to suspect that the element of severe pain or suffering would be satisfied in many of the accounts taken from victims during and after the conflict (in addition to those incidents discussed in the earlier sections of this legal analysis – see the description at paragraphs 12.10 - 12.13).

Public official or person acting in an official capacity

12.54 Witness accounts describe SFs officers themselves committing acts of torture and other forms of ill treatment.¹⁵⁶⁸ The evidentiary material also suggests that the commission of such crimes was well-known throughout the SFs, including among senior officers, indicating that this practice was accepted and committed with the acquiescence of other officers.

Purpose

12.55 Witnesses described being tortured in the context of interrogations. This infers the purpose was to obtain information. Other witnesses recounted being forced to confess to being LTTE members and some witnesses were allegedly tortured after declaring they were LTTE. The purpose behind some of the alleged incidents of torture could have therefore been to obtain information, force a confession, or punish the victim.

Obligation to investigate and punish

12.56 The CAT also imposes obligations on States parties to ensure their authorities investigate where there are reasonable grounds to suspect that an act of torture has been committed,¹⁵⁶⁹ and to either extradite a person alleged to have committed an offence under the treaty, or submit the case to its competent authorities for prosecution.¹⁵⁷⁰

12.57 The UN Expert Panel noted significant shortcomings in Sri Lanka's investigation and prosecution of alleged acts of torture. These included lengthy delays, threats against complainants,¹⁵⁷¹ and 'troublingly inconsistent' judicial responses.¹⁵⁷² It stated, 'the majority of prosecutions initiated against the authorities on charges of... torture have been inconclusive due to lack of satisfactory evidence and unavailability of witnesses.'¹⁵⁷³ To date, there is no indication that the Sri Lankan Government has addressed these issues.

E. Further investigation

12.58 Further investigation should be undertaken to determine whether the alleged acts of torture or cruel treatment committed by the SFs amount to discrete crimes, war crimes, or crimes against humanity. The following areas in particular warrant further investigation: the identification of SF officers other than those named in the evidentiary material (although not provided in this report), who allegedly participated in the commission of acts of torture and cruel treatment or who had command responsibility for those allegedly engaged in acts of

¹⁵⁶⁸ See 'Incidents' section, and in particular 'Torture in Police Custody' and 'Torture at IDP Camps'.
¹⁵⁶⁹ Art 12, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.
¹⁵⁷⁰ Art 7, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.
¹⁵⁷¹ UN Expert Panel Report, [360].
¹⁵⁷² Ibid, [373].
¹⁵⁷³ Ibid, [360].

torture or cruel treatment; and whether the acts of torture alleged in the evidentiary material occurred at the instigation, or with the consent or acquiescence, of a public official (or a person acting in an official capacity).

13 ENFORCED DISAPPEARANCE OF PERSONS

A. Summary

13.1 The available evidentiary material shows it is reasonable to conclude that:

- enforced disappearances were conducted by the SFs and paramilitary groups;
- LTTE ‘surrendeers’ were targeted and these disappearances took place on multiple occasions and in several different locations; and
- enforced disappearances occurred at points of surrender, screening sites and IDP camps.

13.2 Under the 2005 International Convention on the Protection of All Persons from Enforced Disappearance, enforced disappearance constitutes the

arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.¹⁵⁷⁴

13.3 Both customary IHL and international human rights law prohibit the practice of enforced disappearances. The ICC Statute expressly provides for the crime against humanity of enforced disappearances.¹⁵⁷⁵ Witness accounts collected by ICEP provide details of situations in which there are reasonable grounds to suspect the contextual elements for the crime against humanity of enforced disappearances are satisfied. If it can be proven that there was a targeted use of enforced disappearances against the Tamil population, this may also constitute the crime against humanity of persecution, provided the contextual elements of crimes against humanity are also satisfied.¹⁵⁷⁶

13.4 The seriousness of these allegations means that further investigation is warranted into the incidents discussed below to ascertain whether or not enforced disappearances were perpetrated by members of the SFs and the SFs’ paramilitary groups. Further investigation is also needed to determine whether such violations amount to crimes against humanity as defined by the ICC Statute; and whether the crime against humanity of persecution was committed by the SFs and paramilitary groups under the ICC Statute.

B. Evidentiary material analysis

(i) **Background**

13.5 In a 2010 report, HRW concluded that Sri Lanka has an ‘appalling record of enforced disappearances’ with more than 20,000 disappearances in the 1980s and 1990s.¹⁵⁷⁷ It stated:

¹⁵⁷⁴ Art 2.
¹⁵⁷⁵ Art 7(1)(e), Rome Statute of the International Criminal Court.
¹⁵⁷⁶ Ibid, Art 7(1)(h).
¹⁵⁷⁷ HRW Report, ‘Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka’, 2 February 2010, <http://www.hrw.org/sites/default/files/reports/srilanka0210webwcover.pdf> [accessed 4 November 2013], 10.

The collapse of the ceasefire between the government and the LTTE in 2006 was accompanied by a new wave of 'disappearances' committed by Sri Lankan security forces and pro-government paramilitary groups. Over two years, more than 1,500 people, the vast majority of them ethnic Tamils, were forcibly disappeared, placing Sri Lanka among the countries with the highest number of new cases in the world.¹⁵⁷⁸

- 13.6 According to the 2009 Report of the Working Group on Enforced or Involuntary Disappearances (the **Disappearances Working Group**), at the end of the reporting period, there were 5,651 outstanding cases of disappearances in Sri Lanka.¹⁵⁷⁹ According to the Disappearances Working Group, the 'disappearances [that] took place between 2006 and 2008, occurred mainly in Colombo, Trincomalee, Mannar, Vavuniya and Jaffna. The military, police, and security forces are allegedly responsible for these disappearances.'¹⁵⁸⁰
- 13.7 The UN Expert Panel found that there were credible allegations to support a finding that 'numerous persons, perceived by the Government to be critical of its approach or sympathetic to the LTTE, have been disappeared during and after the final stages of the war.'¹⁵⁸¹ It stated that credible allegations indicated that people were removed and disappeared by the Sri Lankan Army and paramilitary groups from various locations including from screening sites¹⁵⁸² and points of surrender.¹⁵⁸³ The UN Expert Panel further stated that '[t]he Government did not guarantee the physical security of IDPs in camps insofar as it gave paramilitary groups access to the camps, with a broad writ to continue the removal of people.'¹⁵⁸⁴
- 13.8 ICEP has received second-hand reports of disappearances and has interviewed witnesses who described their fear of being disappeared. A witness interviewed by ICEP, who was a local employee of an NGO, observed that many people in Sri Lanka continued to fear the paramilitary group known as the Karuna Group because of its perceived involvement in abductions.¹⁵⁸⁵ The witness also claimed it was common knowledge that the Karuna Group, along with another paramilitary group, the Eelam People's Democratic Party (**EPDP**), who were allegedly both involved in abductions and extortion, worked for the Sri Lankan Government.¹⁵⁸⁶ The witness stated:

One of the reasons for this belief is that, if a civilian is abducted by one of these armed groups, and someone makes a complaint about it to the Sri Lankan authorities, nothing will be done. In addition, on one or two occasions, members of the Sri Lankan public have stood up to these groups and chased them. When the public has chased them, the men have been seen running into the SFs-controlled camps.¹⁵⁸⁷

1578

Ibid.

1579

Report of the Working Group on Enforced or Involuntary Disappearances, 21 December 2009, A/HRC/13/21, [504].

1580

Ibid, [505].

1581

UN Expert Panel Report, [251(e)].

1582

After leaving areas of conflict civilians were generally strip searched by the SFs and then transferred to initial screening sites at Kilinochchi, Pulmoddai, Padaviya and a secondary screening site at Omanthai. An essential part of this process was separating those with suspected links to the LTTE from civilians. Announcements were made directing those involved with the LTTE, even if only for one day, to declare themselves to the SFs. The SFs also recruited former LTTE cadres to identify LTTE members among surrendering civilians. See UN Expert Panel Report, [144]–[146], [164].

1583

UN Expert Panel Report, [215].

1584

Ibid, [220].

1585

WS-901, [31].

1586

Ibid, [28]–[29].

1587

Ibid.

- 13.9 The UN Expert Panel stated that credible allegations pointed to ‘disappearances carried out by agents on behalf of the State, the victims of which were frequently suspected LTTE cadre, community activists, journalists or human rights defenders.’¹⁵⁸⁸ The UN Expert Panel also stated that ‘[c]redible allegations detail a common practice whereby such individuals were abducted and removed in white vans and never seen again’.¹⁵⁸⁹
- 13.10 The UN Expert Panel pointed to credible allegations that the Sri Lankan Government breached the prohibition on disappearances under international human rights law.¹⁵⁹⁰ Notably, the UN Expert Panel stated that credible allegations indicated that disappearances were a widespread practice in Sri Lanka before, during and after the final stages of the war,¹⁵⁹¹ and that there was a widespread or systematic attack against the civilian population of the Vanni during the final stages of the war.¹⁵⁹² Accordingly, the UN Expert Panel concluded that ‘credible allegations support a finding of the crime against humanity of disappearances’.¹⁵⁹³
- 13.11 The LLRC stated that it was ‘alarmed by a large number of representations made alleging abductions, enforced or involuntary disappearances, and arbitrary detention.’¹⁵⁹⁴ This included numerous representations from relatives of LTTE cadres who surrendered to or were arrested by the Army and have not been seen or heard from since.¹⁵⁹⁵ Other people made representations to the LLRC that members of the clergy,¹⁵⁹⁶ and large numbers of civilians,¹⁵⁹⁷ had disappeared during the conflict.
- 13.12 The LLRC also received representations alleging disappearances involving white van abductions by groups such as the EPDP and the Karuna Group.¹⁵⁹⁸ The LLRC acknowledged that during its visit to Ampara, it was told in relation to a representation on behalf of a number of missing persons from the Monaragala district that people were reluctant ‘to come forward and make complaints about these incidents due to fear’.¹⁵⁹⁹ It also stated, ‘According to the representations made a substantial number of cases of abductions involving the LTTE were reported during the Commission’s visits to Batticaloa, Jaffna, and Muttur.’¹⁶⁰⁰
- 13.13 The LLRC concluded that
- 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. The Commission emphasizes that it is the responsibility of the State to ensure the security and safety of any person who is taken into custody by governmental authorities through surrender or an arrest.¹⁶⁰¹

¹⁵⁸⁸ UN Expert Panel Report, [234].
¹⁵⁸⁹ Ibid.
¹⁵⁹⁰ Ibid, [233]–[234].
¹⁵⁹¹ Ibid, [234].
¹⁵⁹² Ibid, [251].
¹⁵⁹³ Ibid, [251(e)].
¹⁵⁹⁴ LLRC Report, [5.34].
¹⁵⁹⁵ Ibid, [4.318]; see also [4.241]–[4.260].
¹⁵⁹⁶ Ibid, [5.28].
¹⁵⁹⁷ Ibid, [5.15].
¹⁵⁹⁸ Ibid, [5.27], [5.70], [5.72].
¹⁵⁹⁹ Ibid, [5.14].
¹⁶⁰⁰ Ibid, [5.25].
¹⁶⁰¹ Ibid, [5.34]–[5.35].

- 13.14 The UN Expert Panel criticised the LLRC's response to allegations of disappearances and stated that while

victims reported particular violations, such as disappearances or missing relatives, the Commission has displayed seemingly little interest in pursuing these issues... In most of these cases, the Commission has sought to assuage humanitarian concerns rather than address allegations of human rights violations.¹⁶⁰²

- 13.15 The Sri Lankan Army appointed a Board to formulate an action plan based on the LLRC's recommendations. The Board's report, *The Full Report of the Army Board on Implementation of the Recommendations of the Lessons Learnt & Reconciliation Commission (LLRC) (Army Board Report)*, was published in January 2013 and commented on some of the LLRC's findings. In respect of alleged disappearances, the Army Board Report noted:

It is a common practice by LTTE to classify LTTE cadres killed in combat, civilians killed by LTTE for various reasons (such as for their anti-LTTE beliefs), civilians killed by LTTE whilst fleeing to the Government areas, civilians [who] died during their flight to freedom for reasons such as drowning, exhaustion, land mines etc and LTTE cadres and civilian [who] illegally left Sri Lanka and presently domiciled abroad as Missing persons to evoke international sympathy... In this backdrop, doubts exist [sic] as to the alleged incidents of abductions and disappearances submitted to LLRC by various persons and the numbers indicated as disappeared.¹⁶⁰³

(ii) Incidents

- 13.16 ICEP has obtained second-hand witness accounts of disappearances from screening sites, IDP camps, and separate LTTE 'surrender' detention and rehabilitation facilities. These incidents provide examples of the many alleged accounts of individuals disappearing at the end of the conflict.¹⁶⁰⁴ Several witness accounts also detail events relating to a group of people, including Father Francis Joseph and senior LTTE cadres. This group allegedly surrendered to the SFs at the conclusion of the conflict and have not been seen or heard from since.

Reported disappearances at surrender and screening sites

- 13.17 The UN Expert Panel noted, 'The Government has not provided a public registration of persons at screening sites or Omanthai, neither did it allow international organisations to monitor the process. This makes it difficult to trace persons.'¹⁶⁰⁵ The UN Expert Panel further noted that there had been a 'deliberate lack of transparency' by the Government at separate LTTE 'surrender' sites and that LTTE cadres were 'highly vulnerable to violations such as ... disappearances, which could be committed with impunity.'¹⁶⁰⁶

- 13.18 HRW reported:

¹⁶⁰² UN Expert Panel Report, [326].

¹⁶⁰³ The Full Report of the Army Board on Implementation of the Recommendations of the Lessons Learnt & Reconciliation Commission, January 2013, 12 [57], http://www.jdslanka.org/images/documents/sl_army_report_on%20llrc.

¹⁶⁰⁴ See, eg, HRW Report, 'Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka', 2 February 2010, 10–14, <http://www.hrw.org/sites/default/files/reports/srilanka0210webwcover.pdf> [accessed 4 November 2013].

¹⁶⁰⁵ UN Expert Panel Report, [151].

¹⁶⁰⁶ Ibid, [167].

Many families have not heard anything about their relatives' fate since they were separated and detained at Omanthai checkpoint, after crossing into government-controlled areas. In September 2009, several aid workers told Human Rights Watch that families approached them on a daily basis searching for their relatives, mostly young men, who had been detained at Omanthai. While some detainees seem to have later 'reappeared' in detention camps, the fate of many others remains unknown.¹⁶⁰⁷ [Footnote omitted.]

- 13.19 In his statement to the LLRC, the Army Commander Jagath Jayasuriya, spoke about the process the Army undertook at the Omanthai Exit Re-entry point to prevent allegations of disappearances. He stated:

Here there was a requirement to identify the people who were connected with the LTTE organization and at all times I ensured that representatives from the UN and ICRC were present at all times in order to avoid allegations that people go missing at check points. My staff officers will agree with that. At the end I ensured that their list and our list were the same in total and names. I didn't want anyone to say later on that so and so was missing.¹⁶⁰⁸

- 13.20 Contrary to these alleged measures put in place to avoid allegations of disappearances at screening points, a local teacher, whose statement was likely to have been before other inquiries, stated that while there were many rumours of disappearances at separate LTTE surrender and rehabilitation centres. He stated, 'I don't know that anyone outside those camps knew what happened in those places.'¹⁶⁰⁹ According to the UN Expert Panel, 'There is virtually no information about conditions at separate LTTE surrendee sites' and there has been 'no external scrutiny for almost two years'.¹⁶¹⁰ Similarly, HRW reported that since mid-July 2009, the 'ICRC has also been barred from accessing the detention centers and the main 'welfare centers' for displaced persons, nor do they have access to the registration lists.'¹⁶¹¹

- 13.21 Furthermore, one witness, a local employee of an international agency who visited IDP camps between January and May 2009, heard reports that some women were disappeared after being screened by the SFs.¹⁶¹² According to this witness, these complaints were communicated to the UN, the ICRC and other human rights organisations.¹⁶¹³ The witness also stated that he regularly heard reports of LTTE cadres being separated from civilians during screening by the SFs, and that some of these cadres are still missing.¹⁶¹⁴

Reported disappearances from IDP camps

- 13.22 A witness, a local teacher who was detained for several months at Menik Farm in 2009, described 'the fear and terror' that continued in the IDP camps following the defeat of the LTTE.¹⁶¹⁵ The witness recalled seeing members of the Karuna Group accompanied by Army

¹⁶⁰⁷ See for example, HRW Report, 'Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka', 2 February 2010, 10–11, <http://www.hrw.org/sites/default/files/reports/srilanka0210webwcover.pdf> [accessed 4 November 2013].

¹⁶⁰⁸ Proceedings of public sittings of the LLRC, representations made by the Commander of the Army Jagath Jayasuriya, 8 September 2010.

¹⁶⁰⁹ WS-902, [425].

¹⁶¹⁰ UN Expert Panel Report, [167]

¹⁶¹¹ See for example, HRW Report, 'Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka', 2 February 2010, 11–12, <http://www.hrw.org/sites/default/files/reports/srilanka0210webwcover.pdf> [accessed 4 November 2013].

¹⁶¹² WS-903, Addendum, [14].

¹⁶¹³ Ibid.

¹⁶¹⁴ Ibid, [21]. For more detail about the screening process, see paragraph 12.15.

¹⁶¹⁵ WS-902, [411].

soldiers, identifying people in shelters and dragging them into armoured vehicles.¹⁶¹⁶ The witness believed that these people were not seen again.¹⁶¹⁷ ICEP has taken a statement from a witness detained at Chettiukulam Camp from early to mid-2009, who described an NGO worker being arrested and taken into custody by the SFs from the camp. The witness believed the person has not been seen or heard from since.¹⁶¹⁸

Alleged disappearance of Father Francis Joseph and senior LTTE leaders who surrendered to the SFs

13.23 The LLRC detailed the accounts of two women who reported that their respective husbands had been missing since surrendering to the SFs with a Catholic priest, Father Francis Joseph, and other LTTE cadres at Wadduvakal on 18 May 2009. The wife of a former LTTE Political Wing member stated that her husband surrendered with Father Francis Joseph and other senior LTTE leaders whom she identified as Kutty, Elamparathy, Babu, Lawrence Thilakar and Yogi.¹⁶¹⁹ She informed the LLRC that she has 'had no news of her husband'.¹⁶²⁰ Another witness, the wife of a former cadre, recalled that her husband had surrendered on the morning of 18 May 2009, with Father Francis Joseph and other senior LTTE cadres who included Elamparathy, Kumaran, Ruben, Babu and Velavan.¹⁶²¹ The group was allegedly taken away on a bus and she had not heard from her husband since.¹⁶²²

13.24 The LLRC stated:

The Commission made inquiries regarding Father Francis Joseph from Father Muralitharan the Parish Priest and Assistant Administrator of Madhu Church, and he stated that Father Francis Joseph had been a political teacher of the LTTE and people had told him that Father Francis Joseph had been in the conflict area until the end with the LTTE and was supposed to have surrendered and since then his whereabouts were unknown.¹⁶²³

13.25 In 2010, the Commissioner General of Rehabilitation reportedly stated that neither Balakumaran nor Yogi were among the thousands of former LTTE cadres being detained.¹⁶²⁴

13.26 ICEP has obtained new witness accounts regarding the disappearance of Catholic priest Father Francis Joseph from a SFs surrender point. Several witnesses described having recognised and observed Father Francis Joseph with a group of senior LTTE leaders¹⁶²⁵ surrendering near Wadduvakal Bridge on 18 May 2009.¹⁶²⁶ One witness, a senior local

¹⁶¹⁶ Ibid.

¹⁶¹⁷ Ibid.

¹⁶¹⁸ WS-901, at [205].

¹⁶¹⁹ LLRC Report, [4.246].

¹⁶²⁰ Ibid.

¹⁶²¹ LLRC Report, [4.247].

¹⁶²² Ibid.

¹⁶²³ Ibid.

¹⁶²⁴ Ministry of Defence, 'Hardcore Tigers among Detainees Identified, Legal Action Awaited' (media release), 28 July 2010, http://www.defence.lk/new.asp?fname=20100728_03.

¹⁶²⁵ There is some overlap between the witness accounts of LTTE members present with Father Francis reported by the LLRC, and the accounts of LTTE members present with Father Francis reported by witnesses interviewed by ICEP. Witnesses interviewed directly by ICEP also describe additional LTTE members being present. WS-904, [20]–[21] stated that senior LTTE leaders present with Father Francis included Yogi, Balakumaran, Ilankumaran, Kutti, Velavan, Maniarasan, Illamparithy, Balathas, Sanjay, Kunam, Silampan, Arunasalam Loganathan, Elilan (Elizhan), Paapa, S Thangan and others. This witness stated that all were unarmed and in civilian clothes. WS-905, [162] stated that Thangan, Ezhilan, Thilak and other LTTE leaders were with Father Francis Joseph. This witness also stated that nearby were Thilak, Yogi, Balakumaran, Baby Subramaniam (Elankumaran), Velavan and Colonel Mukunthan: see [165]–[166].

¹⁶²⁶ WS-904, [19]–[29]; WS-905, [163].

official of an NGO whose statement was taken directly by ICEP, stated that he saw a group of LTTE leaders, including Father Francis Joseph, and that there was a white flag on a stick next to Father Francis Joseph but the witness could not remember who was holding it.¹⁶²⁷ The witness stated that he saw Father Francis Joseph and other LTTE leaders talking to SFs, some of whom he believed to be high-ranking SFs members as they wore different uniforms and had a lot of badges on their uniforms, carried different weapons, wore their shirts un-tucked and some wore hats instead of the helmets worn by ordinary SFs members.¹⁶²⁸ Another witness stated that Father Francis Joseph and the group of cadres were placed in a bus, while their families were allowed to go through the rest of the surrender process.¹⁶²⁹ Witness accounts and media articles indicate that Father Francis Joseph and some other members of the group have not been seen or heard from since.¹⁶³⁰

C. International legal framework

(i) *The prohibition of enforced disappearances under IHL and human rights law*

- 13.27 Acts of 'enforced disappearances' encompass a series of violations of human rights and IHL norms.¹⁶³¹ Under customary IHL, persons taking no active part in the hostilities must be treated humanely.¹⁶³² Customary IHL also prohibits arbitrary deprivation of liberty;¹⁶³³ requires a register to be kept of persons deprived of their liberty;¹⁶³⁴ requires respect for detainees' family life; requires that detainees be permitted to receive visitors, especially near relatives to the degree practicable;¹⁶³⁵ and requires that correspondence be allowed between detainees and their families.¹⁶³⁶ Customary IHL further provides that each party to a conflict 'must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate'.¹⁶³⁷ The combined effect of these IHL obligations is that the practice of enforced disappearance amounts to a violation of, among other laws, customary IHL.¹⁶³⁸
- 13.28 Enforced disappearances violate or threaten to violate a series of human rights obligations, notably, the right to liberty and security, the prohibition of torture and other cruel and inhuman or degrading treatment and, frequently, the right to life.¹⁶³⁹ Recognising the extreme distress that family members endure when their relatives are forcibly disappeared,

¹⁶²⁷ WS-905, [163].

¹⁶²⁸ Ibid, [163]–[164].

¹⁶²⁹ WS-904, [21].

¹⁶³⁰ Ibid, [23]; WS-906, [6]; WS-905, [165]; The Sunday Leader, *Sri Lanka's Missing*, 19 February 2012 (available at: <http://www.thesundayleader.lk/2012/02/19/sri-lankas-missing/> [accessed 22 July 2013]; D.B.S. Jeyeraj, 'What is Happening to the Ex-LTTE Cadre Surrendees?', 30 July 2010, <http://dbsjeyaraj.com/dbsj/archives/1599>; Siva Sundaram, 'List of Names of LTTE Men Unaccounted for by the Government', *The Sri Lankan Guardian*, 10 June 2012, <http://www.srilankaguardian.org/2012/06/list-of-names-of-ltte-men-unaccounted.html>.

¹⁶³¹ Gloria Gaggioli, 'The Prohibition of Enforced Disappearances: A Meaningful Example of a Partial Merger between Human Rights Law and International Humanitarian Law', Robert Kolb and Gloria Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law*, (Edward Elgar Publishing, 2013), 343ff.

¹⁶³² Rule 87, CIHL Study.

¹⁶³³ Rule 99, CIHL Study.

¹⁶³⁴ Rule 123, CIHL Study.

¹⁶³⁵ Rule 126, CIHL Study.

¹⁶³⁶ Rule 125, CIHL Study.

¹⁶³⁷ Rule 117, CIHL Study.

¹⁶³⁸ Rule 98, CIHL Study; UN Human Rights Council, UN Doc. A/HRC/17/44, 1 June 2011, Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya ('**Report of the Libyan Commission of Inquiry**'), [103].

¹⁶³⁹ See General Comment No. 31: The Nature of the General Legal Obligation Imposed on States, Human Rights Committee, 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, [18]; *Sarma v. Sri Lanka*, Views of the Human Rights Committee of 16 July 2003, UN Doc. CCPR/C/78/D/950/2000, [9.3]; *Velásquez-Rodríguez v. Honduras*, Judgment of the Inter-American Court of Human Rights of 29 July 1988, [155].

all human rights bodies have found that the family members themselves are also the victims of inhumane treatment.¹⁶⁴⁰ Finally, allegations of enforced disappearance must be duly investigated and those responsible brought to justice.¹⁶⁴¹ According to the Inter-American Court of Human Rights, the prohibition and its corresponding duty to investigate and prosecute allegations of enforced disappearances are *jus cogens* norms.¹⁶⁴²

- 13.29 Under the 2006 *International Convention on the Protection of All Persons from Enforced Disappearance*, enforced disappearance constitutes a discrete crime as defined in paragraph 13.2 above. Sri Lanka is not a party to this Convention. However, indicative of their customary law nature, the same essential elements can be found in previous definitions, contained in the 1992 *UN Declaration on the Protection of all Persons from Enforced Disappearance*¹⁶⁴³ and the 1994 *Inter-American Convention on Forced Disappearance of Persons*,¹⁶⁴⁴ although the exact formulation is slightly different. These elements are as follows: a) the disappeared person was deprived of his or her liberty; b) state officials, whether directly or indirectly, including by simply acquiescence, were responsible for the deprivation of liberty; c) the state refuses to acknowledge the person's detention or conceals the fate of the person and d) as a result, the person was removed from the protection of the law.
- 13.30 On the basis of these common elements, the Inter-American Court considered enforced disappearances as such as a crime under international law.¹⁶⁴⁵ Finally, although Sri Lanka is not a party to the 2006 *Convention on the Protection of All Persons from Enforced Disappearances*, the UN Committee against Torture called on Sri Lanka 'to ensure that enforced disappearance is established as an offence in its domestic law' and 'to ensure that the cases of enforced disappearances are thoroughly and effectively investigated, the suspects are prosecuted and those found guilty punished with sanctions proportionate to the gravity of their crime.'¹⁶⁴⁶
- 13.31 In conclusion, any enforced disappearance is a violation of human rights and humanitarian law and needs to be investigated and prosecuted as such.

