

REPORT OF THE SECRETARY-GENERAL'S PANEL OF EXPERTS ON ACCOUNTABILITY IN SRI LANKA

Executive Summary

On 22 June 2010, the Secretary-General announced the appointment of a Panel of Experts to advise him on the implementation of the joint commitment included in the statement issued by the President of Sri Lanka and the Secretary-General at the conclusion of the Secretary-General's visit to Sri Lanka on 23 March 2009. In the Joint Statement, the Secretary-General "underlined the importance of an accountability process", and the Government of Sri Lanka agreed that it "will take measures to address those grievances". The Panel's mandate is to advise the Secretary-General regarding the modalities, applicable international standards and comparative experience relevant to an accountability process, having regard to the nature and scope of alleged violations of international humanitarian and human rights law during the final stages of the armed conflict in Sri Lanka. The Secretary-General appointed as members of the Panel Marzuki Darusman (Indonesia), Chair; Steven Ratner (United States); and Yasmin Sooka (South Africa). The Panel formally commenced its work on 16 September 2010 and was assisted throughout by a secretariat.

Framework for the Panel's work

In order to understand the accountability obligations arising from the last stages of the war, the Panel undertook an assessment of the "nature and scope of alleged violations" as required by its Terms of Reference. The Panel's mandate however does not extend to fact-finding or investigation. The Panel analysed information from a variety of sources in order to characterize the extent of the allegations, assess which of the allegations are credible, based on the information at hand, and appraise them legally. The Panel determined an allegation to be credible if there was a reasonable basis to believe that the underlying act or event occurred. This standard gives rise to a legal responsibility for the State or other actors to respond. Allegations are considered as credible in this report only when based on primary sources that the Panel deemed relevant and trustworthy. In its legal assessment, the Panel proceeded from the long-settled premise of international law that during an armed conflict such as that in Sri Lanka, both international humanitarian law and international human rights law are applicable. The Panel applied the rules of international humanitarian and human rights law to the credible allegations involving both of the primary actors in the war, that is, the Liberation Tigers of Tamil Eelam (LTTE) and the Government of Sri Lanka. Neither the publicly expressed aims of each side (combating terrorism, in the case of the Government, and fighting for a separate homeland, in the case of the LTTE), nor the asymmetrical nature of the tactics employed affects the applicability of international humanitarian and human rights law.

Sri Lanka is a party to several human rights treaties which require it to investigate alleged violations of international humanitarian and human rights law and prosecute those responsible; customary international law applicable to the armed conflict also includes such obligations. In addition to underscoring these legal obligations, in providing its advice to the Secretary-General, the Panel has drawn heavily on the international standards expressed in various United Nations documents and views of treaty bodies. These sources express the core understanding that

achieving accountability for crimes under international law involves the right to the truth, the right to justice and the right to reparations, including through institutional guarantees of non-recurrence. The Panel has also drawn on the diverse practical approaches, consistent with these standards, which have been developed in numerous other countries that have faced similar challenges for ensuring accountability. The Panel has used this framework as the basis both for assessing the domestic policy, measures and institutions, which are relevant to the approach to accountability taken by the Government of Sri Lanka to date, and for developing its recommendations to the Secretary-General. Finally, in formulating its advice, the Panel has given priority to the rights and needs of the victims who suffered tragic consequences from the actions of both parties in the protracted armed conflict in Sri Lanka; women, children and the elderly usually bear the brunt of suffering and loss in wars, and the Sri Lankan case is no exception.

Allegations found credible by the Panel

The Panel's determination of credible allegations reveals a very different version of the final stages of the war than that maintained to this day by the Government of Sri Lanka. The Government says it pursued a "humanitarian rescue operation" with a policy of "zero civilian casualties." In stark contrast, the Panel found credible allegations, which if proven, indicate that a wide range of serious violations of international humanitarian law and international human rights law was committed both by the Government of Sri Lanka and the LTTE, some of which would amount to war crimes and crimes against humanity. Indeed, the conduct of the war represented a grave assault on the entire regime of international law designed to protect individual dignity during both war and peace.

Specifically the Panel found credible allegations associated with the final stages of the war. Between September 2008 and 19 May 2009, the Sri Lanka Army advanced its military campaign into the Vanni using large-scale and widespread shelling, causing large numbers of civilian deaths. This campaign constituted persecution of the population of the Vanni. Around 330,000 civilians were trapped into an ever decreasing area, fleeing the shelling but kept hostage by the LTTE. The Government sought to intimidate and silence the media and other critics of the war through a variety of threats and actions, including the use of white vans to abduct and to make people disappear.

The Government shelled on a large scale in three consecutive No Fire Zones, where it had encouraged the civilian population to concentrate, even after indicating that it would cease the use of heavy weapons. It shelled the United Nations hub, food distribution lines and near the International Committee of the Red Cross (ICRC) ships that were coming to pick up the wounded and their relatives from the beaches. It shelled in spite of its knowledge of the impact, provided by its own intelligence systems and through notification by the United Nations, the ICRC and others. Most civilian casualties in the final phases of the war were caused by Government shelling.