(ii) Enforced disappearances as a crime against humanity

- 13.32 The definition of 'enforced disappearance' as a crime against humanity under the ICC Statute¹⁶⁴⁷ is based on the *UN Declaration on the Protection of All Persons from Enforced*

¹⁶⁴⁰ *Sarma v. Sri Lanka*, Views of the Human Rights Committee of 16 July 2003, UN Doc. CCPR/C/78/D/950/2000, [9.5]; *Kurt v. Turkey*, Judgment of the European Court of Human Rights of 25 May 1998, [133]–[134]; *Blake v. Guatemala*, Judgment of the Inter-American Court of Human Rights of 24 January 1998, [114]; *Amnesty International and Others v. Sudan* (No. 48/90 and others), Decision of the African Commission on Human and Peoples' Rights of 15 November 1999, [54].

¹⁶⁴¹ See General Comment 31 of the UN Human Rights Committee, *Arhuaco v. Colombia*, Views of the Human Rights Committee of 29 July 1997, UN Doc. CCPR/C/60/D/612/1995, [8.8]; *Gómez-Palomino v. Peru*, Judgment of the Inter-American Court of Human Rights, 22 November 2005, [79].

¹⁶⁴² *Goiburú et al. v. Paraguay*, Judgment of the Inter-American Court of Human Rights, 22 September 2006, [84].

¹⁶⁴³ UN GA Declaration on the Protection of All Persons From Enforced Disappearance, UN Doc. A/RES/47/133, 1992, third preambular paragraph.

¹⁶⁴⁴ Article 2, Inter-American Convention on Forced Disappearance of Persons.

¹⁶⁴⁵ *Goiburú et al. v. Paraguay*, Judgment of the Inter-American Court of Human Rights of 22 September 2006, [85], [92].

¹⁶⁴⁶ UN Committee against Torture, Consideration of Reports : Sri Lanka. Concluding Observations, UN Doc. CAT/C/LKA/CO/3-4, 2011, [9].

¹⁶⁴⁷ Enforced disappearances as an underlying offense were not expressly included in the Statute of the ICTY. The ICTY dealt with enforced disappearances as the crime against humanity of 'inhumane acts' and murder as a war crime, see for example *Furundžija* (ICTY-95-17-TC), Trial Chamber, 10 December 1998, [174] (crime against

*Disappearance and the Inter-American Convention on the Forced Disappearance of Persons.*¹⁶⁴⁸ Article 7(2)(i) of the ICC Statute provides that 'enforced disappearance' is the

arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or 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 law for a prolonged period of time.

D. Legal analysis

(i) **Enforced disappearance of persons as a crime against humanity**

13.33 The elements required to establish the crime against humanity of enforced disappearance in the ICC Elements of Crimes,¹⁶⁴⁹ are addressed below.

Contextual elements

13.34 Section 5 of this report set out the contextual elements for crimes against humanity. It is reasonable to conclude that the enforced disappearance of people surrendering and people who were part of, or perceived to be connected with, the LTTE formed part of the widespread or systematic attack on the civilian population. The characteristics, aims, nature and consequence of the disappearances appear to be consistent with the attack against the civilian population in that such acts would have contributed to the strategy of the Government to completely defeat the LTTE.¹⁶⁵⁰ Additionally, the 2009 Report of the Disappearances Working Group stated that not only were there a high number of cases of enforced disappearances at that time, but that disappearances were conducted by the military, the police, and the security forces.¹⁶⁵¹ This suggests that knowledge that the attack was against civilians might be inferred from the perpetrators' potential confidence that they would enjoy impunity.¹⁶⁵²

Deprivation of freedom and refusal to acknowledge the deprivation

13.35 It is reasonable to conclude that incidents occurred in which people were forcibly taken into custody and their whereabouts remain unknown since that time. Witness accounts of the disappearance of Father Francis Joseph and other senior LTTE cadres and members provide an example of a disappearance following surrender to the SFs. Given that the alleged disappearance of Father Francis Joseph has never been recognised and his whereabouts is still unknown, it is reasonable to conclude that this element of the crime would be satisfied.

Refusal to acknowledge fate or whereabouts and awareness that this would follow arrest, detention or abduction

13.36 Although witnesses before the LLRC and witnesses who gave statements directly to ICEP have claimed that Father Francis Joseph was detained when he attempted to surrender, no

humanity); *Kupreskic* (ICTY-95-16-T), 14 January 200, [566] (crime against humanity); *Krnjelac* (ICTY-97-26-T), 12 March 2002, [325]–[37] (war crime of murder).

¹⁶⁴⁸ UN GA Declaration on the Protection of All Persons From Enforced Disappearance, UN Doc. A/RES/47/133, 1992, third preambular paragraph; Inter-American Convention on Forced Disappearance of Persons, art 2.

¹⁶⁴⁹ ICC Elements of Crimes, Art 7(1)(i), Elements 1-8.

¹⁶⁵⁰ See discussion in *Prosecutor v Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No ICTY-96-23-T, 22 February 2001) [100].

¹⁶⁵¹ See section 13.6.

¹⁶⁵² See reasoning in the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, 25 January 2005, 95 [360], http://www.un.org/news/dh/sudan/com_inq_darfur.pdf [accessed 24 July 2013].

information has been provided as to his fate or whereabouts. ICEP does not possess information regarding the perpetrator's awareness that the detention of Father Francis would be followed by a refusal to provide information on his fate or whereabouts. Further investigation into who was involved in Father Francis' disappearance and their awareness is required in order to satisfy this element.

Support or acquiescence of a State or a political organisation

- 13.37 A witness account of the disappearance of Father Francis Joseph and other senior LTTE cadres described some of the soldiers present at the scene to be apparently high-ranking SFs members. Their presence suggests support or at least acquiescence, even if they were not directly responsible.

Intention to remove such persons from the protection of the law for a prolonged period of time

- 13.38 A perpetrator would need to be identified and his or her intentions ascertained in order to prove this element.

Conclusion

- 13.39 There are therefore reasonable grounds to suspect that the case of Father Francis Joseph would amount to the crime against humanity of enforced disappearances.

(ii) Persecution as a crime against humanity

- 13.40 The elements required to establish the crime against humanity of persecution in the ICC Elements of Crimes,¹⁶⁵³ are addressed below.

Contextual elements

- 13.41 See paragraph 13.34 above.

Severe deprivation of fundamental rights

- 13.42 Witness accounts described above suggest that enforced disappearances occurred in the final stages of the conflict and its immediate aftermath. The practice of enforced disappearance involves the severe deprivation of fundamental rights. It is especially serious because it places the victim outside the protection of the law,¹⁶⁵⁴ making them vulnerable to violations such as torture, murder or extra-judicial executions.¹⁶⁵⁵

The perpetrator's target

- 13.43 Although a range of people have been targeted for enforced disappearances, the available evidentiary material supports a reasonable suspicion that the enforced disappearances described were predominantly directed at members of the LTTE and perceived supporters, arguably a political group.¹⁶⁵⁶ Accounts of enforced disappearances provided to ICEP relate to LTTE cadres, LTTE supporters or people suspected of being aligned with the LTTE being disappeared from surrender sites, screening sights, and IDP camps. These disappearances appear to target people based on political grounds. The seriousness of the allegation warrants further investigation.

¹⁶⁵³ ICC Elements of Crimes, art 7(1)(h).

¹⁶⁵⁴ See, eg, art 2, International Convention for the Protection of All Persons from Enforced Disappearance (2010).

¹⁶⁵⁵ See, eg, *Ticona Estrada v Bolivia*, 27 November 2008, [59]–[60].

¹⁶⁵⁶ See 13.5–13.9.

Conduct committed in connection with another crime

- 13.44 There are reasonable grounds to suspect that enforced disappearances as a crime against humanity were committed which would mean in turn, that the alleged crime of persecution was committed in connection with another crime under the jurisdiction of the ICC.

(iii) Enforced disappearance as a violation of the ICCPR

- 13.45 As discussed above, enforced disappearance violates or threatens to violate a series of human rights norms. Since Sri Lanka is a party to the ICCPR,¹⁶⁵⁷ the alleged acts of enforced disappearances referred to in the evidentiary section could violate the relevant provisions thereof. Moreover, under human rights law, Sri Lanka is obliged to investigate and prosecute those responsible for enforced disappearances.¹⁶⁵⁸

E. Further investigation

- 13.46 The seriousness of these allegation means that further investigation into the incidents discussed in this section should be undertaken to ascertain whether the crime against humanity of enforced disappearance and/or persecution committed by members of the SFs and the extent of involvement of paramilitary groups.

¹⁶⁵⁷ A list of signatories and details of ratification is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en [accessed 23 July 2013].

¹⁶⁵⁸ See, eg, *Sarma v. Sri Lanka*, Views of the Human Rights Committee of 16 July 2003, UN Doc. CCPR/C/78/D/950/2000, [9.5].

14 POST CONFLICT VIOLATIONS

A. Summary

- 14.1 In its investigations ICEP obtained evidentiary material relating to violations that occurred after the conflict had ceased. The available evidentiary material shows there are reasonable grounds to suspect that torture, cruel treatment, rape and enforced disappearances were among these crimes. While post-conflict violations were not the focus of ICEP's investigation, nor of this report, ICEP has set out below a brief summary of some of the evidentiary material it has collected in relation to these alleged violations. The ongoing nature of these violations indicates an environment where people are not held accountable for credible allegations of serious crimes. When a culture of impunity exists, violations continue.
- 14.2 In addition, shortly before this report was finalised, ICEP obtained new witness testimony alleging that members of the SFs in Sri Lanka had destroyed forensic evidence in the post-conflict period. The allegations outlined in this section of the report – namely that mass burial sites in the conflict zone were exhumed and human remains from these burial sites were covertly destroyed – highlight the urgent need for an internationally-mandated investigation.

B. Evidentiary material analysis

(i) Torture and cruel treatment at separate LTTE 'surrendee' rehabilitation and detention facilities

- 14.3 ICEP has directly taken witness accounts from two individuals detained and tortured at detention camps and rehabilitation centres. One witness, an LTTE cadre, was detained at various facilities between May 2009 and September 2011.¹⁶⁵⁹ The other witness, also an LTTE cadre, was detained at various facilities between May 2009 and September 2010.¹⁶⁶⁰ Both witnesses described being questioned by the SFs as to their involvement with the LTTE, the location of weapons supplies, and the identity and whereabouts of other LTTE members.¹⁶⁶¹ Both witnesses claim to have been tortured during their detention.¹⁶⁶²
- 14.4 One witness described being slapped, punched, and beaten severely with electrical wire and wooden batons.¹⁶⁶³ This witness also reported having his head submerged in a barrel of water to the point he lost consciousness.¹⁶⁶⁴ ICEP has obtained a medico-legal report supporting the account of one of these witnesses.¹⁶⁶⁵
- 14.5 One of the witnesses, in respect of whom ICEP has obtained a medico-legal report, explained how being tortured has affected him:

I have visible scarring as a result of the torture I was subjected to whilst being held against my will... Even now, I still experience body aches, especially through my back. I am also suffering mentally as a result of this torture. I often have headaches,

¹⁶⁵⁹ WS-1002, [67], [74], [88].

¹⁶⁶⁰ WS-1007, [34]–[37].

¹⁶⁶¹ Ibid, [37], WS-1002, [75], [79].

¹⁶⁶² WS-1007, [37], WS-1002, [78].

¹⁶⁶³ Exhibits (two) to WS-1007, [37], [38].

¹⁶⁶⁴ WS-1002, [78].

¹⁶⁶⁵ Exhibit to WS-1007.

nightmares and experience memory loss. I also have a poor appetite and have thoughts about harming myself and ending my life.¹⁶⁶⁶

(ii) Torture in police custody

- 14.6 ICEP has directly taken witness accounts indicating that torture of individuals in police custody has continued after the conflict, and that incidents of torture have occurred as recently as 2012. ICEP has obtained five first-hand accounts of torture in police custody in 2011 and 2012.¹⁶⁶⁷ Collectively, these witnesses described being subjected to treatment such as being kicked, slapped and punched; being beaten with plastic pipes filled with sand or electric wire; being burnt with cigarettes; and four witnesses reported being suffocated by having a petrol-infused plastic bag placed over their heads.¹⁶⁶⁸ In addition, two witnesses described being hit with a wooden baton on the soles of their feet,¹⁶⁶⁹ one witness described being suspended upside down, with his head close to a pot of boiling water containing chillies,¹⁶⁷⁰ and another two witnesses recounted being suspended by their ankles. One of these witnesses, who was suspended, recalled being severely beaten and burnt with cigarettes while in this vulnerable position.¹⁶⁷¹
- 14.7 Two witnesses stated that they repeatedly had their heads forcibly submerged in a barrel of water, one of whom described it as continuing almost to the point of drowning.¹⁶⁷² Four of the witnesses were forced to sign documents written in Sinhala, which they did not understand, and in most instances, were not explained to them.¹⁶⁷³ ICEP has obtained medico-legal reports supporting the accounts of four of these witnesses.¹⁶⁷⁴
- 14.8 ICEP has recorded first-hand witness accounts from two young Tamil women who stated that they were repeatedly raped and subjected to sexual violence, among other forms of torture, by the CID.¹⁶⁷⁵ These accounts relate to incidents that are reported by the witnesses to have occurred in 2011 and 2012. One of these witnesses described being tortured by both plain-clothed CID officers, and officers wearing military uniform.¹⁶⁷⁶ The witness observed that some of the officers in military uniform wore gold insignia or badges,¹⁶⁷⁷ indicating to the witness that they were of higher rank. Both women's accounts are supported by medico-legal reports.¹⁶⁷⁸ In addition, a male witness reported having his genitals tightly squeezed during questioning by the CID in 2012, causing ongoing pain.¹⁶⁷⁹ His account is also supported by a medico-legal report.¹⁶⁸⁰

¹⁶⁶⁶

WS-1002, [100].

¹⁶⁶⁷

WS-1002, [94], [96]–[98]; WS-1010, [105], Appendix B, [11]; exhibit to WS-1007, [39]; WS-1011, [25], [30]; WS-1012, [27]–[35], [59]–[63].

¹⁶⁶⁸

WS-1002, [98]; WS-1010, Appendix B, [11]; exhibit to WS-1007; WS-1011, [25], [30]; WS-1012, [28]–[29], [59]–[62].

¹⁶⁶⁹

WS-1002, [98]; WS-1010, Annexure B, [11]

¹⁶⁷⁰

WS-1002, [98].

¹⁶⁷¹

WS-1010, Appendix B, [11].

¹⁶⁷²

WS-1012, [32], [61]; WS-1011, [31].

¹⁶⁷³

WS-1002, [99]; WS-1010, [106]; WS-1011, [31]; WS-1012, [64].

¹⁶⁷⁴

WS-1010, Appendix B, [37]; WS-1007, Appendix A, [8]; WS-1012, [72], Annexure E; WS-1011, Annexure A.

¹⁶⁷⁵

WS-1011, WS-1012.

¹⁶⁷⁶

WS-1012, [26], [62].

¹⁶⁷⁷

Ibid.

¹⁶⁷⁸

Ibid, [33], WS-1012, [72]; Appendix E, [41].

¹⁶⁷⁹

WS-1010, Appendix B, [11].

¹⁶⁸⁰

WS-1010, Appendix B, [37]. Rape and Other Forms of Sexual Violence were discussed in earlier in section 11 of this report.

(iii) Abductions

- 14.9 ICEP has been provided with accounts that indicate that torture in the context of abductions was perpetrated on individuals as recently as 2012.¹⁶⁸¹ ICEP has also collected first-hand witness accounts from three individuals who described being abducted in 2012, before finding themselves in CID custody where they were interrogated and tortured.¹⁶⁸²
- 14.10 An example of the nature of these abductions is provided by the account of one female witness who was approached by two men in civilian clothing while riding home from work on her bicycle. The two men stopped the woman, asked to see her identification card, and then pushed her into a white van. She was blindfolded and her hands were tied behind her back. She said she was being driven around for several hours before being taken out of the van and finding herself in CID custody where she was later interrogated and tortured.¹⁶⁸³
- 14.11 Witness accounts of torture in 2011 and 2012, if proven, could constitute crimes under domestic law and other international laws such as the CAT but they would not constitute war crimes and are unlikely to constitute crimes against humanity.

(iv) Rape and sexual violence

- 14.12 In its report on sexual violence against Tamils by the SFs, HRW has documented incidents of rape and sexual violence occurring in the years following the conflict, including eight incidents that occurred in 2012. It also stated that new cases continue to be reported.¹⁶⁸⁴
- 14.13 ICEP has four witness accounts that were taken directly by ICEP, describing incidents of rape and sexual violence occurring in the period following the conflict. This is relevant in demonstrating the importance of accountability, as ongoing impunity can encourage further violations.
- 14.14 One of the witness accounts that was taken directly by ICEP is an account of sexual violence against a man during interrogations at separate LTTE 'surrendee' detention and rehabilitation facilities. This witness was detained at several rehabilitation and detention camps between May 2009 and December 2010 after surrendering to the SFs.¹⁶⁸⁵ He stated that, during questioning by the SFs at both of these camps, his clothing was removed and SFs personnel touched his penis and mocked him.¹⁶⁸⁶
- 14.15 ICEP has also directly recorded first-hand witness accounts of two young Tamil women who detailed being tortured and raped multiple times as well as being subjected to acts of sexual violence during interrogations over an extended period of time by the CID in 2011 and 2012.¹⁶⁸⁷ Both women's accounts are corroborated by medico-legal reports.¹⁶⁸⁸
- 14.16 In the following extract, one of these young women recounts her torture and rape by the CID:

¹⁶⁸¹ Torture in the context of abductions may have continued beyond this date however at the time of writing this report, ICEP had not taken any more recent statements.

¹⁶⁸² WS-1011, [21], [25]; WS-1002, [94], [97], [98]; WS-1010, [105].

¹⁶⁸³ WS-1011, [21]–[32].

¹⁶⁸⁴ HRW, *Sexual Violence Against Tamils*, 2.

¹⁶⁸⁵ WS-1109, [43], [62], [72].

¹⁶⁸⁶ WS-1109, [70], [76].

¹⁶⁸⁷ WS-1110; WS-1111.

¹⁶⁸⁸ WS-1111, Annexures E, F; WS-1110, Annexure A.

I was then taken to a different room by the two men and the door was closed...The male officers tried to take my clothes off, but I resisted. When I resisted, they beat me. They were kissing me on the face and fondling my breasts. They also bit my breasts. This happened for about one hour until, eventually, I lost the energy to fight back. The male officers then raped me... They took it [in] turns...

My whole body was hurting...

I was experiencing a lot of pain.¹⁶⁸⁹

14.17 The same witness said:

As a result of the torture and sexual violence I was subjected to, I still have scarring on my body. I experience body aches, especially through my back, and regularly get headaches. I also have nightmares, difficulty sleeping... I cannot forget these things and I think about them all the time.¹⁶⁹⁰

14.18 The other young woman observed Sri Lankan Army soldiers at the CID facility where she was detained in Colombo, some of whom had gold insignia sewn onto their uniforms, indicating to the witness that they were high-ranking soldiers.¹⁶⁹¹ This witness was detained by the CID for two separate periods, and states that she was raped multiple times.¹⁶⁹² Regarding one of these periods of detention, she stated:

During the time I was in detention, I was also sexually abused and raped. This included having my breasts pulled and squeezed and being sexually manhandled. This happened on more than one occasion by multiple officers and my breasts are still sore and painful as a result. Two or three officers at the facility raped me... Each of the officers did this two or three times each.¹⁶⁹³

14.19 After being released from CID custody in Colombo, this witness was required to sign an attendance form each week at the local police station in her home town. The witness described this experience as 'very unpleasant' and explained:

When I attended the police station, the male police officers would take me to another room... They would speak to me in an abusive way, threaten me, pull my hair and touch private parts of my body... They would touch my breasts and grab my buttocks through my clothes. This would happen every time I attended the police station. Whichever police officers were on duty would do this to me.¹⁶⁹⁴

14.20 The fourth witness, a Tamil man, provided ICEP with a first-hand account of an occasion where his genitals were tightly squeezed during an interrogation by the CID in 2012, causing him ongoing pain.¹⁶⁹⁵ He has also experienced ongoing bleeding from his anus since his interrogation and torture by the CID, which he attributed to receiving severe kicks to his stomach.¹⁶⁹⁶ He did not experience this bleeding prior to his detention. He stated that he does not know the extent of mistreatment he was subjected to, as at times he was

¹⁶⁸⁹ WS-1110, [27]–[29].

¹⁶⁹⁰ Ibid, [37].

¹⁶⁹¹ WS-1111, [26].

¹⁶⁹² Ibid, [33]–[34], [63].

¹⁶⁹³ Ibid, [63].

¹⁶⁹⁴ Ibid, [42].

¹⁶⁹⁵ WS-1112, Appendix B, [11].

¹⁶⁹⁶ Ibid.

unconscious from pain.¹⁶⁹⁷ ICEP has sighted a medico-legal report provided by the witness supporting his statement.¹⁶⁹⁸

C. Destruction of mass grave sites

- 14.21 Shortly before this report was finalised, ICEP obtained new eye-witness information in respect of the registration and burial of the civilian dead in the former conflict zone in Sri Lanka during the final five months of the war, and the alleged systematic destruction of civilian mass burial sites in the post-conflict period.
- 14.22 According to this witness, these burial sites contained human remains from hundreds, and in some instances, thousands of men, women and children who died during the conflict. The precise location of these, and other, burial sites, has been provided to ICEP.
- 14.23 This witness has alleged that scores of civilian mass burial sites were systematically destroyed after the conflict. According to this witness, the SFs, and specifically members of the Sri Lankan Police and Sri Lankan Army, are directly implicated in this conduct. This witness believes that senior SFs officials knew that graves were being identified for the purpose of exhumation, and permanent destruction, over a period of more than a year. Self-evidently, these allegations are very serious and there is an urgent need for further investigation to determine their veracity.

D. Further investigation

- 14.24 The credible allegations of ongoing violations identified above show there are reasonable grounds to suspect that torture, enforced disappearance, rape and sexual violence have continued in Sri Lanka since the conflict ended in May 2009. This suggests that human rights and the rule of law in Sri Lanka need to be strengthened in this period following the end of the civil war. However, if there is no accountability for previous crimes, the rule of law will continue to be eroded and, as has been demonstrated, violations are likely to continue.
- 14.25 Throughout this report, evidentiary material relating to the final stages of the conflict has been explained and analysed with reference to international law. As such, there are reasonable grounds to suspect that numerous serious international crimes were committed in the final stages of the Sri Lankan civil war. ICEP's investigation to date, which is summarised in this report, cannot be an exhaustive assessment of relevant events that took place during the civil war. Rather, ICEP has sought to investigate and document a representative sample of credible and serious allegations. This report adds to an understanding of a number of key, contentious events.
- 14.26 This report's factual and legal analysis makes it clear that a full, comprehensive investigation is needed to determine the precise scope of the violation of international law that took place, and to bring those who bear the greatest responsibility to justice. This is required for a full and real reconciliation and transition to take place among the different sections of the Sri Lankan community, both emotionally and institutionally.

¹⁶⁹⁷
¹⁶⁹⁸

Ibid.
WS-1112, Appendix B.

15 ANNEX I BACKGROUND TO THE REPORT

A. Committee of Experts

15.1 In June 2012, ICEP established a Committee of Experts to guide its investigation on Sri Lanka. The Committee of Experts provides guidance and oversight on the conduct of ICEP's investigation. Ultimately, PIAC assumes responsibility for the content of this report. The Committee of Experts assumes responsibility for its contribution to ICEP, which includes advice on:

- the gathering of evidentiary material from witnesses and others;
- the establishment of protocols to ensure, among other things, the security of the project and the protection of witnesses;
- the factual and legal analysis of ICEP's evidentiary material; and
- the process for preparing this report.

15.2 The Committee of Experts comprises experts across a range of key areas in international criminal justice, including: international criminal law and IHL; international crimes investigations; international criminal law prosecutions; military operations, weapons and command and control structures; and the social, historical and political context of Sri Lanka's civil war.

B. Methodology

15.3 ICEP has collected and analysed information collected from a range of sources including:

- Witness accounts – including statements taken by ICEP staff and those provided to ICEP staff by other investigators with witness consent. These accounts include both first-hand and second-hand accounts gathered from alleged victims and other witnesses interviewed in various locations around the world.
- Photographs and videos – a combination of material provided by the original creator of the photographic/video material and material provided through second-hand sources and other means.
- Satellite imagery – satellite imagery of key locations was collected as well as expert analyses of the imagery.
- Confidential correspondence – including correspondence between key international officials, international agency staff and the Sri Lanka Government relating to the conflict.
- UN and non-government organisation (**NGO**) reports – all major reports containing information about potential crimes perpetrated in the Sri Lankan conflict published by the UN or NGOs were considered by ICEP (the major UN and NGO reports are discussed further at section (iv) below).
- Other open-source material – what ICEP has considered to be relevant and credible media reporting from both the international media and Sri Lankan media.

(i) Limitations and challenges

- 15.4 ICEP's evidence gathering and analysis have been undertaken to withstand the highest legal scrutiny. Nevertheless, two limitations should be noted.
- 15.5 First, for security reasons, ICEP has not directly accessed persons or places within Sri Lanka. All alleged victims and witnesses have been interviewed by ICEP in locations outside of Sri Lanka.
- 15.6 Secondly, ICEP has conducted its collection of evidentiary material within a limited time frame and with limited resources. This report specifically identifies where further investigation is required, and ICEP is aware of important witnesses who may have significant evidence that would contribute to a stronger understanding of certain events and alleged crimes and criminal responsibility. Naturally, therefore, the evidence collected by ICEP, and relied on in this report, is not exhaustive.
- 15.7 Notwithstanding these limitations, this report presents a representative selection of the available evidentiary material, so that decision-makers, especially those associated with the UNHRC, can draw appropriate conclusions at this juncture regarding what is needed to achieve accountability.

(ii) Witness accounts

- 15.8 ICEP has primarily relied on two kinds of witness statements in its identification and analysis of alleged violations of international humanitarian law and international human rights law: first-hand witness accounts that were likely to have been before other inquiries, and first-hand witness accounts new to ICEP. Second-hand and circumstantial witness accounts were also relied on to the extent that they corroborated or added meaningfully to the first-hand information collected. All statements are identified as to whether they are first hand, second hand, likely to have been before other inquiries, taken directly by ICEP, or are new to ICEP. In relation to some incidents, most notably rape and sexual violence, where first-hand information was difficult to obtain, second-hand and circumstantial information was given more weight. Where witness accounts were supported by forensic and medical reports, these reports were also taken into account when assessing the credibility of witness accounts. In a small number of situations, witness statements were unsigned by the witness or were unsigned 'will say' statements. Any statements that fall into these categories are identified accordingly in the footnotes.
- 15.9 ICEP has interviewed, and obtained witness statements from, a range of witnesses since it began its investigation on Sri Lanka. These include alleged victims, civilian eye-witnesses, journalists, members of international and local NGOs, international agency officials, medical personnel and individuals who worked in the structures of the Sri Lankan Government, Government armed forces, and the Liberation Tigers of Tamil Eelam (LTTE).
- 15.10 Where a witness has requested that their identity be kept confidential, ICEP has taken all reasonable steps to ensure the witness' identity is protected and that any information that might reveal the witness' identity or present location remains undisclosed. For this reason, witness names and other personal information, which might reveal a witness' identity or

present location, are not disclosed in this report unless the witness has explicitly agreed to have such information disclosed.

(iii) Other sources of information

15.11 In addition to witness accounts, ICEP has relied on a range of sources including photographs, videos, satellite imagery, confidential correspondence, UN reports, NGO reports and media articles. In relation to photographs, videos and confidential correspondence, ICEP has sought as far as possible to ascertain the original creator or author of the material. In the case of confidential correspondence, ICEP has also sought to determine the original recipient of the correspondence. Where the original creator, author or recipient of the material could be located and he or she verified its authenticity, ICEP placed greater weight on the material. In circumstances where material passed through multiple sets of hands or was provided anonymously to ICEP, less weight was placed on this material. However, regardless of whether the original author or creator was known to ICEP, audio/visual sources collected by ICEP, which are independent of witness statements and are relied on for the preparation of this report, were subjected to independent expert analysis to ascertain the likely authenticity of the material and any other relevant information. Unless an individual source has specifically agreed to have their identity disclosed, ICEP has not named its sources or the location from which the material was collected in this report.

15.12 During and after the conflict, both local and international media have reported on alleged violations of IHL and international human rights law in Sri Lanka. Some of these reports include direct witness accounts. In addition, the international media have reported on some of the video and photographic material that has become public or has been made privately available to the media since the conclusion of the conflict. Unless ICEP has been able to assess the credibility and veracity of these accounts or video and photographic material underlying the reporting, it has not placed substantial weight on these reports other than for the purpose of corroborating information collected by ICEP by other means.

(iv) Summary of key post-conflict reports

15.13 In compiling this report, ICEP first considered the information contained in a number of other major reports before engaging in a factual and legal analysis of its own evidentiary material. A summary of the major reports considered by ICEP is below.

Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka

15.14 In June 2010, the UN Secretary-General announced a UN Expert Panel mandated to analyse allegations of violations of IHL and international human rights law during the final stages of the Sri Lankan armed conflict and to attribute, where possible, responsibility for such violations.¹⁶⁹⁹ The UN Expert Panel's report was published on 31 March 2011.

15.15 In its report, the UN Expert Panel found that there were credible allegations concerning a wide range of serious violations of IHL and international human rights law committed by the Sri Lankan Government and LTTE.¹⁷⁰⁰ The UN Expert Panel concluded that 'the conduct of

¹⁶⁹⁹ UN Expert Panel Report, i.
¹⁷⁰⁰ Ibid, ii.

the war represented a grave assault on the entire regime of international law¹⁷⁰¹ and found that as many as 40,000 civilians may have been killed in its final months,¹⁷⁰² most as a result of indiscriminate shelling by the Sri Lankan Army. The UN Expert Panel called on the UN Secretary-General to, among other things, conduct an independent international investigation into the alleged violations of IHL and international human rights law committed by both sides.¹⁷⁰³

- 15.16 On 28 April 2011, the Sri Lankan Government rejected the conclusions of the UN Expert Panel, stating that they contained ‘fundamental deficiencies, inherent prejudices and malicious intentions’.¹⁷⁰⁴

Lessons Learnt and Reconciliation Commission (LLRC) Report

- 15.17 In December 2011, the LLRC, whose members were appointed by the Sri Lankan President, delivered its own report on the civil war known as the LLRC Report.¹⁷⁰⁵ Crisis Group stated that, while ‘[t]he report acknowledges important events and grievances that have contributed to decades of political violence and civil war in Sri Lanka and makes sensible recommendations on governance, land issues and the need for a political solution... it fails in a crucial task – providing the thorough and independent investigation of alleged violations of international humanitarian and human rights law that the UN and other partners of Sri Lanka have been asking for.’¹⁷⁰⁶

- 15.18 The LLRC concluded that, while the LTTE repeatedly violated principles of IHL, the Sri Lankan Government Security Forces (SFs) did not.¹⁷⁰⁷ According to the LLRC, the SFs gave the ‘highest priority’¹⁷⁰⁸ to protecting civilians, while the LTTE had ‘no qualms about resorting to a combat strategy which paid little heed to the safety of the civilian population.’¹⁷⁰⁹ The LLRC acknowledged that civilians had been killed by the SFs and that hospitals had been shelled, but did not find that such acts were intentional or that the responsible parties could be identified.¹⁷¹⁰

- 15.19 The UN Expert Panel considered that the legitimacy of the LLRC was compromised by the fact that several Commissioners were implicated in the Sri Lankan conflict.¹⁷¹¹ The UN Expert Panel also noted that the LLRC was ‘deeply flawed’ and did ‘not meet international standards for an effective accountability mechanism’ as it was neither independent nor impartial.¹⁷¹²

1701

Ibid.

1702

Ibid, [137].

1703

Ibid, vii.

1704

Sri Lankan Ministry of Defence, ‘Sri Lanka: UN Panel Report Fundamentally Flawed and Patently Biased’ (webpage), http://www.defence.lk/new.asp?fname=20110415_01.

1705

LLRC Report, 1.

1706

Crisis Group, ‘Statement on the Report of Sri Lanka’s Lessons Learnt and Reconciliation Commission’ (webpage), 22 December 2011, <http://www.crisisgroup.org/en/publication-type/media-releases/2011/asia/statement-on-the-report-of-sri-lanka-s-lessons-learnt-and-reconciliation-commission.aspx> [accessed 9 December 2013].

1707

Report of the Secretary-General’s Internal Review Panel on United Nations Action in Sri Lanka (hereafter **UN Internal Review Report**), [184].

1708

LLRC Report, [4.262].

1709

Ibid, [4.264].

1710

Ibid, [4.359].

1711

UN Expert Panel Report, v.

1712

Ibid.

UN Internal Review Panel Report

15.20 Following the findings of the UN Expert Panel Report, the UN Secretary-General commissioned a senior diplomat, Charles Petrie, to lead an internal review of the UN's actions during the final stages of the war in Sri Lanka and its aftermath. The UN Internal Review Panel sought to identify the structural and institutional constraints of the UN's response to the Sri Lankan crisis, and to make recommendations on UN policies and guidelines.

15.21 Its report concluded that the UN had failed to respond adequately to the protection crisis in Sri Lanka, stating 'when confronted by similar situations, the UN must be able to meet a much higher standard in fulfilling its protection and humanitarian responsibilities'.¹⁷¹³ The Panel concluded that its 'findings and recommendations provide an urgent and compelling platform for action'.¹⁷¹⁴

Office of the High Commissioner for Human Rights (OHCHR) Report

15.22 UNHRC Resolution 19/2 of March 2012 'encouraged' the OHCHR to provide advice and technical assistance to Sri Lanka in its implementation of the resolution and requested the OHCHR to 'present a report on the provision of such assistance to the Human Rights Council at its twenty-second session'.¹⁷¹⁵ In February 2013, just prior to the UNHRC's twenty-second session, the OHCHR released a comprehensive report on Sri Lanka primarily addressing the steps taken by the Sri Lankan Government to implement the recommendations of its own LLRC and to address alleged violations of IHL and international human rights law.

15.23 In relation to alleged violations of international law, the OHCHR concluded that the steps taken by the Sri Lankan Government were 'inconclusive' and lacked 'the independence and impartiality required to inspire confidence'.¹⁷¹⁶ In addition, the OHCHR noted that during the preceding year, reports of extrajudicial killings, abductions and enforced disappearances had continued, highlighting the 'urgency of action to combat impunity'.¹⁷¹⁷

Other reports

15.24 A number of other NGO reports have addressed alleged war crimes and crimes against humanity committed in Sri Lanka. The following reports (although not an exhaustive list) are considered by ICEP to be independent and impartial and are discussed and referenced at various points in this report:

- Amnesty International, *Sri Lanka's Assault on Dissent*, 2013;
- Human Rights Watch, *We Will Teach You a Lesson – Sexual Violence against Tamils by Sri Lankan Security Forces*, 26 February 2013;
- International Crisis Group, *War Crimes in Sri Lanka*, Asia Report No. 191, 17 May 2010; and

¹⁷¹³ UN Internal Review Report, [88].

¹⁷¹⁴ Ibid.

¹⁷¹⁵ HRC Res. 19/2, 3 April 2012, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/19/2.

¹⁷¹⁶ Report of the Office of the United Nations High Commissioner for Human Rights on advice and technical assistance for the Government of Sri Lanka on promoting reconciliation and accountability in Sri Lanka, UN Doc. A/HRC/22/38, 11 February 2013 (hereafter '**OHCHR Report**'), [62].

¹⁷¹⁷ OHCHR Report, 1.

- Human Rights Watch, *Complicit in Crime – State Collusion in Abductions and Child Recruitment by the Karuna Group*, January 2007.

16 ANNEX II COMMAND AND CONTROL STRUCTURES

- 16.1 The principal parties to the conflict are the Sri Lankan Government and the Liberation Tigers of Tamil Eelam (LTTE). The structure, organisation and capabilities of the parties are set out below. ICEP has drawn primarily on credible open-source information including, in particular, analysis conducted by military intelligence services such as Jane's, The Military Balance and Global Security,¹⁷¹⁸ and also witness accounts obtained by ICEP.
- 16.2 In addition to the SFs and LTTE, the UN Expert Panel discussed violence by 'paramilitary and other groups acting as surrogates of, or tolerated by, the State'.¹⁷¹⁹ In particular, the UN Expert Panel referred to the Tamil Makkal Viduthalai Palikal (Karuna Group), a politico-militant organisation whose members, together with members of other Tamil militant groups, 'were deployed by the Government in the military campaigns against the LTTE and used in intelligence operations among Tamil civilians'.¹⁷²⁰ Such operations allegedly included the identification and disappearance of LTTE cadres.¹⁷²¹ The conduct of Karuna Group members is discussed in the report in connection to specific incidents under investigation.
- 16.3 From 1987 to March 2004, Vinayagamorthy Muralitharan (nom de guerre: Colonel Karuna Amman) (Karuna) was the Eastern Commander of the LTTE in the Batticaloa and Ampara Districts.¹⁷²² In March 2004, Karuna broke away from the LTTE and formed the Karuna Group which was estimated to have comprised up to 5,000 former LTTE cadres.¹⁷²³ Witness accounts indicate that Karuna left the LTTE after he was ordered by Prabhakaran to respond to allegations that he was engaging in forced recruitment, including of children, contrary to LTTE policy at that time.¹⁷²⁴ After breaking away, the Karuna Group allegedly operated with impunity in the Eastern Province of Sri Lanka in close proximity to, or from within, Sri Lankan Army bases.¹⁷²⁵ In October 2008, Karuna was appointed as a Member of Parliament for the ruling party of Sri Lanka.¹⁷²⁶

A. Sri Lankan Government Security Forces

- 16.4 The Sri Lankan Government Security Forces (SFs) were the unified military of the Democratic Socialist Republic of Sri Lanka, and comprised an Army, Air Force, Navy, the Police, intelligence services and Civil Defence Force.
- 16.5 Between 2005 and 2009, the combined strength of the SFs was reported by the Secretary to the Ministry of Defence, Public Security and Law and Order (**Secretary of Defence**) to have

¹⁷¹⁸ These services are available online.

¹⁷¹⁹ UN Expert Panel Report, vii.

¹⁷²⁰ Ibid, [43]. See also [145], [220].

¹⁷²¹ See, eg, WM-016, [20], [38]–[39]; WM-001, [27]; DM-009. See also UN Expert Panel Report, [145], [220].

¹⁷²² US Embassy Colombo, 'Confidential Cable – Sri Lanka: Government Security Forces in cahoots with Karuna?', 06COLOMBO1911, 14 November 2006, available at: <http://wikileaks.org/cable/2006/11/06COLOMBO1911.html>, available at: http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf [accessed 16 January 2014].

¹⁷²³ UN Expert Panel Report, [43]. See also US Embassy Colombo, 'Confidential Cable – Sri Lanka: Government Security Forces in cahoots with Karuna?', 06COLOMBO1911, 14 November 2006, available at: <http://wikileaks.org/cable/2006/11/06COLOMBO1911.html> [accessed 16 January 2014].

¹⁷²⁴ See, for example, DM-006, 1-2; WF-011, [13].

¹⁷²⁵ US Embassy in Colombo, 'Confidential Cable – Is Sri Lanka Going Back to War – And What Can We Do about It?', 06COLOMBO4, 3 January 2006, <http://wikileaks.org/cable/2006/01/06COLOMBO4.html> [accessed 16 January 2014]; Human Rights Watch, *Complicit in Crime: State Collusion in Abductions and Child Recruitment by the Karuna Group*, (January 2007), 60, 63, 66, <http://www.hrw.org/reports/2007/01/23/complicit-crime> [accessed 16 January 2014].

¹⁷²⁶ 'Renegade Sworn in as S Lanka MP', *BBC*, 7 October 2008, http://news.bbc.co.uk/2/hi/south_asia/7657668.stm [accessed 16 January 2014].

reached 450,000 personnel.¹⁷²⁷ However, *The Military Balance* noted that, as at January 2009, the number of SFs personnel, including paramilitary members, was approximately 249,000.¹⁷²⁸

(i) **SFs command structures**

Commander-in-Chief

16.6 Under the Constitution, the Commander-in-Chief of the Sri Lankan Armed Forces was the President of the Republic of Sri Lanka.¹⁷²⁹ The President appointed the heads of the Army, Air Force and Navy (**Service Commanders**),¹⁷³⁰ and subject to Article 41C of the Constitution, also appointed the Inspector-General of Police (**IGP**).¹⁷³¹ From 19 November 2005, when he was sworn in for his first presidential term, the Commander-in-Chief has been His Excellency Mahinda Rajapaksa.¹⁷³²

National Security Council

16.7 The National Security Council (**NSC**) was established by the President in the mid-1980s as the 'supreme decision-making body relating to the government war effort'.¹⁷³³ Under the Prevention of Terrorism (National Security Council) Regulations No. 4 of 2001 (**NSC Regulations**), the NSC was established 'for the purposes of conducting operations to combat and control terrorism'.¹⁷³⁴ The NSC was 'charged with the maintenance of national security, with authority to direct security operations and matters incidental to it'.¹⁷³⁵

16.8 According to the author Jagath P. Senaratne, the NSC was the 'apex body' of Sri Lanka's security establishment, and 'the most important policy-making body'.¹⁷³⁶ More specifically,

¹⁷²⁷ Secretary of Defence, Gotabaya Rajapaksa, interviewed in V.K. Shashikumar, 'Winning Wars: Political Will is the Key', (April–June 2010) 25 *Indian Defence Review* 2. This interview is cited in Crisis Group, *War Crimes in Sri Lanka*, 9, and featured on the Sri Lankan Ministry of Defence and Urban Development website, 'Winning Wars: Political Will is Key – Defence Secretary' (webpage), http://www.defence.lk/new.asp?fname=20100429_05 [accessed 16 January 2014].

¹⁷²⁸ 'Chapter Seven: Central and South Asia Caribbean and Latin America', (2009) 109 *The Military Balance* 329–362, 356. ICEP notes that there is a discrepancy between the article's summary of 'Active' and 'Reserve' capabilities (totalling 249,000 personnel) and the sum of the figures provided for each branch of the armed services (239,500).
¹⁷²⁹ Constitution of the Democratic Socialist Republic of Sri Lanka 1978 (hereafter '**Sri Lankan Constitution**'), art 30(1). Under article 30(1) of the Sri Lankan Constitution, the President is also the Head of the State, the Head of the Executive and of the Government.

¹⁷³⁰ Sri Lankan Constitution, Art 61E(a).

¹⁷³¹ Ibid, Art 61E(b). Under this same provision, and subject to Art 41C of the Constitution, the President also appointed the Attorney-General. The 18th Amendment to the Constitution passed by the Sri Lankan Parliament in 2010 repealed Art 41C, and repealed and substituted Art 61E(b) to remove reference to the IGP.

¹⁷³² Sri Lankan President website, 'President Mahinda Rajapaksa', http://www.president.gov.lk/mahinda_rajapaksa.php [accessed 16 January 2014].

¹⁷³³ Jane's, 'Jane's World Armies – Sri Lanka', 13 May 2012, 3. The author Raj K. Mehta stated that the NSC was 'the authority charged with formulating and executing defence policies for the nation' and 'procurements for the armed forces': Raj K. Mehta, *Lost Victory: The Rise & Fall of LTTE Supremo*, V. Prabhakaran (New Delhi: Pentagon Security International, 2010) (hereafter '**Lost Victory**'), 99.

¹⁷³⁴ The Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary), No. 1193/31, 21 July 2001, 'Government Notifications – Regulations made under section 27 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979'. The website of the Sri Lankan Defence Review Committee, which was created by the Minister of Defence in mid-2002, noted that 'the structures governing National Security Policy and Defence Policy, hitherto governed by Emergency Regulations or the Prevention of Terrorism Act have to be formulated in the statutes of the nation, and not be resorted to under emergency conditions only': 'What is Defence Review Committee', 30 March 2003, http://www.army.lk/defence/Whatis_drc.htm [accessed 20 January 2014].

¹⁷³⁵ The Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary), No. 1193/31, 21 July 2001, 'Government Notifications'.

¹⁷³⁶ Jagath Senaratne, 'The Security Establishment in Sri Lanka: A Case for Reform', in Gavin Cawthra and Robin Luckham (eds.) *Governing Insecurity: Democratic Control of Military and Security Establishments in Transitional Democracies* (London/New York: Zed Books, 2003) (hereafter '**The Security Establishment in Sri Lanka**'), 187. The author also noted that there was 'a high degree of civilian governmental (or more accurately presidential) control.'

[a]ll the important security-related policies and strategies of the government are discussed at the NSC, and after discussion the President takes the decisions which are passed on to the armed forces and police to be implemented.¹⁷³⁷

- 16.9 The current available information indicates that, in practice, the NSC did not interfere with operational-level decisions.¹⁷³⁸ Accordingly, '[t]he respective force commanders [were] the principal advisers to the NSC on matters pertaining to their departments.'¹⁷³⁹
- 16.10 Pursuant to the NSC Regulations, the President, 'as Commander-in-Chief of the Armed Forces', was designated the Head of the NSC.¹⁷⁴⁰ The Commander-in-Chief chaired regular meetings of the NSC.¹⁷⁴¹ The NSC Regulations provide that the NSC comprised the following members:
- or more ministers, if any, appointed by the President;
 - The Deputy Minister of Defence;
 - The Secretary to the President;
 - The Secretary of Defence;
 - The Chief of Defence Staff (CDS);¹⁷⁴²
 - The Army Commander;
 - The Navy Commander;
 - The Air Force Commander;
 - The IGP; and
 - The Director General of Internal Intelligence.¹⁷⁴³
- 16.11 However, the available information indicates that the composition of the NSC changed from time to time, also including, for example, the Commandant of the Sri Lankan Army Volunteer Force¹⁷⁴⁴ and the President's security advisor.¹⁷⁴⁵ Other members of the NSC included the Secretary to the Ministry of Foreign Affairs, Secretary to the Treasury, Chief of National Intelligence, Director General of the State Intelligence Service and the Director General Humanitarian Relief.¹⁷⁴⁶

¹⁷³⁷

Ibid.

¹⁷³⁸

Udaya Perera, *Defeating Terrorism through a Politico-Military Strategy: The Sri Lankan Experience*, 21 March 2012, Manuscript submitted to the United States Army War College in partial fulfillment of the requirements of the Master of Strategic Studies Degree (hereafter '**Defeating Terrorism through a Politico-Military Strategy**'), 51.

¹⁷³⁹

'The Security Establishment in Sri Lanka', 187.

¹⁷⁴⁰

The Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary), No. 1193/31, 21 July 2001, 'Government Notifications – Regulations Made under Section 27 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979', Regulation 3.

¹⁷⁴¹

Lalith Weeratunga, 'Speech for the Launch of Gota's War', *Business Today*, <http://businesstoday.lk/art.php?art=7101> [accessed 16 January 2014]. See also The Security Establishment in Sri Lanka, 187.

¹⁷⁴²

The Chief of Defence Staff was appointed under Regulation 5 of the NSC Regulations.

¹⁷⁴³

The Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary), No. 1193/31, 21 July 2001, 'Government Notifications – Regulations Made under Section 27 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979', Regulation 4. See also Iqbal Athas, 'Situation Report – A New Body and a New Head to Counter Terrorism', *Sunday Times*, 6 June 1999, <http://www.sundaytimes.lk/990606/sitrep.html> [accessed 16 January 2014]; Shamindra Ferdinando, 'LTTE Suicide-Pack in Northern Waters', *War on Terror Revisited: Part 32, The Island*, 16 August 2012, http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=59337 [accessed 16 January 2014].

¹⁷⁴⁴

Sri Lankan Volunteer Force website, 'About Us', available at: <http://www.army.lk/slavf/> [accessed 4 November 2013].

¹⁷⁴⁵

Jane's, 'Jane's World Armies – Sri Lanka', 13 May 2012, 3.

¹⁷⁴⁶

Defeating Terrorism through a Politico-Military Strategy, 44.

16.12 CA Chandraprema has written:

The security council began meeting every Wednesday at 10.30am, and would at times go on till evening. The president participated in all the security council meetings. When there were incidents, there would be extra meetings. Comprehensive debriefings were done about all operations and the progress achieved, the number of casualties, the areas captured, the present location of troops, etc. No notes were taken at security council meetings. Everything was done by word of mouth.¹⁷⁴⁷

16.13 Public statements made by senior Sri Lankan Police officials indicated that the Secretary of Defence chaired or coordinated NSC meetings.¹⁷⁴⁸ Further investigation is warranted to determine more precisely the nature and extent of the Secretary of Defence's involvement in the NSC.

16.14 The LLRC Report noted:

Senior Defence Officials who appeared before the Commission stated that the Security Council had decided to pursue a strategy aimed at avoiding civilian casualties in the conduct of military operations. Accordingly, all operational orders to the Army, Navy and Air Force had clearly directed that, every possible step be taken to avoid civilian casualties.¹⁷⁴⁹

Ministry of Defence, Public Security and Law and Order

16.15 The Sri Lankan Ministry of Defence, Public Security and Law and Order (**Ministry of Defence**) was charged with formulating and implementing 'defence policy and procurements for the armed forces'.¹⁷⁵⁰ The Ministry of Defence was also responsible *inter alia* for defence and internal security of Sri Lanka; prevention of terrorism; and intelligence.¹⁷⁵¹

16.16 Administrative matters relating to the SFs were within the purview of the Ministry of Defence.¹⁷⁵² Such matters included 'all enlistments, appointments, promotions, relinquishments, withdrawal of commissions, registrations, secondments, transfers and disciplinary matters of the three forces [Army, Air Force and Navy].'¹⁷⁵³

16.17 The President of Sri Lanka, Mahinda Rajapaksa, was the Minister of Defence.¹⁷⁵⁴ According to the Sri Lankan Constitution, the secretaries to government ministries were appointed by the President.¹⁷⁵⁵ The Secretary of Defence exercised supervision over the departments of Government or other institutions in the charge of the Minister of Defence,¹⁷⁵⁶ and was

¹⁷⁴⁷ C. A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 329.

¹⁷⁴⁸ Udeshi Amarasinghe & Thilini Kahandawaarachchi, 'The Eye on Colombo – Inspector General of Police Jayantha Wickramaratna', *Business Today*, April 2009, <http://www.businesstoday.lk/art.php?art=26> [accessed 16 January 2014]. The IGP refers to the Secretary of Defence chairing the NSC in respect of preparations for the 61st Independence Day celebrations.

¹⁷⁴⁹ LLRC Report, [4.36], citing Mr Gotabhaya Rajapaksa before the LLRC at Colombo on 17 August 2010.

¹⁷⁵⁰ Sri Lankan Army Defence Seminar 2013 website, 'The Sri Lanka Army', available at:

<http://www.defseminar.lk/about-us/TheSriArmy.php> [accessed 16 January 2014].

¹⁷⁵¹ The Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary) No. 1422/22. 8 December 2005. See also Sri Lankan Ministry of Defence and Urban Development, 'Mission: Responsibilities and Functions' (webpage), available at: http://www.defence.lk/main_abt.asp?fname=resp_funcions [accessed 16 January 2014].

¹⁷⁵² Ibid.

¹⁷⁵³ Sri Lankan Ministry of Defence and Urban Development, 'Organisational Structure' (webpage), available at: http://www.defence.lk/main_abt.asp?fname=orgstr [accessed 1 September 2013].

¹⁷⁵⁴ UN Expert Panel Report, [57].

¹⁷⁵⁵ Sri Lankan Constitution, Art 52(1).

¹⁷⁵⁶ Ibid, Art 52(2). This provision refers generally to secretaries of ministries.

subject to the direction and control of the Minister of Defence.¹⁷⁵⁷ From 24 November 2005, the Secretary of Defence was the President's brother, Gotabaya Rajapaksa.¹⁷⁵⁸

Joint Operations Headquarters

16.18 The Joint Operations Headquarters (**JOH**) had operational control of the SFs.¹⁷⁵⁹ The nominal head of the JOH was the CDS, the highest ranking military officer (in the rank of Air Chief Marshall, Admiral or General) in the SFs.¹⁷⁶⁰ The JOH also comprised the three Service Commanders and the IGP. The CDS linked the Ministry of Defence and the Service Commanders.¹⁷⁶¹

16.19 The NSC Regulations provided that the CDS commanded '[t]he armed forces and such officers of the police force as are engaged in anti-terrorist operations'.¹⁷⁶² Accordingly, the Army Commander, Navy Commander, Air Force Commander and IGP acted under the command of the CDS. The duties of the CDS were:

- to implement directions issued to him by the President, the NSC and conveyed to him on behalf of the President, the Deputy Minister of Defence and the Secretary of Defence;
- to advise the NSC 'on the operational capability and preparedness of the armed forces and the police force under his command'; and
- to maintain a Joint Operations Headquarters.¹⁷⁶³

¹⁷⁵⁷ Sri Lankan Constitution, Art 52(2).

¹⁷⁵⁸ The Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary) No. 1423/4, 13 December 2005, available at: <http://documents.gov.lk/Extgzt/2005/pdf/Dec/1423-4/1423-4e.pdf> [accessed 16 January 2014].