The Government systematically shelled hospitals on the frontlines. All hospitals in the Vanni were hit by mortars and artillery, some of them were hit repeatedly, despite the fact that their locations were well-known to the Government. The Government also systematically

deprived people in the conflict zone of humanitarian aid, in the form of food and medical supplies, particularly surgical supplies, adding to their suffering. To this end, it purposefully underestimated the number of civilians who remained in the conflict zone. Tens of thousands lost their lives from January to May 2009, many of whom died anonymously in the carnage of the final few days.

The Government subjected victims and survivors of the conflict to further deprivation and suffering after they left the conflict zone. Screening for suspected LTTE took place without any transparency or external scrutiny. Some of those who were separated were summarily executed, and some of the women may have been raped. Others disappeared, as recounted by their wives and relatives during the LLRC hearings. All IDPs were detained in closed camps. Massive overcrowding led to terrible conditions, breaching the basic social and economic rights of the detainees, and many lives were lost unnecessarily. Some persons in the camps were interrogated and subjected to torture. Suspected LTTE were removed to other facilities, with no contact with the outside world, under conditions that made them vulnerable to further abuses.

Despite grave danger in the conflict zone, the LTTE refused civilians permission to leave, using them as hostages, at times even using their presence as a strategic human buffer between themselves and the advancing Sri Lanka Army. It implemented a policy of forced recruitment throughout the war, but in the final stages greatly intensified its recruitment of people of all ages, including children as young as fourteen. The LTTE forced civilians to dig trenches and other emplacements for its own defences, thereby contributing to blurring the distinction between combatants and civilians and exposing civilians to additional harm. All of this was done in a quest to pursue a war that was clearly lost; many civilians were sacrificed on the altar of the LTTE cause and its efforts to preserve its senior leadership.

From February 2009 onwards, the LTTE started point-blank shooting of civilians who attempted to escape the conflict zone, significantly adding to the death toll in the final stages of the war. It also fired artillery in proximity to large groups of internally displaced persons (IDPs) and fired from, or stored military equipment near, IDPs or civilian installations such as hospitals. Throughout the final stages of the war, the LTTE continued its policy of suicide attacks outside the conflict zone. Even though its ability to perpetrate such attacks was diminished compared to previous phases of the conflict, it perpetrated a number of attacks against civilians outside the conflict zone.

Thus, in conclusion, the Panel found credible allegations that comprise five core categories of potential serious violations committed by the Government of Sri Lanka: (i) killing of civilians through widespread shelling; (ii) shelling of hospitals and humanitarian objects; (iii) denial of humanitarian assistance; (iv) human rights violations suffered by victims and survivors of the conflict, including both IDPs and suspected LTTE cadre; and (v) human rights violations outside the conflict zone, including against the media and other critics of the Government.

The Panel's determination of credible allegations against the LTTE associated with the final stages of the war reveal six core categories of potential serious violations:

(i) using civilians as a human buffer; (ii) killing civilians attempting to flee LTTE control; (iii) using military equipment in the proximity of civilians; (iv) forced recruitment of children; (v) forced labour; and (vi) killing of civilians through suicide attacks.

Accountability

Accountability for serious violations of international humanitarian or human rights law is not a matter of choice or policy; it is a duty under domestic and international law. These credibly alleged violations demand a serious investigation and the prosecution of those responsible. If proven, those most responsible, including Sri Lanka Army commanders and senior Government officials, as well as military and civilian LTTE leaders, would bear criminal liability for international crimes.

At the same time, accountability goes beyond the investigation and prosecution of serious crimes that have been committed; rather it is a broad process that addresses the political, legal and moral responsibility of individuals and institutions for past violations of human rights and dignity. Consistent with the international standards mentioned above, accountability necessarily includes the achievement of truth, justice and reparations for victims. Accountability also requires an official acknowledgment by the State of its role and responsibility in violating the rights of its citizens, when that has occurred. In keeping with United Nations policy, the Panel does not advocate a “one-size-fits-all” formula or the importation of foreign models for accountability; rather it recognizes the need for accountability processes to be defined based on national assessments, involving broad citizen participation, needs and aspirations. Nonetheless, any national process must still meet international standards. Sri Lanka’s approach to accountability should, thus, be assessed against those standards and comparative experiences to discern how effectively it allows victims of the final stages of the war to realize their rights to truth, justice and reparations.