¹⁷⁵⁹ Jane's, 'Jane's World Armies – Sri Lanka', 13 May 2012, 4.

¹⁷⁶⁰ Sri Lankan Office of the Chief of Defence Staff, 'History' (web page) <http://www.ocds.lk/history.html> [accessed 16 January 2014]; Lost Victory, 97–98. In relation to the rank of the CDS while serving in this office, see also Chief of Defence Staff Act, No. 35 of 2009, section 4, <http://documents.gov.lk/Acts/2009/Chief%20of%20%20Defence%20Staff%20Act%20No.%2035/ActNo.35E.pdf> [accessed 16 January 2014].

¹⁷⁶¹ Jane's, 'Jane's World Armies – Sri Lanka', 13 May 2012, 4.

¹⁷⁶² The Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary), No. 1193/31, 21 July 2001, 'Government Notifications – Regulations Made under Section 27 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979', Regulation 6.

¹⁷⁶³ Ibid, regulation 7(c). Pursuant to section 5 of the Chief of Defence Act No. 35 of 2009, the functions of the CDS were formalised after the conflict as '[s]ubject to the authority, direction, control and supervision of the Secretary [of Defence]' and comprised the following:

- (a) to assist in providing for the strategic direction of the armed forces;
- (b) to develop a doctrine for the joint employment of the armed forces;
- (c) to facilitate the preparation of strategic plans for the armed forces;
- (d) to co-ordinate matters in respect of the functions relating to intelligence as between the armed forces;
- (e) to undertake assessments to determine capabilities of the armed forces in comparison with those of their potential adversaries;
- (f) to facilitate the preparation of operational plans for the armed forces and to co-ordinate the implementation of the same as between the armed forces;
- (g) to prepare and review contingency plans relating to the armed forces;
- (h) to tender advise [sic] on critical deficiencies and strengths and assess the effect of such deficiencies and strengths –
- (i) in meeting national security objectives; and
- (ii) in ensuring conformity with policy;
- (i) to tender advise [sic] on the extent to which the programmes, recommendations and budget proposals of the armed forces for a fiscal year conform to the priorities established in relation to strategic plans;
- (j) to tender advise [sic] on the extent to which the major programmes and policies of the armed forces relating to manpower and equipment conform to strategic plans;
- (k) to assess military requirements as against the proposed defence procurement plans and to advise the Ministry [of Defence] accordingly;
- (l) to facilitate the formulation of policies for the joint training of the armed forces;
- (m) to facilitate the formulation of policies for peace-keeping operations by the armed forces; and
- (n) to do all such other things as are required or are necessary for the implementation of the above.

The Chief of Defence Staff Act 'extended' the duties or functions of the CDS: Office of the Chief of Defence Staff website, 'History', available at: <http://www.ocds.lk/history.html> [accessed 27 August 2013].

- 16.20 While the CDS ostensibly commanded the Service Commanders and the IGP,¹⁷⁶⁴ the current information available indicates that they exercised a high degree of autonomy in their deployments.¹⁷⁶⁵
- 16.21 From 12 June 2006 to 13 July 2009, the CDS was Air Chief Marshall Gabadarachchige Donald Perera.¹⁷⁶⁶
- 16.22 The Chief of Defence Staff Act No. 35 of 2009, which came into force after the conflict, formalised the role of the CDS who functioned 'under the direction, supervision and control of the Secretary to the Ministry of the Minister in charge of the subject of Defence'.¹⁷⁶⁷

(ii) Sri Lankan Army organisational structure

- 16.23 Under the Army Act No. 17 of 1949, the Army comprised: a regular force; a regular reserve; and volunteer force and reserve.¹⁷⁶⁸ The Army Commander was 'responsible for operational decision-making from Army HQ in Colombo'.¹⁷⁶⁹ From 6 December 2005 to 13 July 2009, the Army Commander was Lieutenant General Gardihewa Sarath Chandralal Fonseka.¹⁷⁷⁰
- 16.24 The Army Commander reported directly to the Secretary of Defence, Gotabaya Rajapaksa, who was responsible to the President.¹⁷⁷¹

¹⁷⁶⁴ The Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary), No. 1193/31, 21 July 2001, 'Government Notifications – Regulations made under section 27 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979', Regulation 6.

¹⁷⁶⁵ Jane's, 'Significant Changes in Sri Lankan Defence Structure – Asia Pacific', *Jane's Defence Weekly*, 16 June 1999; Defeating Terrorism through a Politico-Military Strategy, 51; Lost Victory, 98.

¹⁷⁶⁶ Sri Lankan Ministry of Defence and Urban Development website, 'Air Chief Marshal G D Perera VSV, USP, NDC, PSC – Chief of Defence Staff', http://www.defence.lk/main_abt.asp?fname=CDS1 [accessed 16 January 2014]; The Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary) No. 1610/10, 13 July 2009, [http://documents.gov.lk/Extqzt/2009/PDF/July/1610_10/1610_10%20\(E\).pdf](http://documents.gov.lk/Extqzt/2009/PDF/July/1610_10/1610_10%20(E).pdf) [accessed 16 January 2014].

¹⁷⁶⁷ Chief of Defence Staff Act No. 35 of 2009, section 2(2), <http://documents.gov.lk/Acts/2009/Chief%20of%20Defence%20Staff%20Act%20No.%2035/ActNo.35E.pdf> [accessed 16 January 2014].

¹⁷⁶⁸ Army Act No. 17 of 1949, section 2(2), http://www.defence.lk/main_pub.asp?fname=armyact [accessed 16 January 2014].

¹⁷⁶⁹ Jane's, 'Jane's World Armies – Sri Lanka', 13 May 2012, 3. See also Udeshi Amarasinghe & Thilini Kahandawaarachchi, 'Defence Secretary Gotabaya Rajapaksa Salutes the War Heroes', *Business Today*, June 2009, <http://www.defence.lk/pdf/DefSec-BusinesstodayJune.pdf> [accessed 16 January 2014]; General Sarath Fonseka, 'Winning the War – Sri Lankan Experience – I', *The Sri Lanka Guardian*, 1 June 2011. General Fonseka was reported to have stated that '[a]ll strategies and operational plans of Elam war IV was [sic] worked out purely by the Commander of the Army and all tactical plans of the GOC[']s [General Officers Commanding] were closely monitored and directed by the Army Commander himself': General Sarath Fonseka, 'Winning the War – Sri Lankan Experience – I', *The Sri Lanka Guardian*, 1 June 2011, <http://www.srilankaguardian.org/2011/06/winning-war-sri-lankan-experience-part.html> [accessed 16 January 2014]. General Fonseka also reportedly wrote that the Army Commander took responsibility for 'all [o]perational matters down to four-man team level', 'the deployment down to platoon level were [sic] always decided by the Army Commander', and ultimately, 'the Sri Lanka Army Commander took the whole Elam war IV under his personal Operational Command and directed the [o]peration to [v]ictory': General Fonseka, 'Winning the War – Sri Lankan Experience – 4', *The Sri Lanka Guardian*, 1 June 2011, <http://www.srilankaguardian.org/2011/06/winning-war-sri-lankan-experience-4.html> [accessed 16 January 2014]. However, ICEP notes that an army commander would normally not have responsibilities at the tactical level and accordingly, further investigation into the nature and scope of Fonseka's responsibilities should be undertaken.

¹⁷⁷⁰ The Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary) No. 1421/38 (2 December 2005), <http://documents.gov.lk/Extqzt/2005/pdf/Dec/1421-38/1421-38e.pdf> [accessed 16 January 2014]; Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary) No. 1610/10, 13 July 2009, [http://documents.gov.lk/Extqzt/2009/PDF/July/1610_10/1610_10%20\(E\).pdf](http://documents.gov.lk/Extqzt/2009/PDF/July/1610_10/1610_10%20(E).pdf) [accessed 16 January 2014]; and UN Expert Panel, [62]. Fonseka reportedly stated that he was in China from 11-16 May 2009 during which time he monitored operations. He returned to Sri Lanka at around 9pm on 17 May 2009. From 2:30am on 18 May, Fonseka stated: 'I led the operation until the victory on the 19th [May]'; Manopriya Gunasekara, 'I Am in Jail while Karuna Enjoys Privileges as a Minister – Fonseka', *The Sunday Times*, 29 May 2011, available at: http://www.sundaytimes.lk/110529/News/news_17.html [accessed 2 December 2013].

¹⁷⁷¹ Crisis Group, *War Crimes in Sri Lanka*, 10. This command structure is corroborated by the summary of witness statement of an international agency official who had direct and regular contact with the SFHQ-Vanni Commander: DM-009, 37.

- 16.25 The Chief of Staff of the Army headed the staff at Army Headquarters and ensured that the Army Commander's policies on all matters were effectively executed.¹⁷⁷² The Chief of Staff was specifically responsible to the Army Commander for:
- coordinating all staff work at Army Headquarters, assisted by the Deputy Chief of Staff;
 - ensuring the smooth functioning of the General Staff Branch and Military Secretary's Branch;
 - coordinating and controlling all operations in the field, and functioning as a force/theatre commander, as and when required; and
 - deputising for the Army Commander, when required.¹⁷⁷³
- 16.26 From March 2008 to 28 February 2009, the Chief of Staff of the Army was Major General Nissanka Wijesinghe. On 1 March 2009, he was succeeded by Major General GA Chandrasiri who held this position until July 2009.¹⁷⁷⁴
- 16.27 Orders were passed from the Army Commander to the commanders of regional commands, known as Security Forces Headquarters (**SFHQ**), for implementation by the divisional commanders.¹⁷⁷⁵
- 16.28 There is some information to suggest that, in relation to the surrender of senior LTTE leaders at the end of the conflict, the Secretary of Defence bypassed regular command lines to convey orders directly to a senior field commander¹⁷⁷⁶ (discussed at section 8 of this report).

¹⁷⁷² Sri Lanka Army, 'Chief of Staff Office' (intranet web portal), <https://army.lk/webportal/directorates.php?bid=c81e728d9d4c2f636f067f89cc14862c242464e296f15791961311338261&id=2> [accessed 27 August 2013].

¹⁷⁷³ Ibid.

¹⁷⁷⁴ Sri Lankan Ministry of Defence and Urban Development, 'Major General G.A. Chandrasiri – New Governor of the Northern Province' (web page), http://www.defence.lk/new.asp?fname=20090718_03 [accessed 27 August 2013].

¹⁷⁷⁵ Jane's, 'Jane's World Armies – Sri Lanka', 13 May 2012; Udeshi Amarasinghe & Thilini Kahandawaarachchi, 'Defence Secretary Gotabaya Rajapaksa Salutes the War Heroes', *Business Today*, June 2009, <http://www.defence.lk/pdf/DefSec-BusinesstodayJune.pdf> [accessed 16 January 2014]; Sri Lankan Army, 'LTTE's Killing Field 'Pooneryn' in Army Hands' (web page), 15 November 2008, <http://www.army.lk/opdetail.php?id=64> [accessed 16 January 2014]; and Crisis Group, *War Crimes in Sri Lanka*, 10.

¹⁷⁷⁶ See, for example, deposition of WM-016, 46-48; Frederica Jansz, "Gota Ordered Them To Be Shot" – General Sarath Fonseka', *The Sunday Leader*, 13 December 2009, <http://www.thesundayleader.lk/2009/12/13/%E2%80%9Cgot-a-ordered-them-to-be-shot%E2%80%9D-%E2%80%93-general-sarath-fonseka/> [accessed 13 January 2014].

Overview of branches of the Sri Lankan Army

Table 16.1 Branches of the Sri Lankan Army

Branch	Responsibilities
General Staff Branch (GS Branch)	Responsible for military operations, intelligence and training ¹⁷⁷⁷
Adjutant General Branch (AG Branch)	Responsible for personal administration, pay and records, legal and medical services, welfare and rehabilitation ¹⁷⁷⁸
Quarter Master General (QMG Branch)	Responsible for the provision of supplies and transport, movement and engineering services ¹⁷⁷⁹
Master General of Ordnance Branch (MGO Branch)	Responsible for munitions procurement and maintenance of equipment ¹⁷⁸⁰
Military Secretary's Branch	Responsible for all matters pertaining to officers, such as promotions, postings and discipline ¹⁷⁸¹

16.29 Under each branch of the Army Headquarters, there were several directorates with discrete areas of responsibility.

GS Branch

16.30 The GS Branch, of central importance to the Army's administration, was headed by the Director General of General Staff who was one of four Principal Staff Officers (**PSOs**) in the rank of Major General.¹⁷⁸² The GS Branch comprised, in particular, the following directorates:

¹⁷⁷⁷ Sri Lanka Army, 'General Staff Branch' (intranet web portal), <https://army.lk/webportal/directorates.php?bid=e4da3b7fbbce2345d7772b0674a318d5180614e296f41a50b61311338305&id=5> [accessed 22 August 2013].

¹⁷⁷⁸ Sri Lankan Army, 'Adjutant General Branch' (intranet web portal), <https://army.lk/webportal/directorates.php?bid=1679091c5a880faf6fb5e6087eb1b2dc123544e296f4cc54571311338316&id=6> [accessed 22 August 2013].

¹⁷⁷⁹ Sri Lankan Army, 'Quarter Master General Branch' (intranet web portal), <https://army.lk/webportal/directorates.php?bid=8f14e45fcee167a5a36dedd4bea2543226114e296f574d65e1311338327&id=7> [accessed 22 August 2013].

¹⁷⁸⁰ Sri Lankan Army, 'Master General Ordnance Branch' (intranet web portal), <https://army.lk/webportal/directorates.php?bid=c9f0f895fb98ab9159f51fd0297e236d239204e296f6b864861311338347&id=8> [accessed 22 August 2013].

¹⁷⁸¹ Sri Lankan Army, 'Military Secretary's Branch' (intranet web portal), <https://army.lk/webportal/directorates.php?bid=a87ff679a2f3e71d9181a67b7542122c274284e296f36b278f1311338294&id=4> [accessed 22 August 2013].

¹⁷⁸² Sri Lanka Army, 'General Staff Branch' (intranet web portal), <https://army.lk/webportal/directorates.php?bid=e4da3b7fbbce2345d7772b0674a318d5180614e296f41a50b61311338305&id=5> [accessed 22 August 2013].

Table 16.2 Key directorates within GS Branch

Directorate	Responsibilities
Directorate of Operations	Responsible for staff work connected with the military operations, military strategy, concept of operations, contingency plans and the issuing of operational orders and instructions ¹⁷⁸³
Directorate of Military Intelligence	Responsible for gathering, interpreting and distributing information on the enemy and general reconnaissance ¹⁷⁸⁴
Directorate of Training	Responsible for policy directions and the coordination of all military training ¹⁷⁸⁵
Directorate of Psychological Operations	Responsible for psychological warfare, including propaganda ¹⁷⁸⁶
Directorate of Staff Duties	Responsible for all staff duties matters, including organisation, establishment, staff tables and orders of battle ¹⁷⁸⁷

- 16.31 In relation to the Directorate of Operations (see Table 16.2 above), from August 2006 to April 2009, the Director of Operations was Brigadier Ganegama Vithanage Don Udaya Annesly Perera.¹⁷⁸⁸ Brigadier Perera was replaced by Colonel Aruna Wanniarachchi in April 2009.¹⁷⁸⁹
- 16.32 CA Chandraprema has written that '[d]uring the war, Udaya Perera director of operations of the army maintained constant contact with Gōta [Gotabaya Rajapaksa] and kept him updated about the ammunition stocks.'¹⁷⁹⁰

¹⁷⁸³ Sri Lanka Army, 'Directorate of Operations' (intranet web portal), available at: <https://army.lk/webportal/branches.php?did=33e75ff09dd601bbe69f351039152189130834e5e1f9b253181314791323> [accessed 22 August 2013]. CA Chandraprema wrote that this directorate 'coordinated the distribution of arms, ammunition, communication equipment and manpower to the divisional commands': C. A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 388.

¹⁷⁸⁴ Sri Lanka Army, 'Directorate of Military Intelligence' (intranet web portal), <https://army.lk/webportal/branches.php?did=8e296a067a37563370ded05f5a3bf3ec325324e5df16c89f0a1314779500&bt=1> [accessed 22 August 2013].

¹⁷⁸⁵ Sri Lanka Army, 'Directorate of Training' (intranet web portal), <https://army.lk/webportal/branches.php?did=37693cfc748049e45d87b8c7d8b9aacd164544e5df136280a31314779446> [accessed 22 August 2013].

¹⁷⁸⁶ Sri Lanka Army, 'Directorate of Psychological Operations' (intranet web portal), <https://army.lk/webportal/branches.php?did=4e732ced3463d06de0ca9a15b6153677250954e5df18da548a1314779533> [accessed 22 August 2013].

¹⁷⁸⁷ Sri Lanka Army, 'Directorate of Staff Duties' (intranet web portal), <https://army.lk/webportal/branches.php?did=02e74f10e0327ad868d138f2b4fdd6f0255334e5df1a3e38a31314779555> [accessed 22 August 2013].

¹⁷⁸⁸ Shanika Sriyananda, 'Former Director Operations of Sri Lanka Army Denies War Crimes Allegations', *Sunday Observer*, 1 May 2011, <http://www.sundayobserver.lk/2011/05/01/sec02.asp> [accessed 16 January 2014]; C. A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 388.

¹⁷⁸⁹ 'New Army Director Operations', *The Nation*, 5 April 2009, <http://www.nation.lk/2009/04/05/news9.html> [accessed 16 January 2014].

¹⁷⁹⁰ C. A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 319.

Regional operational command

16.33 SFs formations came under three regional commands (SFHQ), which comprised the Security Forces Headquarters Vanni (SFHQ-Vanni), Security Forces Headquarters Jaffna (SFHQ-Jaffna) and Security Forces Headquarters East (SFHQ-East).¹⁷⁹¹

Table 16.3 SFHQs

SFHQ	Area of responsibility	Headquarters	Commander
SFHQ-Vanni	Kilinochchi, Mullaitivu, Mannar, Vavuniya, Puttalam and Anuradhapura Districts ¹⁷⁹²	Vavuniya ¹⁷⁹³	Major General Jagath Jayasuriya (6 August 2007 – 14 July 2009) ¹⁷⁹⁴
SFHQ-Jaffna	Jaffna District	Palaly ¹⁷⁹⁵	Major General G.A. Chandrasiri (December 2005 – January 2009); ¹⁷⁹⁶ and Major General MC 'Mendaka' P Samarasinghe (January – 27 July 2009) ¹⁷⁹⁷
SFHQ-East	Trincomalee, Polonnaruwa, Batticaloa and Ampara Districts ¹⁷⁹⁸	Welikanda ¹⁷⁹⁹	Major General JJPST Liyanage (28 December 2007 – 16 November 2008); and Major General 'Srinath'M De A Rajapakse (16 November 2008 – 30 November 2009) ¹⁸⁰⁰

¹⁷⁹¹ Sri Lankan Army, 'Contact Us' (web page), <http://www.army.lk/contactus.php> [accessed 6 April 2009].

¹⁷⁹² Sergei Desilva-Ranasinghe, 'LTTE's Global Network a Long-Term Concern', *SP's Land Forces*, 2010, <http://www.spslandforces.net/story.asp?id=11> [accessed 16 January 2014]; UN Office for the Coordination of Humanitarian Affairs district maps, eg, 'Sri Lanka: Agencies Working in the Disaster Management Sector by District 9as of 11 April 2011', 12 April 2011, <http://reliefweb.int/map/sri-lanka/sri-lanka-agencies-working-disaster-management-sector-district-11-apr-2011> [accessed 16 January 2014].

¹⁷⁹³ Security Forces Headquarters Wannai, 'Contact Us' (web page), http://220.247.214.182/sfhqwanni/contact_us.php [accessed 4 November 2013].

¹⁷⁹⁴ Security Forces Headquarters Wannai, 'History' (web page), <http://220.247.214.182/sfhqwanni/history.php> [accessed 4 November 2013].

¹⁷⁹⁵ Sri Lankan Army, 'Military Contacts Information: SFHQ(J)' (intranet web portal), https://army.lk/webportal/military_contact.php?code=c81e728d9d4c2f636f067f89cc14862c132094e11c111b691a1309786385 [accessed 22 August 2013]; Sri Lankan Civil Military Coordination Jaffna, 'About Us' (web page), <http://www.cimicjaffna.com/main.php> [accessed 27 August 2013].

¹⁷⁹⁶ Sri Lankan Ministry of Defence and Urban Development, 'Major General G.A. Chandrasiri – New Governor of the Northern Province' (web page), http://www.defence.lk/new.asp?fname=20090718_03 [accessed 27 August 2013].

¹⁷⁹⁷ It is unclear on what date Major General Samarasinghe assumed command of SFHQ-Jaffna, and at least one Sri Lankan report states that he 'assum[ed] duties as Jaffna Security Forces commander in December 2008': 'Unprecedented Glorious Victory', *Daily News*, 3 June 2009, <http://archives.dailynews.lk/2009/06/03/supstory.asp?id=s01> [accessed 2 December 2013]. This report is inconsistent with other reports that Major Chandrasiri retired from this post in January 2009. In relation to the end date of Major General Samarasinghe's term at SFHQ-Jaffna, see Sri Lankan Army website, 'New Chief of Staff Major General Samarasinghe Takes Office', 27 July 2009, <http://www.army.lk/detailed.php?NewsId=1004> [accessed 2 December 2013].

¹⁷⁹⁸ Security Forces Headquarters – East, 'History' (web page), <http://www.sfhqe.lk/history.php> [accessed 2 September 2013].

¹⁷⁹⁹ Sri Lankan Army, 'Military Contacts Information: SFHQ(E)' (intranet web portal), https://army.lk/webportal/military_contact.php?code=a87ff679a2f3e71d9181a67b7542122c122994e11ce74cd84b1309789812 [accessed 22 August 2013].

¹⁸⁰⁰ Security Forces Headquarters East, 'History' (web page), <http://sfhqe.lk/history.php> [accessed 2 December 2013]. Major General Rajapakse was succeeded by Major General JC Rambukpotha on 30 November 2009.

SFHQ-Vanni

16.34 Military operations in north-east Sri Lanka were coordinated by the commander of the SFHQ-Vanni, based in Vavuniya.¹⁸⁰¹ SFHQ-Vanni was the Army's largest and, according to defence analyst Sergei Desilva-Ranasinghe, most strategically important regional command, covering an estimated land area of 25,000 square kilometres.¹⁸⁰²

16.35 From 6 August 2007 to 14 July 2009, the SFHQ-Vanni Commander was Major General Jagath Jayasuriya.¹⁸⁰³ The SFHQ-Vanni Commander is reported as stating:

As the Security Forces Commander Vanni, the entire northern operation was conducted in the tactical area of responsibility that came under my command. I was actively involved in the ground operations executing the directives from Army Headquarters and the Ministry of Defence from the very inception of the north humanitarian operations, starting from Mannar in 2007, right up to the very end, May 18 2009.¹⁸⁰⁴

16.36 The current information available indicates that the SFHQ-Vanni ostensibly commanded the following manoeuvre formations which were deployed in the Vanni Region:

- 53rd Division;
- 55th Division;
- 57th Division;
- 58th Division (formerly Task Force 1);
- 59th Division;
- Task Force 2;
- Task Force 3;
- Task Force 4; and
- Task Force 8.¹⁸⁰⁵

16.37 However, reported statements by the former Army Commander¹⁸⁰⁶ suggest that further investigation is required into the structure and function of the SFHQ-Vanni and other SFHQs which might have been actively engaged during the final months of the conflict.

¹⁸⁰¹ 'Transcript of Lieutenant General Jagath Jayasuriya's Testimony before the LLRC', 8 September 2010 (copy on file with ICEP).

¹⁸⁰² See, eg, Sergei Desilva-Ranasinghe, 'LTTE's Global Network a Long-Term Concern', *SP's Land Forces*, 2010, <http://www.spslandforces.net/story.asp?id=11> [accessed 13 January 2014]. This defence analyst noted that SFHQ-Vanni stretched as far north as Pooneryn, Elephant Pass and Chundikulam, and as far south as Mannar, Puttalam, Anuradhapura and Welioya.

¹⁸⁰³ UN Expert Panel, [62]; The Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary) No. 1610/10. 13 July 2009; Sri Lankan Security Forces Headquarters Wannai website, 'SFQH Wannai History', <http://www.army.lk/sfhqwanni/> [accessed 16 January 2014]; 'Transcript of Lieutenant General Jagath Jayasuriya's testimony before the LLRC', 8 September 2010; and various Sri Lankan Army briefings to defence attachés on file with ICEP.

¹⁸⁰⁴ Sergei Desilva-Ranasinghe, 'LTTE's Global Network a Long-Term Concern', *SP's Land Forces*, 2010, <http://www.spslandforces.net/story.asp?id=11> [accessed 16 January 2014].

¹⁸⁰⁵ Ibid; C. A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 437; and Crisis Group, *War Crimes in Sri Lanka*, 17 May 2009, 10–11, fn 49, <http://www.crisisgroup.org/~media/Files/asia/south-asia/sri-lanka/191%20War%20Crimes%20in%20Sri%20Lanka.ashx> [accessed 16 January 2014].

¹⁸⁰⁶ Contrary to other information outlined above, General Sarath Fonseka has reportedly stated that the 59th Division was the only manoeuvre (or 'offensive') formation ever under the command of the SFHQ-Vanni Commander: General Fonseka, 'Winning the War – Sri Lankan Experience – I', *The Sri Lanka Guardian*, 1 June 2011, <http://www.srilankaguardian.org/2011/06/winning-war-sri-lankan-experience-part.html> [accessed 16 January 2014].

16.38 The SFHQ-Vanni Commander reportedly also commanded 51 battalions in holding operations, namely the Area Headquarters Mannar, 21st Division, 56th Division, 61st Division, Area Headquarters Welioya, Task Force 5 and Task Force 6.¹⁸⁰⁷ In addition, the SFHQ-Vanni Commander reportedly commanded approximately 3,000 Navy troops, several hundred Air Force troops, 10,000 policemen and 5,000 Home Guards.¹⁸⁰⁸

SFHQ-Jaffna

16.39 The SFHQ–Jaffna, with headquarters in Palaly, played an important but less prominent role during the conflict. From December 2005 to January 2009, the SFHQ-Jaffna was under the command of Major General G.A. Chandrasiri.¹⁸⁰⁹ Major General MCMP ‘Mendaka’ Samarasinghe replaced Major General Chandrasiri until July 2009.¹⁸¹⁰

SFHQ-East

16.40 From 16 November 2008 to 30 November 2009, the SFHQ-East headquartered in Welikanda was under the command of Major General SM De A Rajapakse.¹⁸¹¹ Major operations were conducted in the area of responsibility of SFHQ-East from 20 July 2006 to 11 July 2007.¹⁸¹²

Field formations

16.41 Each SFHQ had several divisions under its command and each division was further divided into brigades. *Jane’s* notes:

Each operational command in the field ha[d] its own staff within which there [was] the usual hierarchical command structure that extend[ed] down from the division, through brigade, battalion, and company to the platoon. The rank of commanders varie[d], and brigades [could] be commanded by either a [C]olonel or a [B]rigadier.¹⁸¹³

16.42 According to *Global Security*, in 2009 the Army was organised into 14 divisions consisting of 36 infantry brigades.¹⁸¹⁴ However, the former Director of Operations in the Army, Udaya Perera, has stated that ‘[a]t the termination of the [military] campaign, the army had increased [from 9 divisions, 32 brigades and 155 battalions in mid-2006] to 21 divisions, 60 brigades and 204 battalions.’¹⁸¹⁵

¹⁸⁰⁷ Sergei Desilva-Ranasinghe, ‘LTTE’s Global Network a Long-Term Concern’, *SP’s Land Forces*, 2010, <http://www.spslandforces.net/story.asp?id=11> [accessed 16 January 2014].

¹⁸⁰⁸ Ibid.

¹⁸⁰⁹ Sri Lankan Ministry of Defence and Urban Development, ‘Major General G.A. Chandrasiri – New Governor of the Northern Province’ (web page), http://www.defence.lk/new.asp?fname=20090718_03 [accessed 13 January 2014].

¹⁸¹⁰ Sri Lankan Ministry of Defence and Urban Development, ‘Commander Congratulates Troops for their Recent Achievements’ (web page), http://www.defence.lk/new.asp?fname=20090114_01 [accessed 13 January 2014]; ‘Samarasinghe Transferred to JOH’, *The Nation*, 31 January 2010, <http://www.nation.lk/2010/01/31/news6.htm> [accessed 13 January 2014].

¹⁸¹¹ Security Forces Headquarters East, ‘History’ (web page), <http://sfhq.lk/history.php> [accessed 2 December 2013]. Major General Rajapakse was succeeded by Major General JC Rambukpotha on 30 November 2009.

¹⁸¹² Security Forces Headquarters East, ‘Operations’ (web page), <http://www.sfhqe.lk/operation.php> [accessed 2 December 2013].

¹⁸¹³ Jane’s, ‘Jane’s World Armies – Sri Lanka’, 13 May 2012, 3. The Sri Lankan Army website noted that ‘a divisional headquarters is divided into a GS branch [and] an AQ branch, each headed by a Colonel and is responsible for ‘operations and training’ and ‘administration and logistics’ respectively. Similarly, a Brigade Major and Major AQ is responsible for operations and administration in a brigade’: Sri Lankan Army, ‘Organisations & Units’ (web page), <http://www.army.lk/Organisations3.htm> [accessed 15 October 2004].

¹⁸¹⁴ Global Security, ‘Sri Lanka – Army Order of Battle’ (web page), <http://www.globalsecurity.org/military/world/sri-lanka/army-orbat.htm> [accessed 16 January 2014].

¹⁸¹⁵ Defeating Terrorism through a Politico-Military Strategy, 56.

- 16.43 A division reportedly comprised three brigades (nine infantry battalions), whereas a task force comprised two brigades (six infantry battalions).¹⁸¹⁶ A brigade consisted of 2,500 to 3,000 personnel.¹⁸¹⁷
- 16.44 *Global Security* also noted that the constituent brigades of each division, which were the operational tactics units of the division, could be re-assigned to other divisions as needed.¹⁸¹⁸ Further investigation is required to ascertain the nature and scope of command relationships between such divisions and brigades in order to determine whether, in respect of a particular incident, a divisional commander was responsible for the brigade's operational actions.
- 16.45 Each brigade 'ha[d] Infantry battalions, support arms (Artillery, Engineers and Signals), and Services (Service Corps, Engineering Services, Ordnance Corps, Electrical and Mechanical Engineers), under its command... Armour, Artillery, Engineers and Signals Units [were] grouped under Brigade Headquarters of their own arm; Armoured Brigade, Artillery Brigade and so on.'¹⁸¹⁹ In particular, from 1 September 2008 to 18 June 2009, Brigadier NAPC Napagoda was the Brigade Commander of the Artillery Brigade.¹⁸²⁰
- 16.46 There were also several independent brigades, including the Commandos Brigade, Special Forces Brigade and Air Mobile Brigade, which were not permanently attached to any particular division.¹⁸²¹ According to the Sri Lankan war correspondent, Shamindra Ferdinando, the 53rd Division itself 'comprised Army Commandos, Special Forces and the Air Mobile Brigade'.¹⁸²²
- 16.47 *Jane's* has reported that the Commandos Brigade and Special Forces Brigade each comprised three battalions.¹⁸²³ These elite soldiers were mobilised in support of SFs infantry and conducted independent operations into LTTE-controlled territory as 'Deep Penetration Units'.¹⁸²⁴ Sri Lankan media reports suggest that, during the final months of the conflict, Commandos and Special Forces were predominately deployed by the GOC of the 58th Division, Brigadier Shavendra Silva.¹⁸²⁵

¹⁸¹⁶ Shamindra Ferdinando, 'Famed 58 Div to the Fore', *War on Terror Revisited: Part 87*, The Island, 28 December 2012. The strength of a division which is stated in the LLRC Report (5,000 personnel) appears to be incorrect: 34, fn 19.

¹⁸¹⁷ LLRC Report, 34, fn 19.

¹⁸¹⁸ Global Security, 'Sri Lanka – Army Order of Battle' (web page), <http://www.globalsecurity.org/military/world/sri-lanka/army-orbat.htm> [accessed 13 January 2014].

¹⁸¹⁹ Ibid.

¹⁸²⁰ Sri Lankan Gunner, 'Brigade Commanders of Artillery Brigade' (web page), <http://www.gunner.lk/information.php?inoid=3> [accessed 20 January 2014].

¹⁸²¹ Lost Victory, 101, 104.

¹⁸²² Shamindra Ferdinando, 'CFA and US Assessment of Sri Lanka's Military Capabilities', *War on Terror Revisited*, 28 August 2012, http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=60259 [accessed 16 January 2014].

¹⁸²³ Jane's, 'Jane's World Armies – Sri Lanka', 13 May 2012, 4. It has been reported that the Commandos and Special Forces expanded from three to five regiments between 2007 and 2008: Sergei DeSilva-Ranasinghe, 'Strategic Analysis of Sri Lankan Military's Counter-Insurgency Operations', *Future Directions International Strategic Analysis Paper*, 12 February 2010, 5, <http://www.futuredirections.org.au/files/1266992558-FDIStrategicAnalysisPaper-12February2010.pdf> [accessed 16 January 2014].

¹⁸²⁴ Udeshi Amarasinghe and Thilini Kahandawaarachchi, 'Defence Secretary Gotabaya Rajapaksa Salutes the War Heroes', *Business Today*, June 2009, <http://www.defence.lk/pdf/DefSec-BusinesstodayJune.pdf> [accessed 16 January 2014]; C. A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 395–396, 432, 434–435.

¹⁸²⁵ 'Transcript of Major General Shavendra Silva's Testimony before the LLRC', 8 September, 2010, 1 (on file with ICEP). See also, 'Ground Fighting One-Sided: New Divisions Enters Battle', *The Nation*, 2 November 2008, <http://www.nation.lk/2008/11/02/militarym.htm> [accessed 16 January 2014]; 'Is Kilinochchi Worth Taking in a Hurry?', *The Nation*, 21 December 2008, <http://www.nation.lk/2008/12/21/militarym.htm> [accessed 16 January 2014].

- 16.48 Colonel HP Ranasinghe, Commander of the Special Forces Brigade of the Sri Lankan Army, reportedly stated that '[t]he key unit in recent operations has been the Special Infantry Operations Team (SIOT).'¹⁸²⁶ Colonel Ranasinghe further noted that:

The SIOT was developed as a concept by the infantry to fight and defeat the LTTE in sub conventional, guerrilla and counter insurgency warfare... The SIOT saw the employment of specially trained infantry teams in four man, eight man and twelve man units as a means of surveillance, target acquisition and a human guidance system for delivery of effective combat power within LTTE controlled areas. The operational range and endurance of these small infantry groups covered a distance 5-6km over a period of four days. With replenishment, some of the teams extended operations to five days depending on circumstances.¹⁸²⁷

- 16.49 Lieutenant Colonel (retired) Ivan Welch has written that 'the SIOTs were spread out through the infantry battalions of the army... By 2006, some infantry companies were completely manned by SIOT soldiers. This level of skill allowed the battalion commander to dominate a broad front that extended 4-5 kilometers in depth.'¹⁸²⁸ Welch concluded that, 'With the focus on highly trained infantry teams, combat became more decentralized. Teams conducted combat operations without officers present. Planning was conducted jointly by officers and men while decisions were made in the field by sergeants.'¹⁸²⁹

- 16.50 According to *Global Security*:

Like the Indian Army, the Sri Lanka Army has largely retained the British-style regimental system that it inherited upon independence. The individual regiments (such as the Sri Lanka Light Infantry and the Sinha Regiment) operate independently and recruited their own members. Like the Indian Army, the Sri Lankan Army's regiments are not operational tactice [sic] units [a role performed by Brigades], but rather are recruitment, training and lineage units. Officers tended to remain in a single battalion throughout their careers. The infantry battalion, the basic unit of organization in field operations, included five companies of four platoons each....¹⁸³⁰

2014]; 'Tigers Engage in Blame Game', *The Nation*, 28 December 2008, <http://www.nation.lk/2008/12/28/militarym.htm> [accessed 16 January 2014]; Rohan Abeywardena and Tissa Ravindra Perera, 'Captive Civilians and Tiger Cadres may Turn Guns on LTTE', *The Nation*, 11 January 2009, <http://www.nation.lk/2009/01/11/militarym.htm> [accessed 16 January 2014]; Tissa Ravindra Perera, 'Army Completes Capture of Jaffna', *The Nation*, 11 January 2009, <http://www.nation.lk/2009/01/11/news6.htm> [accessed 16 January 2014]; 'LTTE-UN Standoff in Wannai', *The Nation*, 25 January 2009, <http://www.nation.lk/2009/01/25/militarym.htm> [accessed 16 January 2014]; Tissa Ravindra Perera, 'Army Plans "No Fire Zone" Capture', *The Nation*, 5 April 2009, <http://www.nation.lk/2009/04/05/defence.html> [accessed 16 January 2014]; Tissa Ravindra Perera, 'Biggest Hostage Rescue in Military History', *The Nation*, 26 April 2009, <http://www.nation.lk/2009/04/26/defence.html> [accessed 16 January 2014]; Tissa Ravindra Perera, 'Security Forces Poised for Victory', *The Nation*, 17 May 2009, <http://www.nation.lk/2009/05/17/militarym.htm> [accessed 16 January 2014]; Shamindra Fernando, 'Dead, No Doubt!', *The Island*, 20 May 2009, <http://www.island.lk/2009/05/20/news1.html> [accessed 16 January 2014]. However, Sri Lankan newspapers have also reported that the Army Commander, Sarath Fonseka, and the General Officer Commanding the 59th Division, General Prasanna De Silva, assumed command of the Special Forces in particular operations: Tissa Ravindra Perera, 'LTTE Grand Assault Routed', *The Nation*, 15 March 2009, <http://www.nation.lk/2009/03/15/militarym.htm> [accessed 16 January 2014]; 'Security Forces Poised for Victory', *The Nation*, 17 May 2009, <http://www.nation.lk/2009/05/17/militarym.htm> [accessed 16 January 2014].

¹⁸²⁶ Colonel HP Ranasinghe, 'Sri Lanka Looks to Special Forces Lead', *SoldierMod*, Volume 7, Summer/Autumn 2011, 39, <http://www.soldiermod.com/volume-7/pdfs/sri-lanka-secial-forces.pdf> [accessed 14 January 2014].

¹⁸²⁷ Ibid.

¹⁸²⁸ Lieutenant Colonel (retired) Ivan Welch, 'Infantry Innovations in Insurgencies: Sri Lanka's Experience', *Infantry*, May-June 2013, 29 (footnotes omitted), <http://fmso.leavenworth.army.mil/documents/innovation-in-insurgencies.pdf> [accessed 14 January 2014].

¹⁸²⁹ Ibid.

¹⁸³⁰ Global Security, 'Sri Lanka – Army Order of Battle'(webpage), <http://www.globalsecurity.org/military/world/sri-lanka/army-orbat.htm> [accessed 14 January 2014]; Lost Victory, 100.

Divisional and Task Force Commanders

- 16.51 Major General Gabadage Don Harischandra Kamal Gunaratne was the GOC of the 53rd Division.¹⁸³¹ While Major General Gunaratne was on leave, reportedly on 1 to 2 April 2009, Brigadier Chagee Gallage was Acting GOC of the 53rd Division.¹⁸³² Major General Gunaratne is reported to have returned to the battlefield on 2 April 2009.¹⁸³³ The available information suggests that overall operational command of the 53rd Division was transferred from the SFHQ-Jaffna to the SFHQ-Vanni.¹⁸³⁴ However, further investigation is required to determine precisely when SFHQ-Vanni assumed overall command of the 53rd Division, as the 53rd Division is implicated in alleged crimes that might have been committed during the final months of the conflict and around the time of the cessation of hostilities.
- 16.52 Brigadier Prasanna De Silva (also known as Prasanna Silva) was the GOC of the 55th Division from 2008 to 30 April 2009.¹⁸³⁵ From this time, the available information indicates that Brigadier Chagee Gallage (referred to above at paragraph 16.51), who was then the Army's Director of Training, was appointed to 'oversee' the 55th Division, although Brigadier De Silva might have retained overall command.¹⁸³⁶
- 16.53 Major General Nanayakkara Agarage Jagath Chulanaga Dias was the GOC of the 57th Division¹⁸³⁷ from June 2007 to June 2009.¹⁸³⁸ The Commanding Officer of the Commando Regiment, Colonel Ralph Nugera, reportedly replaced Major General Dias as GOC of the 57th Division between 30 March and 5 April 2009.¹⁸³⁹

- ¹⁸³¹ UN Expert Panel Report, [62]; Shamindra Ferdinando, 'CFA and US assessment of Sri Lanka's military capabilities', *War on Terror Revisited*, *The Island*, 28 August 2012, http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=60259 [accessed 14 January 2014]; The Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary) No. 1622/32, 2 October 2009.
- ¹⁸³² 'Troops Encircle No Fire Zone', *Daily News*, 3 April 2009, <http://www.dailynews.lk/2009/04/03/sec03.asp> [accessed 14 January 2014]; Shamindra Fernando, 'P'karan Suffers Irrevocable Loss at Anandapuram', *The Island*, 11 December 2012, http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=68084 [accessed 14 January 2014]. It is unclear what position Brigadier Chagee Gallage held prior to assuming the position of Acting GOC of the 53rd Division, although it is noted that regulations normally define how commanders are deputised, and the Chief of Staff often deputises for the commander. As noted in paragraph 16.52, on or around 30 April 2009, Brigadier Gallage was appointed to oversee the 55th Division.
- ¹⁸³³ 'Troops Encircle No Fire Zone', *Daily News*, 2 April 2009, <http://www.dailynews.lk/2009/04/03/sec03.asp> [accessed 14 January 2014].
- ¹⁸³⁴ 'Military Matters – Tigers Use Civilians as Cannon Fodder', *The Nation*, 15 March 2009, <http://www.nation.lk/2009/03/15/militarym.htm> [accessed 14 January 2014]; 'Sri Lanka Army – Defenders of Our nation', *The Nation*, 3 June 2009, 21, http://www.nation.lk/2009/05/31/sp_Edition/sp21.pdf [accessed 16 January 2014].
- ¹⁸³⁵ UN Expert Panel Report, [62]; Tissa Ravindra Perera, "'To Be or Not to Be" Week for LTTE', *The Nation*, 10 May 2009, <http://www.nation.lk/2009/05/10/defence.html> [accessed 14 January 2014].
- ¹⁸³⁶ Ibid; Tissa Ravindra Perera, 'Army Told No Heavy Weapons, Not Prabha', *The Nation*, 3 May 2009, <http://www.nation.lk/2009/05/03/defence.html> [accessed 14 January 2014]; Shamindra Fernando, 'Two-Pronged Assault to Decimate Tigers', *The Island*, 13 May 2009, <http://www.island.lk/2009/05/13/news1.html> [accessed 14 January 2014]; Another Sri Lankan newspaper article states that Fonseka 'shifted Brig[adier] [Prasanna De] Silva from the 55 Division to the 59 Division. He succeeded Brig[adier] Chagi Gallage.'; Shamindra Ferdinando, 'LTTE Checkmated', *War on Terror Revisited*, 23 December 2012, http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=68912 [accessed 14 January 2014]. ICEP notes that the term 'oversee' is not understood in any chain of command or command responsibility. The command relationship alluded to may be one of 'special staff responsibility', but further investigation is required.
- ¹⁸³⁷ It has been reported that the 57th Division comprised three infantry battalions and a Special Forces regiment: Sergei DeSilva-Ranasinghe, 'Strategic Analysis of Sri Lankan Military's Counter-Insurgency Operations', *Future Directions International Strategic Analysis Paper*, 12 February 2010, <http://www.futuredirections.org.au/files/1266992558-FDIStrategicAnalysisPaper-12February2010.pdf> [accessed 14 January 2014], 3.
- ¹⁸³⁸ UN Expert Panel Report, [62]; Security Forces Headquarters – Kilinochchi, '57 Division' (web page), http://220.247.214.182/sfkilinochchi/57div_more_dtl.php [accessed 14 January 2014].
- ¹⁸³⁹ Tissa Ravindra Perera, 'Army Plans "No Fire Zone" Capture', *The Nation*, 4 April 2009, <http://www.nation.lk/2009/04/05/defence.html> [accessed 14 January 2014].

- 16.54 Brigadier Shavendra Silva was the GOC of Task Force 1 from 1 September 2007 to 2 January 2009.¹⁸⁴⁰ Defence correspondent, Shamindra Ferdinando, reported that Task Force 1 had the strength of a division.¹⁸⁴¹ On 3 January 2009, Task Force 1 was re-established as the 58th Division.¹⁸⁴² Brigadier Silva was the GOC of the 58th Division from 3 January to 5 August 2009,¹⁸⁴³ with the divisional headquarters situated in Kilinochchi.¹⁸⁴⁴ During the last phase of the offensive, Brigadier Silva reportedly had nearly two dozen battalions under his command.¹⁸⁴⁵
- 16.55 Major General Nandana Udawatta was the GOC of the 59th Division from 13 November 2007 to late April 2009.¹⁸⁴⁶ In February 2009, Brigadier Chagee Gallage might have temporarily assumed command of the 59th Division.¹⁸⁴⁷ Also in February 2009, Major General Jagath Dias was reportedly directed by Army Headquarters to ‘oversee’ the 59th Division (and Task Force 4).¹⁸⁴⁸ Brigadier Prasanna De Silva assumed command of the 59th Division on or around 30 April 2009.¹⁸⁴⁹ In May 2009, Brigadier Chagee Gallage was reportedly appointed as GOC of the 59th Division.¹⁸⁵⁰
- 16.56 In addition to the aforementioned manoeuvre formation commanders, Brigadier Rohana Bandara was the GOC of Task Force 2 from June 2008;¹⁸⁵¹ Brigadier Sathyapirya Liyanage was the GOC of Task Force 3 from November 2008;¹⁸⁵² Colonel Nishantha Wanniarachchi

¹⁸⁴⁰ Sri Lankan Army, ‘58 Division Marks its 3rd Anniversary’ (web page), <http://www.army.lk/detailed.php?NewsId=4236> [accessed 14 January 2014].

¹⁸⁴¹ Shamindra Ferdinando, ‘Famed 58 Div to the Fore’, *War on Terror Revisited: Part 87*, 28 December 2012, http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=69198 [accessed 14 January 2014].

¹⁸⁴² Sri Lankan Army website, ‘58 Division Marks its 3rd Anniversary’, available at: <http://www.army.lk/detailed.php?NewsId=4236> [accessed 14 January 2014]. It has been reported that the 58th Division comprised two infantry brigades and a commando regiment: Sergei DeSilva-Ranasinghe, ‘Strategic Analysis of Sri Lankan Military’s Counter-Insurgency Operations’, *Future Directions International Strategic Analysis Paper*, 12 February 2010, 5, <http://www.futuredirections.org.au/files/1266992558-FDIStrategicAnalysisPaper-12February2010.pdf> [accessed 14 January 2014].

¹⁸⁴³ Sri Lankan Army, ‘58 Division Marks its 3rd Anniversary’ (web page), <http://www.army.lk/detailed.php?NewsId=4236> [accessed 14 January 2014].

¹⁸⁴⁴ See Sri Lankan Army, ‘58 Division Marks its 3rd Anniversary’ (web page), <http://www.army.lk/detailed.php?NewsId=4236> [accessed 14 January 2014].

¹⁸⁴⁵ Shamindra Ferdinando, ‘Famed 58 Div to the Fore’, *War on Terror Revisited: Part 87*, 28 December 2012, http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=69198 [accessed 14 January 2014].

¹⁸⁴⁶ UN Expert Panel Report, [62]; Tissa Ravindra Perera, ‘Strength behind 59 Division’, *The Nation*, 3 June 2009, http://www.nation.lk/2009/05/31/sp_Edition/sp9.pdf [accessed 14 January 2014].

¹⁸⁴⁷ Shamindra Fernando, ‘P’karan Loses ‘Land of Black Tigers’, *The Island*, 7 December 2012, <http://lrp2.wordpress.com/2012/12/07/war-on-terror-revisited-pkaran-loses-land-of-black-tigers/> [accessed 14 January 2014].

¹⁸⁴⁸ Brigadier Gallage was likely appointed as GOC of the 59th Division on or before 10 May 2009: Tissa Ravindra Perera, ‘“To Be or Not to Be” Week for LTTE’, *The Nation*, 10 May 2009, <http://www.nation.lk/2009/05/10/defence.html> [accessed 14 January 2014].

¹⁸⁴⁹ Tissa Ravindra Perera, ‘Army Told No Heavy Weapons, Not Prabha’, *The Nation*, 3 May 2009, <http://www.nation.lk/2009/05/03/defence.html> [accessed 14 January 2014]; ‘Vanni Liberation Field Commanders’, *Daily News*, 22 May 2009, <http://archives.dailynews.lk/2001/pix/PrintPage.asp?REF=/2009/05/22/fea02.asp> [accessed 14 January 2014]; Shamindra Fernando, ‘Mullaitivu Beach Sealed, Stage Set for Final Battle’, *War on Terror Revisited: Part 84*, 18 December 2012, <http://slwaronterror.blogspot.com.au/2012/12/mullaitivu-beach-sealed-stage-set-for.html> [accessed 14 January 2014].

¹⁸⁵⁰ Tissa Ravindra Perera, ‘“To Be or Not to Be” Week for LTTE’, *The Nation*, 10 May 2009, <http://www.nation.lk/2009/05/10/defence.html> [accessed 14 January 2014].

¹⁸⁵¹ Sri Lankan Ministry of Defence and Urban Development, ‘The Final Countdown’ (web page), http://www.defence.lk/new.asp?fname=20090117_03 [accessed 14 January 2014].

¹⁸⁵² Ibid.

was the GOC of Task Force 4 from December 2008,¹⁸⁵³ and Colonel GV Ravipriya was the GOC of Task Force 8 from February 2009.¹⁸⁵⁴

Overall operations commands

- 16.57 There are differing reports as to whether the Sri Lankan Army had overall operations commands. The Sri Lankan defence correspondent, Shamindra Ferdinando, reported that unlike his predecessors, the Army Commander did not appoint an Overall Operations Commander (OOC); instead, the Army Commander personally supervised operations on the ground on a daily basis,¹⁸⁵⁵ and the SFHQ-Vanni Commander was responsible for supervising military operations on the northern front.¹⁸⁵⁶
- 16.58 However, Sri Lankan Army briefings to defence attachés indicated that, from October 2007, the OOC based at Anuradhapura was Major General SG 'Sanath' Karunaratne.¹⁸⁵⁷ According to leaked US Embassy cables, after his appointment as OOC, 'Karunaratne now has command over all security forces in Anuradhapura District, including police, and his responsibilities include oversight of intelligence activities, civil/commercial security and civil defense.'¹⁸⁵⁸
- 16.59 The defence correspondent referred to above has also written that, after the defeat of the 59-3 Brigade south of Puthukuddiyiruppu in the first week of February 2009, Brigadier Nandana Udawatte was brought to Anuradhapura as OOC.¹⁸⁵⁹ Another Sri Lankan media report stated that Major General Karunaratne 'handed over his duties as the Overall Operation Commander of Anuradhapura to his successor Major General Nandana Udawatta yesterday [14 May 2009].'¹⁸⁶⁰
- 16.60 In addition to the OOC Anuradhapura, Sri Lankan Army briefings indicate that the OOC Western Province and Colombo was under the command of Major General Mendaka Samarasinghe. Major General Samarasinghe was succeeded by Major General AM Perera.¹⁸⁶¹

¹⁸⁵³ Ibid. But see paragraph 16.55 which refers to Major General Jagath Dias overseeing Task Force 4 from February 2009.

¹⁸⁵⁴ Shamindra Fernando, 'P'karan Loses "Land of Black Tigers"', *The Island*, 6 December 2012, http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=67696 [accessed 14 January 2014].

¹⁸⁵⁵ Shamindra Ferdinando, 'A Mysterious Indian among Tigers', *War on Terror Revisited: Part 71, The Island*, 18 November 2012, http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=66373 [accessed 14 January 2014].

¹⁸⁵⁶ Shamindra Ferdinando, 'Tigers Trapped East of A-9, War on Terror Revisited', 2 December 2012, http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=67411 [accessed 14 January 2014].

¹⁸⁵⁷ See defence attaché briefings in December 2007, December 2008, February 2009, March 2009 and May 2009 which note that Major General Karunaratne is the Overall Operations Commander. See also Permanent Mission of Sri Lanka to the UN Office at Geneva, 'Sri Lanka: Major General Sanath Karunathne Appointed as Anuradhapura JOC', 24 October 2007, <http://www.lankamission.org/other%20pages/News/2007/October/2007-10-24MG.htm> [accessed 4 November 2013, but subsequently removed from server].

¹⁸⁵⁸ Wikileaks, 'Sri Lanka: Air Base Attack Results in Heavy Damage, New Security Procedures' (web page), http://www.wikileaks.org/plusd/cables/07COLOMBO1479_a.html [accessed 4 November 2013].

¹⁸⁵⁹ Shamindra Ferdinando, 'P'karan Loses 'Land of Black Tigers', *War on Terror Revisited*, 6 December 2012, http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=67696 [accessed 14 January 2014].

¹⁸⁶⁰ 'Maj. Gen. Sanath Karunaratne to Retire', *Daily News*, 15 May 2009, <http://archives.dailynews.lk/2009/05/15/news35.asp> [accessed 4 November 2013]. The same article was also published in *The Island*, <http://www.island.lk/2009/05/15/news11.html> [accessed 14 January 2014].

¹⁸⁶¹ See, for example, Sri Lankan Army briefings to defence attachés in February 2009, March 2009 and May 2009.

Operational procedures

16.61 The Sri Lankan Ministry of Defence has reported that the Army adopted operational procedures and preparations to safeguard civilian lives, including through the following:

- Radars, including artillery and mortar-detecting radars;¹⁸⁶²
- Unmanned aerial vehicles (**UAVs**);¹⁸⁶³
- Fire controllers with forward troops;¹⁸⁶⁴
- Accurate battle damage assessment;¹⁸⁶⁵ and
- ‘Multiple warnings for civilians were provided as needed prior to attacks, and [the Army] used sophisticated technology to confirm the departure of civilians and minimise collateral damage.’¹⁸⁶⁶

16.62 The Ministry of Defence concluded that the ‘[i]nduction of artillery and mortar detecting radars, extensive use of UAVs and fire controllers with forward troops, helped verify targets and ensure precision.’¹⁸⁶⁷

Artillery capabilities

16.63 Open sources, including military intelligence journals, indicate that the SFs possessed artillery that included:

- Mortars – 81 mm, 82 mm, 107 mm, 120 mm;
- Field artillery and howitzers – 85 mm, 122 mm, 130 mm, 152 mm; and
- Multiple barrelled rocket launchers (**MBRLs**) – 122 mm.¹⁸⁶⁸

16.64 While none of these weapons is a prohibited weapon under IHL *per se*, ICEP will assess whether, in the context of particular incidents under investigation, the SFs used such weapons as part of attacks that were indiscriminate or otherwise in violation of IHL, and/or whether there are reasonable grounds to suspect that the attacks amounted to war crimes or crimes against humanity. ICEP notes generally that all indirect fire weapons, specifically field guns, MBRLs and mortars, are ‘area weapons’ that are not meant to provide a precision capability.

16.65 By way of background, satellite imagery analysis has identified compelling evidence that, throughout the final five months of the conflict, the Sri Lankan Army had an ‘operational military capability to fire substantial quantities of artillery munitions into areas heavily populated with IDPs’.¹⁸⁶⁹ Moreover, this analysis strongly suggests that the SFs significantly

¹⁸⁶² Humanitarian Operation Factual Analysis, [224], [226]. CA Chandraprema has written that artillery locating radars were used in Vanni operations, and these radars ‘were supposed to be effective up to a radius of 32 kilometres, but their actual range was about twice that and were deemed to be exceptionally good pieces of equipment by the army’: C. A. Chandraprema, *Gota’s War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 422.

¹⁸⁶³ Humanitarian Operation Factual Analysis, [224], [226].

¹⁸⁶⁴ Ibid, [226].

¹⁸⁶⁵ Ibid, [227].

¹⁸⁶⁶ Ibid, [228].

¹⁸⁶⁷ Ibid, [226].

¹⁸⁶⁸ See, for example, UN Expert Panel Report, [58], [100]; Stockholm International Peace Research Institute, ‘Transfers of Major Conventional Weapons 2000 to 2009’, *SIPRI Arms Transfers Database*, 27 January 2013; Lost Victory, 107-8; ‘Chapter 7: Central and South Asia Caribbean and Latin America (2009) 109 *The Military Balance* 1, 37; Jane’s, ‘Jane’s World Armies – Sri Lanka’, 13 May 2012, 1, 8.

¹⁸⁶⁹ UNITAR Report, 2 (underline added).

expanded their artillery capabilities from February to May 2009 (from six batteries to 55 batteries),¹⁸⁷⁰ and that artillery assets were oriented towards the ever-contracting NFZs.¹⁸⁷¹

- 16.66 The former Artillery Brigade Commander, Brigadier NAPC Napagoda, is reported to have stated: 'From the battle of Marvil Aru to the final battle at the Nandikadal lagoon the artillery brigade employed a sufficient number of light field medium guns, MBRL and locative radars in support of fighting formation[s] which facilitated the creation of high gun density over any given area.'¹⁸⁷² Further to this, 'Employing senior artillery officers at UAV and Beech craft control stations, UAV down links which were available at headquarters of offensive divisions were extensively used by artillery coordinators to verify and direct concentrated artillery fire with a greater accuracy on high value target[s].'¹⁸⁷³
- 16.67 On the basis of damage assessments conducted by UNITAR, which have been reviewed by an independent artillery expert commissioned by ICEP, and other evidentiary material analysed by ICEP in section 6 of this report, there are reasonable grounds to suspect that some of the SFs' artillery assets were used to attack areas (including the Sri Lankan Army-declared 'No Fire Zones') which comprised high concentrations of civilians, and protected persons and objects.

(iii) Sri Lankan Air Force organisational structure

- 16.68 Under the Air Force Act No. 41 of 1949, the Sri Lankan Air Force comprised: a regular air force; a regular air force reserve; and such volunteer air force and volunteer air force reserve as may be constituted.¹⁸⁷⁴
- 16.69 In support of operations on the ground, the Air Force conducted air strikes and surveillance operations under the command of the Air Force Commander in the rank of Air Chief Marshal.¹⁸⁷⁵ Air Force Headquarters was situated in Colombo.¹⁸⁷⁶ From 12 June 2006 to 27 February 2011, the Air Force Commander was Air Chief Marshal WDRMJ 'Roshan' Goonetilleke.¹⁸⁷⁷ The Air Force Commander was supported by a Chief of Staff in the rank of Air Vice Marshal, and 11 directors.¹⁸⁷⁸
- 16.70 The Air Force's Directorate of Operations was responsible for air and ground operations.¹⁸⁷⁹ Under the direction of the Air Force Commander, the Directorate of Operations was responsible for planning air strikes.¹⁸⁸⁰ Using targeting intelligence provided by various

¹⁸⁷⁰ Expert artillery report commissioned by ICEP, [6.3].

¹⁸⁷¹ Ibid, [6.4]. ICEP's artillery expert acknowledges that the UNITAR Report's analysis 'does qualify its assessment of the SLA artillery activity by indicating that the imagery did not reveal whether batteries were fired'.

¹⁸⁷² 'Artillery' in 'Force Multipliers in Counter Terrorism', *Business Today*, July 2011, <http://www.businesstoday.lk/art.php?art=3486> [accessed 20 January 2014].

¹⁸⁷³ Ibid.

¹⁸⁷⁴ Air Force Act No. 41 of 1949, section 2. A volunteer air force and volunteer air force reserve may be constituted under sections 5 and 6 of the Act: section 2(2), [http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/021b030c8786b1f9c1257383003a21eb/\\$FILE/Air%20Force%20Act.pdf](http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/021b030c8786b1f9c1257383003a21eb/$FILE/Air%20Force%20Act.pdf) [accessed 14 January 2014].

¹⁸⁷⁵ Jane's, 'Jane's World Air Forces – Sri Lanka', 8 May 2012.

¹⁸⁷⁶ Ibid.

¹⁸⁷⁷ Sri Lankan Office of the Chief of Defence Staff, 'Chief of Defence Staff' (web page), <http://www.ocds.lk/formercds.html> [accessed 14 January 2014]; Sri Lankan Air Forces, 'Air Chief Marshal WDRMJ Goonetilleke' (web page), http://www.airforce.lk/pages.php?pages=air_chief_marshall_wdrmj_goonetilleke [accessed 14 January 2014].

¹⁸⁷⁸ Jane's, 'Jane's World Air Forces – Sri Lanka', 8 May 2012.

¹⁸⁷⁹ Sri Lankan Air Force, 'Directorate of Operations' (web page), http://www.airforce.lk/pages.php?pages=directorate_of_operations [accessed 3 December 2013].

¹⁸⁸⁰ 'The Important Role Played by the Air Force', *The Nation*, 3 June 2009, http://www.nation.lk/2009/05/31/sp_Edition/sp16.pdf [accessed 3 December 2013].

intelligence agencies (discussed further at paragraphs 16.96 - 16.104 below) targets were prepared by the Director of Air Operations¹⁸⁸¹ (Air Force targeting procedures are outlined in more detail at paragraph 16.77 below). From 1 November 2008 to 26 February 2011, the Director of Air Operations who directed all air operations was Air Marshal Kolitha Aravinda Gunatilleke.¹⁸⁸²

- 16.71 The Air Force Commander was required to approve targets before a strike could be made¹⁸⁸³ (see further detail on the Air Force Commander's role at paragraph 16.77 below).
- 16.72 The Air Force was organised into four zonal commands, namely the Northern, Eastern, Southern and Western Zonal Commands, each under the command of a Zonal Commander.¹⁸⁸⁴ Military operations were carried out by fixed-wing and helicopter squadrons concentrated at a small number of Air Force bases, and commanded in air and ground operations by Group Captains, Wing Commanders and Squadron Leaders.¹⁸⁸⁵ However, other airfields could be used as forward operating locations, including Ampara, Batticaloa, Katukurunda, Kilinochchi, Koggala, Palaly, Palavi, Sigiriya and Wirawila.¹⁸⁸⁶
- 16.73 The Air Force Regiment was primarily concerned with airfield defence but was also capable of assisting the Army in other ground combat tasks. The regiment had a special forces element that was responsible for unconventional operations, including rescue and close protection.¹⁸⁸⁷ The role of the Air Force Regiment in internal security was increased in late-2008 to include infantry, with elements taking part in large-scale attacks on the LTTE.¹⁸⁸⁸ From 2008 to 2009, the strength of the regiment doubled to 12,000 personnel in order to hold land that had been captured by the SFs from the LTTE.¹⁸⁸⁹

Aircraft fleet and capabilities

- 16.74 The Sri Lankan Air Force included the following fighter and ground attack aircraft:

- Kfir C-2;
- Kfir C-7; and

¹⁸⁸¹ 'Transcript of Air Chief Marshal Roshan Gunatillaka's Testimony before the LLRC', 8 September 2010, 3 (on file with ICEP). See also 'The Important Role Played by the Air Force', *The Nation*, 3 June 2009, http://www.nation.lk/2009/05/31/sp_Edition/sp16.pdf [accessed 14 January 2014].

¹⁸⁸² Sri Lankan Air Force, 'Chief of Staff' (web page), http://www.airforce.lk/pages.php?pages=chief_of_staff_sri_lanka_air_force [accessed 3 December 2013]; 'Taming the Tigers', *Air Forces Monthly*, June 2009, 75, http://www.airforce.lk/pdf/news%20paper/slaf/srilanka_ariforce.pdf [accessed 14 January 2014]; Shamindra Fernando, 'US Powered Israeli Jets Enhance SLAF Capability, War on Terror Revisited', *The Island*, 30 March 2013, http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=80180 [accessed 14 January 2014].

¹⁸⁸³ Humanitarian Operation Factual Analysis, 74; 'Transcript of Gotabaya Rajapaksa's Testimony before the LLRC', 17 August 2010, 6, (on file with ICEP); and 'Transcript of Roshan Gunatillaka's Testimony before the LLRC', 8 September 2010, 3-4 (on file with ICEP); 'The Important Role Played by the Air Force', *The Nation*, 3 June 2009, http://www.nation.lk/2009/05/31/sp_Edition/sp16.pdf [accessed 3 December 2013].

¹⁸⁸⁴ Sri Lankan Air Force, 'A Major Administrative Change – The Zonal Concept' (web page), http://www.airforce.lk/60thanniversary/pages.php?pages=the_zonal_concept [accessed 14 January 2014].

¹⁸⁸⁵ Sri Lankan Air Force, 'Directorate of Operations' (web page), http://airforce.lk/pages.php?pages=directorate_of_operations [accessed 14 January 2014] and http://airforce.lk/pages.php?pages=rank_structure [accessed 14 January 2014]; Jane's, 'Jane's World Air Forces – Sri Lanka', 8 May 2012.

¹⁸⁸⁶ Jane's, 'Jane's World Air Forces – Sri Lanka', 8 May 2012.

¹⁸⁸⁷ Ibid. The special forces element was of about company strength.

¹⁸⁸⁸ Ibid.

¹⁸⁸⁹ 'Taming the Tigers', *Air Forces Monthly*, June 2009, 77, http://www.airforce.lk/pdf/news%20paper/slaf/srilanka_ariforce.pdf [accessed 14 January 2014].

- MiG-27M *Flogger J2*.¹⁸⁹⁰
- 16.75 The Air Force modified its Kfir C-2s in order for them to be able to launch laser-guided bombs with the aid of a laser designation pod fitted to a Searcher II UAV.¹⁸⁹¹ The Kfir C-7s purchased in 2000 or 2001 were fitted with an improved weapons delivery navigation system, which allowed 'pinpoint bombings on lorries, cars, buildings etc.'¹⁸⁹² Accordingly, the Air Force possessed the capability to employ means and methods of warfare that allowed for precision targeting.
- 16.76 The UN Expert Panel found that the Air Force achieved complete air superiority from February 2009.¹⁸⁹³ According to *Jane's*, this allowed the Air Force to play a variety of important roles during the final months of the conflict, which included providing garrison troops to hold captured territory, conducting airborne casualty evacuation and providing logistical support, air defence, aerial surveillance and close air support to ground and maritime forces.¹⁸⁹⁴

Operational procedures

- 16.77 According to the Sri Lankan Ministry of Defence, and statements made by the former Air Force Commander, the Air Force employed the following operational procedures:
- The presence of civilians was verified by intelligence from informants, captured LTTE cadres and, wherever possible, from SFs who penetrated into enemy territory. The Ministry of Defence noted, 'In cases where the slightest doubts were present, such places were avoided';¹⁸⁹⁵
 - 'Targets were re-evaluated using the sources held/maintained by other intelligence organisations prior to engagement. i.e., whenever a target was given by Directorate of Military Intelligence (DMI), it was crosschecked with State Intelligence Service (SIS), Directorate of Naval Intelligence (DNI) and other intelligence agencies.'¹⁸⁹⁶ The Ministry of Defence further noted, 'multiple verification ensured that no doubt was present when targeting was done. Single source verification was never done';¹⁸⁹⁷
 - 'All the targets were re-evaluated using imagery by Unmanned Aerial Vehicles (UAV) or other aerial reconnaissance platforms and other sources like aerial photography/satellite images. This positively confirmed the absence of civilians in other areas targeted by air';¹⁸⁹⁸
 - 'SLAF exercised maximum precautions on weapons to target matching and selecting munitions... When weapon to target matching is done, higher Command was vested with the decision making process'.¹⁸⁹⁹ The 'SLAF deployed only

¹⁸⁹⁰ UN Expert Panel Report, [58]; Sri Lankan Air Force, 'Aircraft Fleet' (web page), http://airforce.lk/pages.php?pages=aircraft_fleet [accessed 14 January 2014].

¹⁸⁹¹ 'Taming the Tigers', *AirForces Monthly*, June 2009, 72, http://www.airforce.lk/pdf/news%20paper/slaf/srilanka_ariforce.pdf [accessed 14 January 2014].

¹⁸⁹² Ibid.

¹⁸⁹³ UN Expert Panel Report, [95], [97].

¹⁸⁹⁴ Jane's, 'Jane's World Air Forces – Sri Lanka', 8 May 2012, 2.

¹⁸⁹⁵ Humanitarian Operation Factual Analysis, [238].

¹⁸⁹⁶ Ibid, [239].

¹⁸⁹⁷ Ibid.

¹⁸⁹⁸ Ibid, [240].

¹⁸⁹⁹ Ibid, [241].

Precision Guided Munitions (PGM) for those targets that demanded a high degree of accuracy¹⁹⁰⁰;

- The Air Force Commander would ‘personally check the targets again and [saw] whether there [were] any chances of collateral damage that [could] take place’;¹⁹⁰¹
- After weapons were matched to the target, the Air Force Commander’s approval was obtained;¹⁹⁰²
- According to the former Air Force Commander, ‘the air crew [was] briefed and then engagement [of the target occurred] under observation of the UAV or any other surveillance asset that we decide[d] to use’;¹⁹⁰³ and
- ‘Battle damage assessment was carried out using real time imagery soon after the strike.’¹⁹⁰⁴

Surveillance, target acquisition and battle damage assessment

16.78 The UN Expert Panel noted that the SFs acquired and used several types of unmanned aerial vehicles (**UAVs**) for surveillance, target acquisition and subsequent battle damage assessment.¹⁹⁰⁵ UAVs were operated by specialised reconnaissance units of the Air Force.¹⁹⁰⁶ In addition, Heron UAVs of the Indian Navy were used to conduct surveillance in India-Sri Lanka waters.¹⁹⁰⁷ The SFs possessed the following UAV technology:

- RQ-2 Pioneers;
- Israeli Aircraft Industry Scouts;
- Israeli Aircraft Searcher II; and
- Israeli EMIT Blue Horizon II.¹⁹⁰⁸

16.79 In relation to the SFs capability to identify military targets throughout the final months of the conflict, the UN Expert Panel found:

Prior to shelling, UAVs were often used to identify potential targets... The UAVs used by the SLAF [Sri Lankan Air Force] have the capacity to identify single targets, such as individuals and their movements or positions, and to depict terrain features, thereby providing ground troops with validated, near real-time information. Through the use of UAVs, the SLAF had the ability to detect enemy formations both day and night, in various topographic areas. The use of UAVs also enabled the SLAF to identify individuals and civilian installations, such as hospitals.¹⁹⁰⁹

16.80 The UN Expert Panel’s findings are consistent with public statements by the Secretary of Defence and senior SFs officers after the conflict. In particular, the Secretary of Defence

¹⁹⁰⁰ Ibid, [243].

¹⁹⁰¹ ‘Transcript of Roshan Gunatillaka’s testimony before the LLRC’, 3 (on file with ICEP).

¹⁹⁰² Ibid, 4.

¹⁹⁰³ Ibid. See also Humanitarian Operation Factual Analysis, [244].

¹⁹⁰⁴ Humanitarian Operation Factual Analysis, [244].

¹⁹⁰⁵ UN Expert Panel Report, [58]; LLRC Report, [4.38]–[4.41].

¹⁹⁰⁶ Jane’s, ‘Jane’s World Air Forces – Sri Lanka’, 8 May 2012, 6.

¹⁹⁰⁷ Ibid.

¹⁹⁰⁸ See correspondence from Air Marshal H.D. Abeywickrama (Air Force Commander) to the Hon C.R. De Silva (LLRC Chairman), ‘UAV and Surveillance Devices’, 29 September 2011 included in LLRC Report, Annex, 61–62; UN Expert Panel Report, fn 18; and Jane’s, ‘Jane’s World Air Forces – Sri Lanka’, 8 May 2012. Israeli Scouts, Searcher II and Blue Horizon II were first delivered to Sri Lanka before September 2008: Stockholm International Peace Research Institute, ‘Transfers of Major Conventional Weapons 2000 to 2009’, *SIPRI Arms Transfers Database*, 27 January 2013.

¹⁹⁰⁹ UN Expert Panel Report, [61].

stated that UAVs were used in real-time mode, and that all SFs commanders, including divisional commanders, were given a direct connection to the UAV stream.¹⁹¹⁰ In his testimony before the LLRC, Brigadier Silva stated that an Air Force UAV officer was located in his headquarters, and that, during the last stages of the military operation,

everything, every incident was seen and planned through the UAV ... we just did not go blind everything was planned through UAV pictures and where we exactly knew where the civilians and the LTTE were...¹⁹¹¹

16.81 In respect of targeting intelligence, the Sri Lankan Secretary of Defence has also stated that before any target was taken, UAVs were used to 'pinpoint the target and also to see whether there were any civilians around. Thus, by doing this the pilot had a better understanding of the target and were able to take the target accurately and precisely'.¹⁹¹²

16.82 AirForces Monthly noted:

The surveillance UAVs also provide a real-time picture of the targets so that pilots can familiarise themselves with the surrounding area while in their operations room prior to the mission. Prior to this, pilots would be given a grid reference and a position on the map they were aiming for.¹⁹¹³

16.83 In addition to UAVs, the SFs employed Beechcraft 200s (or Beechsuper King Air B200T) in order to carry out thorough surveillance of planned targets.¹⁹¹⁴ The SFs also used global positioning systems (**GPS**), digital maps and aerial photographs.¹⁹¹⁵

16.84 In a letter addressed to the chairman of the LLRC, the Air Force Commander stated that, from 1 January to 27 May 2009, SFs' UAVs and Beechcraft were flown for more than 2,334 operational hours.¹⁹¹⁶

(iv) Sri Lankan Navy organisational structure

16.85 Under the Navy Act No. 34 of 1950, the Sri Lankan Navy comprised a regular naval force, a regular naval reserve force and such volunteer naval or naval reserve force that may be constituted under the Act.¹⁹¹⁷

16.86 The Navy was responsible for conducting combat operations at sea.¹⁹¹⁸ The Navy Commander exercised operational and administrative control from Navy Headquarters in

¹⁹¹⁰ LLRC Report, [4.41]; Udeshi Amarasinghe & Thilini Kahandawaarachchi, 'Defence Secretary Gotabaya Rajapaksa Salutes the War Heroes', *Business Today*, June 2009, http://www.businesstoday.lk/cover_page.php?art=891 [accessed on 4 September 2013].

¹⁹¹¹ UN Expert Panel Report, fn 21.

¹⁹¹² Udeshi Amarasinghe & Thilini Kahandawaarachchi, 'Defence Secretary Gotabaya Rajapaksa Salutes the War Heroes', *Business Today*, June 2009, http://www.businesstoday.lk/cover_page.php?art=891 [accessed on 4 September 2013].

¹⁹¹³ 'Taming the Tigers', *AirForces Monthly*, June 2009, 76, http://www.airforce.lk/pdf/news%20paper/slaf/srilanka_ariforce.pdf [accessed 14 January 2014].

¹⁹¹⁴ Sri Lankan Air Force website, 'Aircraft Fleet', http://airforce.lk/pages.php?pages=aircraft_fleet [accessed on 4 September 2013]; correspondence from Air Marshal H.D. Abeywickrama (Air Force Commander) to the Hon C.R. De Silva (LLRC Chairman), 'UAV and Surveillance Devices', 29 September 2011 included in LLRC Report, Annex, 61-62.

¹⁹¹⁵ 'Transcript of Gotabaya Rajapaksa's Testimony before the LLRC', 17 August 2010, 6 (on file with ICEP); LLRC Report, [4.37], [4.39].

¹⁹¹⁶ See correspondence from Air Marshal H.D. Abeywickrama (Air Force Commander) to the Hon C.R. De Silva (LLRC Chairman), 'UAV and Surveillance Devices', 29 September 2011: LLRC Report, Annex, 62.

¹⁹¹⁷ Navy Act No. 34 of 1950, section 2, http://www.defence.lk/main_pub.asp?fname=navyact [accessed 3 November 2013].

¹⁹¹⁸ Sri Lankan Navy, 'Mission & Role' (web page), <http://www.navy.lk/index.php?id=3> [accessed on 4 September 2013].

Colombo.¹⁹¹⁹ From 1 September 2005 to July 2009, the Navy Commander was Admiral Wasantha Kumara Jayadewa Karannagoda.¹⁹²⁰

- 16.87 In the Navy Headquarters, the Navy Commander was assisted by the Chief of Staff, Director Generals (comprising the Board of Management) and Directors (comprising the Board of Directors).¹⁹²¹
- 16.88 The Navy had five area commands (**Naval Areas**), namely the Northern, Eastern, North Central, Southern and Western Naval Areas. Each Naval Area was under the control of an Area Authority.¹⁹²² In particular, the Northern Naval Area included the Kilinochchi, Jaffna and Mannar districts, and the Eastern Naval Area included the Ampara, Batticaloa, Trincomalee, Mullaitivu and Polonnaruwa districts.¹⁹²³ From January 2008 to 8 January 2009, Rear Admiral Thisara Samarasinghe was Northern Area Commander.¹⁹²⁴ From 9 January to July 2009, Rear Admiral Somathilake Dissanayake was Northern Area Commander.¹⁹²⁵ From October 2008 until after the conflict, Rear Admiral Susith Maliya Bandara Weerasekara was Eastern Naval Area Commander.¹⁹²⁶
- 16.89 According to *Jane's*, at the conclusion of the conflict the Navy had a fleet that consisted of more than 50 combat and support ships, and well in excess of 100 inshore patrol craft.¹⁹²⁷ The Navy had been able to dominate the coastal waters of Sri Lanka by resorting to small boat operations.¹⁹²⁸ In particular, the Special Boat Squadron (**SBS**) was established in 1993.¹⁹²⁹ Four to eight-man SBS teams were developed in 2005 to penetrate LTTE territory. Once in enemy territory, the SBS teams provided reconnaissance and surveillance support. The teams were also trained to conduct long-range strikes on high value targets. By 2009, the SBS had grown to 600 personnel.¹⁹³⁰

¹⁹¹⁹ Sri Lankan Navy, 'Organization' (web page), <http://www.navy.lk/index.php?id=44> [captured as at 15 November 2007].

¹⁹²⁰ The Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary) No. 1610/10, 13 July 2009; Sri Lankan Navy, 'Admiral Wasantha Karannagoda' (web page), <http://www.navy.lk/index.php?id=1749>; Shamindra Fernando, 'Karannagoda Speaks Out, War on Terror Revisited: Part 39', *The Island*, 2 September 2012, http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=60632 [accessed 17 January 2014].

¹⁹²¹ Sri Lankan Navy, 'Organization' (web page), <http://www.navy.lk/index.php?id=44> [accessed 15 November 2007]. The 'Naval Headquarters Organisation Chart' is available at: http://www.navy.lk/assets/files/naval_headquarters_structure.pdf [accessed 2 December 2013].

¹⁹²² Sri Lankan Navy, 'Organization' (web page), <http://www.navy.lk/index.php?id=44> [captured as at 15 November 2007].

¹⁹²³ Sri Lankan Navy, 'Eastern Naval Area' and 'Northern Naval Area' (web pages), available at: <http://www.navy.lk/index.php?id=96> [accessed 7 December 2007].

¹⁹²⁴ Shamindra Fernando, 'FAC Role in Battle off Mullaitivu, War on Terror Revisited', *The Island*, 23 September 2012, http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=62192 [accessed 16 January 2014]; 'Biography of Vice Admiral Thisara Samarasinghe' (web page), http://sln60.navy.lk/assets/files/maritime_symposium/Sri_Lanka/Bio_Data_Vice_Admiral_Thisara_Samarasinghe.pdf [accessed 16 January 2014].

¹⁹²⁵ Shamindra Fernando, 'FAC Role in Battle off Mullaitivu, War on Terror Revisited', *The Island*, 23 September 2012, at: http://www.island.lk/index.php?page_cat=art-details&page=art-details&code_title=62192; and Sri Lankan Navy website, 'Vice Admiral Somathilake Dissanayake assumes Duties as Commander of the Navy', <http://www.navy.lk/index.php?id=2807> [accessed 16 January 2014].

¹⁹²⁶ Dhaneshi Yatawara, 'Navy Dragnet Thrown around Mullaitivu Seas', *Sunday Observer*, 3 May 2009, <http://www.sundayobserver.lk/2009/05/03/sec005.asp> [accessed 16 January 2014]; Rafik Jalaldeen, 'Navy – Sea Patrolling Round the Clock', *Daily News*, 3 June 2009, <http://www.dailynews.lk/2009/06/03/supstory.asp?id=s05> [accessed 16 January 2014].

¹⁹²⁷ Jane's, 'Jane's World Navies – Sri Lanka', 13 May 2012, 1.

¹⁹²⁸ Ibid.

¹⁹²⁹ Sri Lankan Navy, 'A Batch of "SBS" Officers and Sailors Pass Out' (web page), <http://www.navy.lk/index.php?id=1334> [accessed 16 January 2014].

¹⁹³⁰ Tim Fish, 'Sri Lanka Learns to Counter Sea Tigers' Swarm Tactics', *Jane's Navy International*, March 2009, 23, http://www.defence.lk/news/Sri_Lanka_Navy.pdf [accessed on 5 September 2013].

Operational procedures

16.90 In respect of the Sri Lankan Navy, the Sri Lankan Ministry of Defence noted the following:

- Electro-optical devices and electro-optical surveillance systems were fitted to the radar mast of boats 'to have continuous surveillance on the sea front and beach area';¹⁹³¹ and
- 'During the entire Humanitarian Operation, there were no incidents of misidentification or firing at escaping boats as strict restrictive conditions were issued to all naval units not to fire unless they were fired upon'.¹⁹³²

(v) Sri Lankan Police Force organisational structure

16.91 Under the Constitution, the Sri Lankan Police Force comprised the national division (including special units) and provincial divisions.¹⁹³³ The Police Force came under the purview of the Ministry of Defence's Police Division.¹⁹³⁴ The head of the Police Force was the Inspector General of Police (IGP) who reported to the Minister of Defence.¹⁹³⁵ The IGP oversaw functional and territorial commands that were each commanded by a Senior Deputy Inspector General of Police.¹⁹³⁶ In addition to these commands, the directors of Police departments in the rank of Deputy-Inspector General of Police reported directly to the IGP.¹⁹³⁷ From 1 July 2008 to 2 November 2009, the IGP was Jayantha Wickramaratna.¹⁹³⁸

Table 16.4 Key Departments within the Sri Lankan Police

Department	Responsibilities	Director
Criminal Investigation Department (CID)	Responsible for investigating serious crime and organised criminal activity ¹⁹³⁹	Deputy Inspector-General of Police Sisira Mendis ¹⁹⁴⁰
Terrorism Investigation Division (TID)	The main police department responsible for investigating and combatting terrorism ¹⁹⁴¹	Senior Superintendent of Police CN Wakishta ¹⁹⁴²

¹⁹³¹ Humanitarian Operation Factual Analysis, [231]–[232].

¹⁹³² Ibid, [233].

¹⁹³³ Sri Lankan Constitution, Appendix I 'Law and order', section 2,

http://www.supremecourt.lk/images/stories/supreme_court/constitution17th.pdf [accessed 15 January 2014].

¹⁹³⁴ Sri Lankan Ministry of Defence and Urban Development, 'Organisational Structure' (web page),

http://www.defence.lk/main_abt.asp?fname=orgstr [accessed 1 September 2013].

¹⁹³⁵ INTERPOL, 'Sri Lanka' (web page), <http://www.interpol.int/Member-countries/Asia-South-Pacific/Sri-Lanka> [accessed 1 September 2013].

¹⁹³⁶ Sri Lankan Police, 'Organisational Structure' (web page),

http://www.police.lk/structure/organizational_structure.html [accessed 1 September 2013].

¹⁹³⁷ Ibid and <http://www.police.lk/structure/structure/IGP.pdf> [accessed 1 September 2013]. Functional commands exist for Administration, Support Service, Intelligence, Security & Special Protection. Territorial commands exist for numerous provinces in Sri Lanka.

¹⁹³⁸ Udeshi Amarasinghe and Thilini Kahandawaarachchi, 'The Eye on Colombo', *Business Today*, April 2009; Anjana Jayashan, 'Sri Lanka: Senior DIG Balasuriya Appointed as new IGP', *Asian Tribune*, 3 November 2009, <http://www.asiantribune.com/news/2009/11/03/sri-lanka-senior-dig-balasuriya-appointed-new-igg> [accessed 22 August 2013].

¹⁹³⁹ INTERPOL, 'Sri Lanka' (web page), <http://www.interpol.int/Member-countries/Asia-South-Pacific/Sri-Lanka> [accessed 1 September 2013].

¹⁹⁴⁰ 'Deputy Inspector General of Police Sisira Mendis', *Business Today*, April 2009, <http://www.businesstoday.lk/art.php?art=23> [accessed 1 September 2013].

¹⁹⁴¹ 'Senior Superintendent of Police C N Wakishta', *Business Today*, April 2009, http://www.businesstoday.lk/cover_page.php?art=205&issue=206 [accessed 3 November 2013].

¹⁹⁴² Ibid.

Special Task Force (STF)	Responsible for counter-terrorist and counter-insurgency operations in Sri Lanka ¹⁹⁴³	Deputy Inspector-General of Police KML Sarathchandra ¹⁹⁴⁴
Colombo Crimes Division (CCD)	Responsible for countering crimes in Colombo city, including bombings ¹⁹⁴⁵	Senior Superintendent of Police Anura Senanayake ¹⁹⁴⁶

16.92 The current available information indicates that various departments of the Sri Lankan Police, in particular the CID and STF, were under the direction of the Secretary of Defence.¹⁹⁴⁷

Special Task Force

16.93 The Special Task Force (STF) was formally established in the early 1980s as an elite paramilitary section of the Sri Lankan Police, specialising in counter-terrorism.¹⁹⁴⁸ By 2009, it had grown in strength from 60 to around 3,000 personnel.¹⁹⁴⁹ Throughout the conflict the STF conducted sensitive operations across Sri Lanka, including direct engagement in combat operations with other arms of the SFs.¹⁹⁵⁰ After the 2005 presidential election, the Police, which included the STF, was reassigned to the Police Division of the Ministry of Defence.¹⁹⁵¹

16.94 The STF was overseen by the Commandant of the STF, Deputy Inspector-General of Police KML Sarathchandra, who reported to the IGP, Jayantha Wickramaratna.¹⁹⁵² According to the organisational structure of the Police, the IGP reported to the Minister of Defence.¹⁹⁵³

¹⁹⁴³ Sri Lankan Police, 'Special Task Force' (web page), <http://www.police.lk/divisions/stf.asp> [accessed 23 May 2009].

¹⁹⁴⁴ Sri Lankan Police, 'Special Task Force' (web page), <http://www.police.lk/index.php/special-task-force-285> [accessed 16 January 2014].

¹⁹⁴⁵ 'Senior Superintendent of Police – Anura Senanayake', *Business Today*, April 2009, <http://www.businesstoday.lk/art.php?art=201> [accessed 4 November 2013].

¹⁹⁴⁶ Ibid.

¹⁹⁴⁷ See, for example, unsigned witness statement of DM-005 6, 9 which corroborates other witness information obtained by ICEP. In relation to the Secretary of Defence's direction of the CID, see, eg: 'Deputy Inspector General of Police Sisira Mendis', *Business Today*, April 2009, <http://www.businesstoday.lk/art.php?art=23> [accessed 1 September 2013]; 'Gotabaya Directed Raid – Police', *Daily Mirror*, 7 April 2011, <http://print2.dailymirror.lk/news/front-page-news/40555-gotabaya-directed-raid-police-.html> [accessed 3 September 2013].

¹⁹⁴⁸ Sri Lankan Police, 'Special Task Force', <http://www.police.lk/index.php/special-task-force-> [accessed 16 January 2014].

¹⁹⁴⁹ Ibid; 'Chapter Seven: Central and South Asia Caribbean and Latin America', 109 *The Military Balance* (2009) 329, 357.

¹⁹⁵⁰ See, eg, Sri Lankan Police, 'Special Task Force' (web page), <http://www.police.lk/index.php/special-task-force-> [accessed 16 January 2014]; Ministry of Defence and Urban Development, 'Situation Report' (media release), 28 December 2008.

¹⁹⁵¹ Sri Lankan Ministry of Defence, 'Organisational Structure' (web page), http://defence.lk/main_abt.asp?fname=orgstr, [accessed 16 January 2014]; US Department of State, *Country Report on Human Rights Practices – Sri Lanka 2006*, 6 March 2007, <http://www.state.gov/j/drl/rls/hrrpt/2006/78875.htm> [accessed 15 January 2014]; Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Follow-Up to Country Recommendations: Addendum, A/HRC/8/3/Add.3*, 14 May 2008, [56]–[57], 16, <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/134/74/pdf/G0813474.pdf?OpenElement> [accessed 16 January 2014]; Amnesty International, *Sri Lanka: Briefing to Committee against Torture*, October 2011, 7, <http://www.amnesty.org/en/library/asset/ASA37/016/2011/si/2bb1bbe4-8ba5-4f37-82d0-70cbfec5bb2d/asa370162011en.pdf> [accessed 15 January 2014]. The LLRC recommended that Sri Lankan Police departments 'be de-linked from the institutions dealing with the armed forces which are responsible for the security of the State': LLRC Report, 302.

¹⁹⁵² Sri Lankan Police, various web pages, <http://www.police.lk/index.php/special-task-force-285>; <http://www.police.lk/index.php/library/82-rank-structure-insignia>; http://www.police.lk/structure/organizational_structure.html; <http://www.police.lk/index.php/special-task-force-285-commandants-of-the-special-task-force> [accessed 16 January 2014].

16.95 Other specialised departments within the Police engaged in intelligence-gathering and investigations into serious crimes, organised crime and terrorism (see Table 16.4 above). These divisions acted under the instructions of the IGP and/or Secretary of Defence.¹⁹⁵⁴

(vi) Sri Lankan intelligence services

16.96 According to the Sri Lankan Presidential Secretariat, '[d]efence and internal security related intelligence services' formed part of the duties and functions of the Minister of Defence.¹⁹⁵⁵

16.97 From 2006, the Secretary of Defence brought all Sri Lankan intelligence services 'under one coordinated command', vested in the Chief of National Intelligence, Major General Kapila Hendawitharana (retired) who was appointed by Gotabaya Rajapaksa.¹⁹⁵⁶ The Chief of National Intelligence was a Cabinet-approved post created by Gotabaya Rajapaksa, with direct line authority over all intelligence agencies.¹⁹⁵⁷ The current information available indicates that these intelligence services comprised the:

- State Intelligence Service;¹⁹⁵⁸
- intelligence units of the Sri Lankan Army, Air Force and Navy;¹⁹⁵⁹ and
- intelligence agencies of the Sri Lankan Police.

16.98 The Chief of National Intelligence reported directly to the Secretary of Defence, which, according to Gotabaya Rajapaksa, 'streamlined coordination and improved cooperation amongst the intelligence agencies.'¹⁹⁶⁰

¹⁹⁵³ Sri Lankan Ministry of Defence website, http://defence.lk/main_abt.asp?fname=orgstr [accessed 16 January 2014]; US Department of State, *Country Report on Human Rights Practices 2009 – Sri Lanka*, 11 March 2010, <http://www.state.gov/j/drl/rls/hrrpt/2006/78875.htm> [accessed 16 January 2014]; Udeshi Amarasinghe and Thilini Kahandawaarachchi, 'The Eye on Colombo', *Business Today*, April 2009, <http://www.busesstoday.lk/art.php?art=26> [accessed 16 January 2014]; Interpol website, <http://www.interpol.int/@%20fr/layout/set/print/Pays-membres/Asie-et-Pacifique-Sud/Sri-Lanka> [accessed 16 January 2014].

¹⁹⁵⁴ For interviews of the directors of these police divisions, see generally Udeshi Amarasinghe and Thilini Kahandawaarachchi, 'The Eye on Colombo', *Business Today*, April 2009, <http://www.busesstoday.lk/art.php?art=26> [accessed 16 January 2014].

¹⁹⁵⁵ Sri Lankan Presidential Secretariat, 'Notification under the Constitution of the Democratic Socialist Republic of Sri Lanka', 22 November 2010, 3, http://www.priu.gov.lk/Ministries_2010/subjects_functions_institutions.pdf [accessed 25 August 2013].

¹⁹⁵⁶ C. A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 356–7. The relevant extract of Gota's War is included in Lalith Weeratunga, Secretary to the President, 'Speech for the Launch of Gota's War', *Business Today*, June 2012, <http://busesstoday.lk/art.php?art=7101> [accessed 16 January 2014].

¹⁹⁵⁷ C. A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 357. The relevant extract of Gota's War is included in Lalith Weeratunga, 'Speech for the Launch of Gota's War', *Business Today*, June 2012, <http://busesstoday.lk/art.php?art=7101> [accessed 16 January 2014]. Weeratunga opined that 'I think this made a tremendous change in the way the intelligence services worked. That is, most people attribute the win over terrorism to the fact that intelligence services were well coordinated.'

¹⁹⁵⁸ It is unclear whether the Directorate of Internal Intelligence ('DII') and Directorate of Foreign Intelligence ('DFI'), both operating under the auspices of the Ministry of Defence, formed part of the SIS. According to a report of the Ministry of Foreign Affairs at The Hague, dated 30 September 1999, until mid-1998, the DII and DFI together formed the National Intelligence Bureau ('NIB'): UK Home Office, *Country of Origin Information Report Sri Lanka*, 31 October 2006, [8.08], available at: http://www.ecoi.net/file_upload/1329_1200301261_sri-lanka-021106.pdf [accessed 17 January 2014]. The NIB was replaced by the SIS.

¹⁹⁵⁹ 'The Jungle Telegraph by Alia', *The Sunday Times*, <http://www.sundaytimes.lk/040829/columns/jungle.html> [accessed 17 January 2014].

¹⁹⁶⁰ Lecture by Gotabaya Rajapaksa titled 'Sri Lanka's National Security Concerns', delivered at Kotelawala Defence University and published as 'The Final Threat To Sri Lanka's National Security Is New Media', *Colombo Telegraph*, 14 June 2013, <http://www.colombotelegraph.com/index.php/sri-lankas-national-security-concerns-social-media-is-a-threat/> [accessed 25 August 2013]. The lecture was also published on the Sri Lankan Ministry of Defence website,

16.99 According to CA Chandraprema – who interviewed a wide range of senior Government officials and SFs officers including the Secretary of Defence Gotabaya Rajapaksa and Chief of National Intelligence Kapila Hendawitharana¹⁹⁶¹ – and reported statements made by a senior Sri Lankan Police official,¹⁹⁶² representatives of Sri Lanka’s intelligence agencies met on a weekly basis with the Secretary of Defence, who presided over these meetings.¹⁹⁶³ The purpose of these weekly meetings was to share intelligence between the agencies, discuss incidents and investigations, and address ‘chinks in the security set up in areas outside the main conflict zone’.¹⁹⁶⁴ The Secretary of Defence reportedly ‘went down to the nuts and bolts of security issues and he made spot decisions on issues raised by the representatives of the various intelligence agencies’.¹⁹⁶⁵

State Intelligence Service

16.100 The State Intelligence Service (**SIS**), formerly known as the National Intelligence Bureau,¹⁹⁶⁶ functioned under the Sri Lankan Ministry of Defence.¹⁹⁶⁷ It conducted internal and external intelligence activities.¹⁹⁶⁸ The Ministry of Defence was also responsible for the administration of the Directorate of Internal Intelligence and Directorate of Foreign Intelligence,¹⁹⁶⁹ although further investigation is required to determine whether these directorates formed part of the SIS.

Defence intelligence units

16.101 The Directorate of Military Intelligence (**DMI**) was part of the GS Branch of the Army¹⁹⁷⁰ (see paragraph 16.30 and Table 16.2 above). It was the command-and-control body of the Army’s Military Intelligence Corps, which was established in 1990.¹⁹⁷¹ The DMI was headed by the Director of Military Intelligence, Brigadier KADA ‘Amal’ Karunasekara.¹⁹⁷²

http://www.defence.lk/new.asp?fname=Sri_Lanka_National_Security_Concerns_20130613_08 [accessed 25 August 2013].

¹⁹⁶¹ C. A. Chandraprema, *Gota’s War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 507.

¹⁹⁶² The Deputy Inspector General of Police who headed the CID stated that the Secretary of Defence arranged weekly meetings with all intelligence agencies and ‘introduced the process of sharing and capturing an agency’s collective expertise to fulfil the mission’: ‘Deputy Inspector General of Police Sisira Mendis’, *Business Today*, April 2009, <http://www.businesstoday.lk/art.php?art=23> [accessed 1 September 2013].

¹⁹⁶³ C. A. Chandraprema, *Gota’s War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 357.

¹⁹⁶⁴ Ibid.

¹⁹⁶⁵ Ibid.

¹⁹⁶⁶ Alain Rodier, ‘Sri Lanka: Role of Intelligence in Victory against LTTE’, Centre Francais de Recherche sur le Renseignement, Note News No. 154, 13 January 2009, <http://www.cf2r.org/fr/notes-actualite/sri-lanka-role-des-services-secrets-dans-la-victoire-contre-le-l.php> [accessed 15 January 2014].

¹⁹⁶⁷ Sri Lankan Ministry of Defence and Urban Development, ‘Responsibilities and Functions’ (web page), http://www.defence.lk/main_abt.asp?fname=resp_functions [accessed 25 August 2013]; Sri Lankan Presidential Secretariat, ‘Notification under the Constitution of the Democratic Socialist Republic of Sri Lanka’, 22 November 2010, 3, http://www.priu.gov.lk/Ministries_2010/subjects_functions_institutions.pdf [accessed 25 August 2013].

¹⁹⁶⁸ ‘Police Recruiting For State Intelligence Services’, *The Sunday Leader*, 20 July 2010, <http://www.thesundayleader.lk/2010/07/20/police-recruiting-for-state-intelligence-services/> [accessed 25 August 2013].

¹⁹⁶⁹ Sri Lankan Ministry of Defence and Urban Development, ‘Responsibilities and Functions’ (web page), http://www.defence.lk/main_abt.asp?fname=resp_functions [accessed 25 August 2013].

¹⁹⁷⁰ The Security Establishment in Sri Lanka, 189; Sri Lankan Army, ‘General Staff Branch’ (intranet web portal), <https://army.lk/webportal/directorates.php?bid=e4da3b7fbbce2345d7772b0674a318d5180614e296f41a50b61311338305&id=5> [accessed 21 August 2013].

¹⁹⁷¹ Ibid.

¹⁹⁷² Sri Lankan newspaper reports indicate that Amal Karunasekara held the position of Director of the DMI from at least 2007 until around November 2009: ‘Light Infantry Regiment Gets New Head’, *Daily Mirror*, 20 May 2007, <http://archives.dailymirror.lk/2007/05/21/front/7.asp> [accessed 4 September 2013]; Iqbal Athas, ‘Bitter Battles, Heavy Toll, Tiger Strongholds under Siege’, *The Sunday Times*, 23 November 2008, <http://www.sundaytimes.lk/081123/Columns/sitreport.html> [accessed 4 September 2013]; Tissa Ravindra Perera, ‘New Director of Military Intelligence’, 15 November 2009, <http://www.nation.lk/2009/11/15/news26.htm> [accessed 4

16.102 The current information available indicates that the Air Force and Navy had an intelligence unit built into their respective directorates of operations.¹⁹⁷³

Police intelligence units

16.103 Within the Sri Lanka Police organisational structure, a Deputy Inspector-General of Intelligence was responsible for the Police Special Branch, headed by the Director of the Special Branch.¹⁹⁷⁴ In addition, intelligence was gathered by other departments of the Police, namely the:

- Western Province Intelligence Division,¹⁹⁷⁵ established in 1988;¹⁹⁷⁶
- Special Task Force which had a dedicated intelligence division,¹⁹⁷⁷
- Terrorist Investigation Department,¹⁹⁷⁸
- Criminal Investigation Department;¹⁹⁷⁹ and
- Colombo Crimes Division.¹⁹⁸⁰

16.104 The IGP has stated that the Police shared intelligence with the defence intelligence units, provided specialised training on intelligence collection to these units, and reviewed their progress on a weekly, or even daily, basis.¹⁹⁸¹

(vii) Civil Defence Force

16.105 The Civil Defence Force (CDF) (formerly the Home Guard Service) came within the purview of the Ministry of Defence's Department of Civil Security.¹⁹⁸² The CDF was established to

¹⁹⁷³ September 2009]. A letter from the Military Intelligence Directorate to the Joint Operations Headquarters dated 8 May 2009 is signed by 'K A D A Karunasekara, Brigadier, Director Military Intelligence': LLRC Report, Annex, 70. The Security Establishment in Sri Lanka, 189; Sri Lankan Navy, 'Naval Headquarters Organisational Structure' (web page), http://www.navy.lk/assets/files/naval_headquarters_structure.pdf [accessed 2 December 2013].

¹⁹⁷⁴ Sri Lankan Police, 'Organisational Structure' (web page), http://www.police.lk/structure/organizational_structure.html; <http://www.police.lk/structure/structure/SDIG%20Intelligence.pdf> [accessed 25 August 2013].

¹⁹⁷⁵ C. A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 357.

¹⁹⁷⁶ Sri Lankan Police, 'Police History' (web page), <http://www.police.lk/index.php/police-history> [accessed 25 August 2013].

¹⁹⁷⁷ Lecture by Gotabaya Rajapaksa titled 'Sri Lanka's National Security Concerns', delivered at Kotelawala Defence University and published as 'The Final Threat To Sri Lanka's National Security Is New Media', *Colombo Telegraph*, 14 June 2013, <http://www.colombotelegraph.com/index.php/sri-lankas-national-security-concerns-social-media-is-a-threat/> [accessed 25 August 2013]. The lecture was also published on the Sri Lankan Ministry of Defence website, http://www.defence.lk/new.asp?fname=Sri_Lanka_National_Security_Concerns_20130613_08 [accessed 25 August 2013].

¹⁹⁷⁸ Lecture by Gotabaya Rajapaksa titled 'Sri Lanka's National Security Concerns', delivered at Kotelawala Defence University and published as 'The Final Threat to Sri Lanka's National Security is New Media', *Colombo Telegraph*, 14 June 2013, <http://www.colombotelegraph.com/index.php/sri-lankas-national-security-concerns-social-media-is-a-threat/> [accessed 25 August 2013]. The lecture was also published on the Sri Lankan Ministry of Defence website, http://www.defence.lk/new.asp?fname=Sri_Lanka_National_Security_Concerns_20130613_08 [accessed 25 August 2013]; C. A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 356–357.

¹⁹⁷⁹ Lecture by Gotabaya Rajapaksa titled 'Sri Lanka's National Security Concerns', delivered at Kotelawala Defence University and published as 'The Final Threat To Sri Lanka's National Security Is New Media', *Colombo Telegraph*, 14 June 2013, <http://www.colombotelegraph.com/index.php/sri-lankas-national-security-concerns-social-media-is-a-threat/> [accessed 25 August 2013]. The lecture was also published on the Sri Lankan Ministry of Defence website, http://www.defence.lk/new.asp?fname=Sri_Lanka_National_Security_Concerns_20130613_08 [accessed 25 August 2013]; C. A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 356–357.

¹⁹⁸⁰ C. A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 357.

¹⁹⁸¹ Udeshi Amarasinghe and Thilini Kahandawaarachchi, 'The Eye on Colombo', *Business Today*, April 2009, http://www.businesstoday.lk/cover_page.php?issue=206 [accessed 17 January 2014].

¹⁹⁸² The functions of the Department of Civil Security are set out in Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary) No. 1462/20, 13 September 2006; see also Sri Lankan Ministry of Defence and Urban Development, 'Organisational Structure' (web page), http://www.defence.lk/main_abt.asp?fname=orgstr [accessed

provide security for ‘threatened villages’ or areas that were adjacent to LTTE-controlled territory.¹⁹⁸³ In addition, the CDF defended the main supply routes, forward defence lines, religious sites and important economic assets.¹⁹⁸⁴ By May 2009, the CDF comprised up to 41,500 personnel.¹⁹⁸⁵

- 16.106 The CDF was commanded by a Director General who operated under the Secretary of Defence. Operations on the ground were supervised by Area Security Officers from the Army or Special Task Force.¹⁹⁸⁶ From October 2006, the Director General of the CDF was Rear Admiral Sarath Weerasekara (retired).¹⁹⁸⁷

B. The Liberation Tigers of Tamil Eelam

- 16.107 The LTTE was a national separatist group founded by Vellupillai Prabhakaran (**Prabhakaran**) as the ‘Tamil New Tigers’ in 1972, and renamed the Liberation Tigers of Tamil Eelam in 1976.¹⁹⁸⁸ Over the next decade, the LTTE established itself as the predominant national separatist group in Sri Lanka, waging a longstanding military campaign against the Sri Lankan Government. The central aim of the LTTE was establishing a Tamil homeland (‘Tamil Eelam’) in the north and east of Sri Lanka.¹⁹⁸⁹ The aspirational Tamil homeland comprised the districts of Puttalam, Mannar, Kilinochchi, Jaffna, Mullaitivu, Trincomalee, Batticaloa and Ampara.¹⁹⁹⁰
- 16.108 The LTTE was most active in the north-east of Sri Lanka, where it was able to control significant territory for substantial periods of time, establishing an extensive network of bases and defensive fortifications.¹⁹⁹¹ The LTTE had its main headquarters in the town of Kilinochchi until the town was captured on 2 January 2009.¹⁹⁹²
- 16.109 According to *Jane’s*, Prabhakaran eliminated rival Tamil politico-militant groups, ‘forcibly establishing the LTTE as the representatives of the Tamil population, and consolidating his position as their de facto leader.’¹⁹⁹³
- 16.110 The UN Expert Panel stated:

The LTTE pioneered modern suicide bombing, which it used against military, political and civilian targets. LTTE suicide bombers, both men and women, were responsible for the deaths of Indian Prime Minister Rajiv Gandhi (1991) and Sri Lankan President Ranasinghe Premadasa (1993) as well as numerous Sri Lankan ministers and members of parliament, and moderate Tamil political leaders. It also carried out

1 September 2013]; Civil Security Department of Sri Lanka website, ‘History’, http://www.csd.lk/index.php?option=com_content&view=art&id=52&Itemid=59 [accessed 1 September 2013].
¹⁹⁸³ Udeshi Amarasinghe and Thilini Kahandawaarachchi, ‘Shielding the Innocent – Rear Admiral Sarath Weerasekara’, *Business Today*, May 2009, <http://www.businesstoday.lk/art.php?art=36> [accessed 1 September 2013]. In relation to the operations of the Civil Security Department, see Civil Security Department of Sri Lanka, ‘Operations’ (web page), http://www.csd.lk/index.php?option=com_content&view=art&id=54&Itemid=61 [accessed 1 September 2013].
¹⁹⁸⁴ Ibid.
¹⁹⁸⁵ Udeshi Amarasinghe and Thilini Kahandawaarachchi, ‘Shielding the Innocent – Rear Admiral Sarath Weerasekara’, *Business Today*, May 2009, <http://www.businesstoday.lk/art.php?art=36> [accessed 1 September 2013].
¹⁹⁸⁶ Ibid.
¹⁹⁸⁷ Ibid.
¹⁹⁸⁸ ‘Liberation Tigers of Tamil Eelam (LTTE)’, *Jane’s World Insurgency and Terrorism*, 6 June 2012.
¹⁹⁸⁹ Humanitarian Operation Factual Analysis, [18]; ‘Liberation Tigers of Tamil Eelam (LTTE)’, *Jane’s World Insurgency and Terrorism*, 6 June 2012.
¹⁹⁹⁰ ‘Liberation Tigers of Tamil Eelam (LTTE)’, *Jane’s World Insurgency and Terrorism*, 6 June 2012.
¹⁹⁹¹ Ibid.
¹⁹⁹² Ibid.
¹⁹⁹³ Ibid, 3.

suicide attacks, often with large numbers of civilian casualties, on economic and religious targets.¹⁹⁹⁴

16.111 Between 1985 and 2006, the LTTE and Sri Lankan Government engaged in several rounds of negotiations to achieve a peaceful solution to the conflict,¹⁹⁹⁵ which resulted in cease-fire agreements being concluded.¹⁹⁹⁶ During these negotiations, the LTTE allegedly claimed to be the 'sole representative of the Tamil people'.¹⁹⁹⁷ During the final months of the conflict, the LTTE was designated as a proscribed organisation in 32 countries.¹⁹⁹⁸

(i) LTTE command structures

16.112 The command of the LTTE was highly centralised, with the Supreme Commander of LTTE forces being the LTTE Leader, Prabhakaran. The UN Expert Panel noted that while the LTTE was a fraction of the size of the SFs, and many of its cadres were inexperienced, 'its basic command structure remained intact, with a military wing and, under it, a political wing. Both were headed by a central governing committee led by Prabhakaran.'¹⁹⁹⁹ ICEP notes that further investigation is required into the relationship between the military and political wings of the LTTE.

16.113 The LTTE had a geographically organised command structure that was divided into seven divisions or wings, each under the command of a district commander who was directly responsible to Prabhakaran.²⁰⁰⁰

16.114 As discussed in detail below, each district in the Vanni Region had both political and military wings with specialised functional commands.²⁰⁰¹ Other divisions or wings within the LTTE included the:

- Intelligence Wing, commanded by the second-in-command of the LTTE, Shanmugalingam Sivashankar (nom de guerre: Pottu Amman) and based in PTK;
- Finance Wing, headed by Sabaratnam Selvathurai (nom de guerre: Thamilendi);²⁰⁰² and
- Equipment Procurement and International Relations Wing, commanded by Shanmugan Kumaran Tharmalingan or Selvarasa Pathmanathan (nom de guerre: Kumaran Pathmanathan or 'KP').²⁰⁰³

(ii) Military Wing

16.115 The LTTE's Military Wing had a land army that consisted of an artillery regiment, a bodyguard unit for the protection of the LTTE leadership and an engineer regiment.²⁰⁰⁴ The

¹⁹⁹⁴ UN Expert Panel Report, [32].

¹⁹⁹⁵ Humanitarian Operation Factual Analysis, [83]–[84].

¹⁹⁹⁶ Ibid, [88], [95], [102], [109].

¹⁹⁹⁷ Ibid, [84].

¹⁹⁹⁸ Ibid, [39].

¹⁹⁹⁹ UN Expert Panel Report, [67].

²⁰⁰⁰ Paul A. Povlock, 'A Guerilla War at Sea: The Sri Lankan Civil War', *Small Wars Journal*, 9 September 2011, 17, <http://smallwarsjournal.com/jrn/art/a-guerilla-war-at-sea-the-sri-lankan-civil-war> [accessed 17 January 2014].

²⁰⁰¹ Ibid.

²⁰⁰² 'Heavy Fighting in North Sri Lanka', *BBC News*, 11 March 2009, http://news.bbc.co.uk/2/hi/south_asia/7938113.stm [accessed 17 January 2014].

²⁰⁰³ 'Liberation Tigers of Tamil Eelam (LTTE)', *Jane's World Insurgency and Terrorism*, 6 June 2012; and Paul A. Povlock, 'A Guerilla War at Sea: The Sri Lankan Civil War', *Small Wars Journal*, 9 September 2011, 19, fn 69, <http://smallwarsjournal.com/jrn/art/a-guerilla-war-at-sea-the-sri-lankan-civil-war> [accessed 17 January 2014].

²⁰⁰⁴ Graeme C. S. Stevens and Rohan Gunaratna, *Counterterrorism: A Reference Handbook*, 200.

commanders of these three special units reported directly to Prabhakaran.²⁰⁰⁵ In addition, the LTTE had special regiments that included:

- The Special Reconnaissance Group, which assisted the Intelligence Wing;
- Snipers, which were used during offensive operations;
- Assault Pioneers and Mine Laying Teams, which undertook engineering tasks; and
- The Tank Regiment and Anti-Tank Regiment, which operated with and against armoured vehicles.²⁰⁰⁶

16.116 The LTTE's Northern Province Commander was Velayuthapillai Baheerathakumar (nom de guerre: Theepan) until he was killed in battle on 4 or 5 April 2009.²⁰⁰⁷ Theepan was replaced by Colonel Bhanu (or Banu).²⁰⁰⁸ After the Eastern Province Commander, Colonel Karuna, broke away from the LTTE, he was replaced by Colonel Thambirasa Thurairasasingam (nom de guerre: Ramesh).²⁰⁰⁹

16.117 In addition to the land army, a Military Intelligence Unit was established under the command of Ratnam Master.²⁰¹⁰ Second-in-command of the Military Intelligence Unit was Krishnapillai Pirabaharan (nom de guerre: Piraba).²⁰¹¹

16.118 At its peak, the LTTE transitioned from guerrilla warfare to conventional military operations,²⁰¹² with the ability to plan, coordinate and carry out military operations. As *Jane's* noted:

In addition to mounting conventional operations in its primary areas of control, the group was able to carry out routine strikes throughout the country, including in the capital Colombo... The possession of a naval and an air arm provided additional means for the LTTE to strike beyond its immediate areas of control.²⁰¹³

16.119 In relation to military strategy and the use of military tactics, '[t]he LTTE was also highly adaptive, capable of adjusting its strategy to reflect changes on the ground'.²⁰¹⁴

16.120 The LTTE 'invested heavily in training and discipline, command and control, communications, ideological indoctrination and psychological warfare instruction.'²⁰¹⁵ It also maintained an ability throughout the conflict to gain access to recruits. Furthermore, LTTE cadres were extensively trained at home and abroad,²⁰¹⁶ with all new recruits undergoing a regular training course of four months.²⁰¹⁷ According to the Sri Lankan Ministry of Defence, 'in July 2006 the LTTE maintained approximately 25,000 cadres including regular cadres and auxiliary forces that had been given combat training and were employed for both

²⁰⁰⁵ Graeme C. S. Stevens and Rohan Guneratna, *Counterterrorism: A Reference Handbook*, 200.

²⁰⁰⁶ Humanitarian Operation Factual Analysis, [49].

²⁰⁰⁷ 'Liberation Tigers of Tamil Eelam (LTTE)', *Jane's World Insurgency and Terrorism*, 6 June 2012; C. A. Chandraprema, *Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Ranjan Wijeratne Foundation, 2012), 459.

²⁰⁰⁸ 'Liberation Tigers of Tamil Eelam (LTTE)', *Jane's World Insurgency and Terrorism*, 6 June 2012.

²⁰⁰⁹ Ibid.

²⁰¹⁰ WF-011, [11].

²⁰¹¹ Ibid.

²⁰¹² 'Liberation Tigers of Tamil Eelam (LTTE)', *Jane's World Insurgency and Terrorism*, 6 June 2012, 1.

²⁰¹³ Ibid, 2–3.

²⁰¹⁴ Ibid, 7.

²⁰¹⁵ Ibid, 11.

²⁰¹⁶ Humanitarian Operation Factual Analysis, [43], [49], [51].

²⁰¹⁷ 'Liberation Tigers of Tamil Eelam (LTTE)', *Jane's World Insurgency and Terrorism*, 6 June 2012, 11.

offensive and defensive operations.²⁰¹⁸ The LTTE intensified recruitment efforts throughout the cease-fire period from 2002 to 2006 and during the final months of the conflict, and at the start of 2008 it was estimated that the LTTE had approximately 30,000 cadres.²⁰¹⁹

16.121 As noted above in paragraph 16.118, in addition to its regular forces, the LTTE was supported by an auxiliary force that had been given basic military training and reportedly comprised some 25,000 personnel by June 2006.²⁰²⁰ According to the Sri Lankan Ministry of Defence, the auxiliary force was divided into two units which were used for defensive and offensive operations: the Eelapadai and Gramapadai.²⁰²¹

16.122 The LTTE maintained access to weapons and military equipment throughout the conflict via an extensive foreign network around the world.²⁰²² According to the Sri Lankan Ministry of Defence, the LTTE upgraded its weapons systems and stockpiled weapons during the cease-fire period between 2002 and 2006, by procuring arms consignments from abroad and maintaining a fleet of merchant vessels which transported weapons to the LTTE.²⁰²³ The Ministry of Defence has stated that the LTTE 'established factories to manufacture ammunitions and mines... set up boatyards to develop suicide boats and submersible vessels, and maintained hangars as well as service centres for its aircraft.'²⁰²⁴

16.123 However, 'the LTTE could not maintain a high operational tempo as the insurgent logistic reserves and manpower pool were incapable of supporting continuous conventional operations.'²⁰²⁵ In relation to the LTTE's strength before the commencement of the final phase of the conflict, the UN Expert Panel found:

By September 2008, the LTTE's military capabilities were severely diminished compared to its past strength. Although its exact size at this time is not known, at its peak it was not larger than 20,000; its core fighters consisted of only a fraction of that in the final stages of the war, perhaps up to 5,000. In the south, its networks and sleeper cells in Colombo and elsewhere had been weakened and its ability to carry out suicide actions, although still existent and active, was reduced by the Government's counterinsurgency operations.²⁰²⁶

16.124 Further investigation is required to determine more precisely the strength and capabilities of the LTTE's armed forces prior to and during the final months of the conflict. By way of background, sources within the SFs, including senior SFs officials, have estimated the strength of the LTTE's land army at various times in the final months of the conflict. In January 2009, it was estimated to be between 1,700 to 1,900 personnel.²⁰²⁷ In early February 2009, an Army spokesperson claimed that there were a 'couple of hundred'

²⁰¹⁸ Humanitarian Operation Factual Analysis, [44].

²⁰¹⁹ Ibid, [44], [119].

²⁰²⁰ Ibid, [45], [119].

²⁰²¹ Ibid, [45].

²⁰²² 'Liberation Tigers of Tamil Eelam (LTTE)', *Jane's World Insurgency and Terrorism*, 6 June 2012, 3.

²⁰²³ Humanitarian Operation Factual Analysis, [115]

²⁰²⁴ Ibid, [43].

²⁰²⁵ Paul A. Povlock, 'A Guerilla War at Sea: The Sri Lankan Civil War', *Small Wars Journal*, 9 September 2011, 16, <http://smallwarsjournal.com/jrnl/art/a-guerilla-war-at-sea-the-sri-lankan-civil-war> [accessed 17 January 2014].

²⁰²⁶ UN Expert Panel Report, [66].

²⁰²⁷ Sri Lankan Army, 'Defence Briefing by Brigadier Udaya Perera, Director of Operations, Sri Lanka Army' (PowerPoint presentation), January 2009, 29 (on file with ICEP).

surviving LTTE cadres.²⁰²⁸ In late-February 2009, Brigadier Shavendra Silva reported that the LTTE had only 500 cadres remaining.²⁰²⁹

Artillery capabilities

16.125 According to the Sri Lankan Ministry of Defence, the LTTE possessed the following artillery weapons:

- Mortars – 60 mm, 81 mm, 120 mm, 140 mm;
- Field guns and howitzers – 80 mm, 122 mm, 130 mm, 152 mm; and
- MBRLs – 107mm.²⁰³⁰

16.126 The available information indicates that, after the fall of Kilinochchi in early January 2009, the LTTE was suffering from a severe shortage of heavy artillery shells and many of their artillery pieces were abandoned or captured as the LTTE withdrew towards the coast.²⁰³¹ According to witness known to senior LTTE cadres, by March or April 2009, the LTTE had run out of ammunitions for its artillery pieces.²⁰³² Other witnesses reported that they did not observe the LTTE in possession of heavy artillery in the final months of the conflict.²⁰³³ These witness accounts call into question the lawfulness of shelling NFZs purporting to have LTTE artillery assets within them.

(iii) Air Tigers

16.127 The LTTE established the only functional air force deployed by an insurgent organisation in the world, known as the Air Tigers or 'Vaana Puligal'.²⁰³⁴ *Jane's* reported that the Air Tigers had approximately 25 trained pilots who wore distinctive uniforms.²⁰³⁵ The identity of Air Tigers personnel was never publicly disclosed and the Air Tigers were understood to have reported directly to Prabhakaran.

16.128 The Air Tigers comprised up to six Czech-built Zlin Z-143 single engine four seat aircraft that were modified to carry up to four bombs per mission.²⁰³⁶ However, *Jane's* noted that only two aircraft were ever witnessed operating at the same time.²⁰³⁷

16.129 The first attack launched by the Air Tigers, on Katunayake International Airport, was on 26 March 2007.²⁰³⁸ On 20 February 2009, the Air Tigers launched its last major strike when

²⁰²⁸ 'Sri Lankan Military: Last Tamil Rebel Stronghold Captured', *CNN*, 5 April 2009, <http://edition.cnn.com/2009/WORLD/asiapcf/04/05/sri.lanka.tamil/index.html?iref=mpstoryview> [accessed 17 January 2014].

²⁰²⁹ Randeep Ramesh, 'Sri Lankan Soldiers Enter Last Town Controlled by Tamil Tiger Guerrillas', *The Guardian*, 25 February 2009, <http://www.theguardian.com/world/2009/feb/25/sri-lanka-tamil-tigers-ltte> [accessed on 5 September 2013].

²⁰³⁰ Humanitarian Operation Factual Analysis, [50].

²⁰³¹ WM-010, [45]–[46]; DM-01127.

²⁰³² WM-010, [45].

²⁰³³ See, eg, WF-011, [19]; WM-003, [68]; WM-010, [45]–[46].

²⁰³⁴ 'Liberation Tigers of Tamil Eelam (LTTE)', *Jane's World Insurgency and Terrorism*, 6 June 2012, 8.

²⁰³⁵ *Ibid.*

²⁰³⁶ *Ibid.*

²⁰³⁷ *Ibid.*

²⁰³⁸ 'Liberation Tigers of Tamil Eelam (LTTE)', *Jane's World Insurgency and Terrorism*, 6 June 2012, 9.

the pilots of two aircraft attempted to fly into buildings in the capital of Colombo.²⁰³⁹ The aircraft were destroyed before they could hit their targets.²⁰⁴⁰

(iv) Sea Tigers

- 16.130 The naval arm of the LTTE, the Sea Tigers, was established in 1984.²⁰⁴¹ The Sea Tigers were responsible for all tactical actions in and around Sri Lanka and for operating the LTTE's fleet of merchant ships that delivered supplies to the LTTE.²⁰⁴² The Sea Tigers initially possessed only a few small vessels, but rapidly grew into a formidable force capable of supporting LTTE missions in the maritime environment.²⁰⁴³ At its peak, the Sea Tigers were reported to have fielded over 3,000 personnel and conducts operations from the littoral seas of Sri Lanka to the deep ocean areas of the Indian Ocean.²⁰⁴⁴ By way of comparison, *Jane's* noted that during the ceasefire period, the strength of the Sea Tigers personnel increased to between 5,000 and 6,000 fighters.²⁰⁴⁵ From 1991 to the end of the conflict, the Sea Tigers Commander was Thillaiambalam Sivanesan (nom de guerre: Soosai).²⁰⁴⁶
- 16.131 As of 2005, Sea Tigers' bases and facilities were spread along the north-east coast of Sri Lanka, from Chundikulam in the north to areas near, and south of, the Government-held port of Trincomalee.²⁰⁴⁷ From 1996, the headquarters of the Sea Tigers were situated in the lagoons north of Mullaitivu.²⁰⁴⁸ However, by early 2009 the SFs had captured 20 Sea Tigers bases.²⁰⁴⁹ In February 2009, the last major Sea Tigers base at Chalai on the north-western coast was captured by the SFs.²⁰⁵⁰
- 16.132 According to military intelligence journals, the Sea Tigers were organised into the following teams or units:
- Battle regiments – responsible for cadres assigned to waterborne or ground combat duties;
 - Underwater demolition teams;
 - Strike teams – responsible for seaborne raids;
 - Marine engineering and boat building team;
 - Radar and telecommunications unit;
 - Marine weapons armoury and dump group;
 - Maritime school and academy;
 - Recruitment section;

²⁰³⁹ Ibid, 4.

²⁰⁴⁰ Ibid.

²⁰⁴¹ Humanitarian Operation Factual Analysis, [54]; 'Maritime Threat: Tactics and Technology of the Sea Tigers', *Jane's Intelligence Review*, 1 June 2006.

²⁰⁴² Paul A. Povlock, 'A Guerilla War at Sea: The Sri Lankan Civil War', *Small Wars Journal*, 9 September 2011, 18, <http://smallwarsjournal.com/jrnl/art/a-guerilla-war-at-sea-the-sri-lankan-civil-war> [accessed 17 January 2014].

²⁰⁴³ Ibid.

²⁰⁴⁴ Ibid.

²⁰⁴⁵ 'Tamil Tigers Seek to Rebuild Naval Force', *Jane's Intelligence Review*, 17 February 2005.

²⁰⁴⁶ Paul A. Povlock, 'A Guerilla War at Sea: The Sri Lankan Civil War', *Small Wars Journal*, 9 September 2011, 18, <http://smallwarsjournal.com/jrnl/art/a-guerilla-war-at-sea-the-sri-lankan-civil-war> [accessed 17 January 2014].

²⁰⁴⁷ 'Tamil Tigers Seek to Rebuild Naval Force', *Jane's Intelligence Review*, 17 February 2005.

²⁰⁴⁸ Ibid.

²⁰⁴⁹ Shankara Jayasekara, 'Survival of Prabhakaran and Ability to Revive its Fundraising Network', *Jane's Intelligence Review*, 11 March 2009.

²⁰⁵⁰ 'Liberation Tigers of Tamil Eelam (LTTE)', *Jane's World Insurgency and Terrorism*, 6 June 2012, 8.

- Political, finance and propaganda section;
- Exclusive economic zone marine logistics support team, responsible for transporting armaments and supplies acquired offshore;
- Reconnaissance and intelligence section, responsible for providing operational level information to the Sea Tigers' command; and
- Welfare and registry.²⁰⁵¹

16.133 The LTTE began developing semi-submersible craft in the mid-1990s.²⁰⁵² By 2000, the Sea Tigers had developed a dozen different types of sea craft with several variations.²⁰⁵³ Mini-submarines were reportedly developed in the 2000s.²⁰⁵⁴ The Sea Tigers also made extensive use of materiel captured from the SFs.²⁰⁵⁵ However, *Jane's* reports that a significant proportion of the Sea Tigers' naval craft was lost as a result of the tsunami in 2004.²⁰⁵⁶

16.134 The Sea Tigers worked in close coordination with the LTTE's military operations, such that when the LTTE conducted major attacks, the Sea Tigers were carefully integrated into the operation.²⁰⁵⁷

(v) Black Tigers

16.135 The Black Tigers, a small group of elite cadres specifically trained for suicidal missions, were an independent arm of the LTTE formed by, and operating under the direct command and control of, Prabhakaran.²⁰⁵⁸ Prabhakaran's involvement in the operation of the Black Tigers was so heavy that he is reported to have personally vetted applications to join the group.²⁰⁵⁹

16.136 Prabhakaran formed the Black Tigers in the late 1980s,²⁰⁶⁰ and the group reportedly undertook its first suicide mission on 5 July 1987.²⁰⁶¹ Black Tigers cadres undertook specialised training that included reconnaissance training, language instruction, weapons and explosives training, training on piloting boats and specific vehicles as well as mission specific training on replica targets.²⁰⁶²

²⁰⁵¹ 'Sea Tiger Organisation', *Jane's Intelligence Review*, 1 March 2001; Paul A. Povlock, 'A Guerilla War at Sea: The Sri Lankan Civil War', *Small Wars Journal*, 9 September 2011, 18, <http://smallwarsjournal.com/jrnl/art/a-guerilla-war-at-sea-the-sri-lankan-civil-war> [accessed 17 January 2014].

²⁰⁵² Humanitarian Operation Factual Analysis, [56].

²⁰⁵³ 'Sea Tiger Craft', *Jane's Intelligence Review*, 1 March 2001.

²⁰⁵⁴ Humanitarian Operation Factual Analysis, [56].

²⁰⁵⁵ Paul A. Povlock, 'A Guerilla War at Sea: The Sri Lankan Civil War', *Small Wars Journal*, 9 September 2011, 19, <http://smallwarsjournal.com/jrnl/art/a-guerilla-war-at-sea-the-sri-lankan-civil-war> [accessed 17 January 2014].

²⁰⁵⁶ 'Tamil Tigers seek to rebuild naval force', *Jane's Intelligence Review*, 17 February 2005.

²⁰⁵⁷ Paul A. Povlock, 'A Guerilla War at Sea: The Sri Lankan Civil War', *Small Wars Journal*, 9 September 2011, 22-23, <http://smallwarsjournal.com/jrnl/art/a-guerilla-war-at-sea-the-sri-lankan-civil-war> [accessed 17 January 2014].

²⁰⁵⁸ 'The History of the Tamil Tigers' (web page), *Al Jazeera*, 28 April 2009, <http://www.aljazeera.com/news/asia/2009/01/200912617918908981.html> [accessed on 5 September 2013].

²⁰⁵⁹ Ibid.

²⁰⁶⁰ Ibid.

²⁰⁶¹ Ibid.

²⁰⁶² Humanitarian Operation Factual Analysis, [67].

(vi) **Political Wing**

- 16.137 The LTTE's Political Wing was headed by Balasingham Mahendran (nom de guerre: Nadesan).²⁰⁶³ Other senior members of the Political Wing included:
- Ilamparithy or Anchinayer, Head of the Political Wing in Jaffna,²⁰⁶⁴
 - Thayomohan or Dayamohan, Head of the Political Wing in Batticaloa,²⁰⁶⁵
 - Ezhilan or Ellilan, Head of the Political Wing in Trincomalee,²⁰⁶⁶
 - Gnanam, Head of the Political Wing in Vavuniya,²⁰⁶⁷ and
 - Iniyanan, Head of the Political Wing in Mannar.²⁰⁶⁸
- 16.138 The Political Wing comprised sub-divisions that included, in particular, the Peace Secretariat. The Peace Secretariat, based in Kilinochchi, was established on 14 January 2003 as an executive office of the Political Wing.²⁰⁶⁹ The head of the Peace Secretariat was Selvaratnam Puleedevan (or Pulidevan).²⁰⁷⁰
- 16.139 The Peace Secretariat had responsibility to:
- ensure the maintenance of the Ceasefire Agreement previously in force;
 - promote peace and involve the people in seeking a lasting peace;
 - monitor human rights violations and resolve disputes;
 - coordinate all political affairs and legal matters;
 - enhance humanitarian and reconciliation work;
 - maintain relationships with foreign embassies, agencies, international political organisations and the Tamil diaspora; and
 - coordinate resettlement, reconstruction, rehabilitation and development work in association with like-minded organisations.²⁰⁷¹

²⁰⁶³ DBS Jeyaraj, 'The Successor: Balasingham Mahendran Alias Nadesan, The New Political Division Head of The LTTE', *Frontline*, Volume 24, Issue 23, 24 November-24 December 2007, <http://www.frontline.in/static/html/fl2423/stories/20071207504103800.htm> [accessed 17 January 2014].

²⁰⁶⁴ Frances Bulathsinghala, 'Jaffna People Yearn for Peace, Says Ilamparithi', *Sunday Times*, 26 September 2004, <http://sundaytimes.lk/040926/news/12.html> [accessed 17 January 2014]; Iqbal Athas, 'Nation in Confusion Over Tiger Stance', *Situation Report, Sunday Times*, <http://www.sundaytimes.lk/051113/columns/sitrep.html> [accessed 17 January 2014].

²⁰⁶⁵ 'Red Cross Handed Soldiers' Bodies', *BBC*, 15 July 2006, http://news.bbc.co.uk/2/hi/south_asia/5179508.stm [accessed 20 January 2014].

²⁰⁶⁶ 'Police Prevented Probing Murders', *BBC*, 10 July 2005, http://www.bbc.co.uk/sinhala/news/story/2005/07/050710_trinco_killing.shtml [accessed 17 January 2014]; Amantha Perera, 'Demons of Muttur Return', *Sunday Leader*, 1 July 2007, <http://www.thesundayleader.lk/archive/20070701/defence.htm> [accessed 17 January 2014]; Swaminathan Nataraj, 'Tamil Tiger's Wife Please for Help in Finding Him', *BBC*, 24 September 2010, <http://www.bbc.co.uk/news/world-south-asia-11383437> [accessed 17 January 2014].

²⁰⁶⁷ Iqbal Athas, 'Nation in Confusion over Tiger Stance', *Situation Report, Sunday Times*, <http://www.sundaytimes.lk/051113/columns/sitrep.html> [accessed 17 January 2014]; 'Vavuniya Not Safe for Doing Political Work, Says LTTE', *The Island*, 16 July 2005, <http://www.island.lk/2005/07/17/news22.html> [accessed 17 January 2014].

²⁰⁶⁸ Iqbal Athas, 'Situation Report – Nation in Confusion over Tiger Stance', *Sunday Times*, <http://www.sundaytimes.lk/051113/columns/sitrep.html> [accessed 17 January 2014].

²⁰⁶⁹ Peace Secretariat of the Liberation Tigers of Tamil Eelam, 'LTTE Peace Secretariat' (web page), <http://www.ltteps.org/list.ltte?folder=13> [captured as at 7 February 2007].

²⁰⁷⁰ 'Liberation Tigers of Tamil Eelam (LTTE)', *Jane's World Insurgency and Terrorism*, 6 June 2012, 5.

²⁰⁷¹ Peace Secretariat of the Liberation Tigers of Tamil Eelam website, 'LTTE Peace Secretariat', <http://www.ltteps.org/list.ltte?folder=13> [captured as at 7 February 2007].

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