The Government has stated that it is seeking to balance reconciliation and accountability, with an emphasis on restorative justice. The assertion of a choice between restorative and retributive justice presents a false dichotomy. Both are required. Moreover, in the Panel’s view, the Government’s notion of restorative justice is flawed because it substitutes a vague notion of the political responsibility of past Government policies and their failure to protect citizens from terrorism for genuine, victim-centred accountability focused on truth, justice and reparations. A further emphasis is clearly on the culpability of certain LTTE cadre; the Government’s plan, in this regard, contemplates rehabilitation for the majority and lenient sentences for the “hard core” among surviving LTTE cadre. The Government’s two-pronged notion of accountability, as explained to the Panel, focusing on the responsibility of past Governments and of the LTTE, does not envisage a serious examination of the Government’s decisions and conduct in prosecuting the final stages of the war or the aftermath, nor of the violations of law that may have occurred as a result.

The Panel has concluded that the Government’s notion of accountability is not in accordance with international standards. Unless the Government genuinely addresses the allegations of violations committed by both sides and places the rights and dignity of the victims

of the conflict at the centre of its approach to accountability, its measures will fall dramatically short of international expectations.

The Lessons Learnt and Reconciliation Commission

The Government has established the Lessons Learnt and Reconciliation Commission as the cornerstone of its policy to address the past, from the ceasefire agreement in 2002 to the end of the conflict in May 2009. The LLRC represents a potentially useful opportunity to begin a national dialogue on Sri Lanka's conflict; the need for such a dialogue is illustrated by the large numbers of people, particularly victims, who have come forward on their own initiative and sought to speak with the Commission.

Nonetheless, the LLRC fails to satisfy key international standards of independence and impartiality, as it is compromised by its composition and deep-seated conflicts of interests of some of its members. The mandate of the LLRC, as well as its work and methodology to date, are not tailored to investigating allegations of serious violations of international humanitarian and human rights law, or to examining the root causes of the decades-long ethnic conflict; instead these focus strongly on the wider notion of political responsibility mentioned above, which forms part of the flawed and partial concept of accountability put forth by the Government. The work to date demonstrates that the LLRC has: not conducted genuine truth-seeking about what happened in the final stages of the armed conflict; not sought to investigate systematically and impartially the allegations of serious violations on both sides of the war; not employed an approach that treats victims with full respect for their dignity and their suffering; and not provided the necessary protection for witnesses, even in circumstances of actual personal risk.

In sum, the LLRC is deeply flawed, does not meet international standards for an effective accountability mechanism and, therefore, does not and cannot satisfy the joint commitment of the President of Sri Lanka and the Secretary-General to an accountability process.

Other domestic mechanisms

The justice system should play a leading role in the pursuit of accountability, irrespective of the functioning or outcomes of the LLRC. However, based on a review of the system's past performance and current structure, the Panel has little confidence that it will serve justice in the existing political environment. This is due much more to a lack of political will than to lack of capacity. In particular, the independence of the Attorney-General has been weakened in recent years, as power has been more concentrated in the Presidency. Moreover, the continuing imposition of Emergency Regulations, combined with the Prevention of Terrorism Act in its current form, present a significant obstacle for the judicial system to be able to address official wrongdoing while upholding human rights guarantees. Equally, the Panel has seen no evidence that the military courts system has operated as an effective accountability mechanism in respect of the credible allegations it has identified or other crimes committed in the final stages of the war.

Other domestic institutions that could play a role in achieving accountability also demonstrate serious weaknesses. Over three decades, commissions of inquiry have been established to examine a number of serious human rights issues. While some have served important fact-finding goals, overwhelmingly these commissions have failed to result in comprehensive accountability for the violations identified. Many commissions have failed to produce a public report, and recommendations have rarely been implemented. The Human Rights Commission of Sri Lanka could also potentially contribute to advancing certain aspects of accountability, but the Panel still has serious reservations and believes that the Commission will need to demonstrate political will and resourcefulness in following up on cases of missing persons and in monitoring the welfare of detained persons.

Other obstacles to accountability

During the course of its work, the Panel observed that there are several other contemporary issues in Sri Lanka, which if left unaddressed, will deter efforts towards genuine accountability and may undermine prospects for durable peace in consequence. Most notably, these include: (i) triumphalism on the part of the Government, expressed through its discourse on having developed the means and will to defeat “terrorism”, thus ending Tamil aspirations for political autonomy and recognition, and its denial regarding the human cost of its military strategy; (ii) on-going exclusionary policies, which are particularly deleterious as political, social and economic exclusion based on ethnicity, perceived or real, have been at the heart of the conflict; (iii) the continuation of wartime measures, including not only the Emergency Regulations and the Prevention of Terrorism Act, mentioned above, but also the continued militarization of the former conflict zone and the use of paramilitary proxies, all of which perpetuate a climate of fear, intimidation and violence; (iv) restrictions on the media, which are contrary to democratic governance and limit basic citizens’ rights; and (v) the role of the Tamil diaspora, which provided vital moral and material support to the LTTE over decades, and some of whom refuse to acknowledge the LTTE’s role in the humanitarian disaster in the Vanni, creating a further obstacle to accountability and sustainable peace.

An environment conducive to accountability, which would permit a candid appraisal of the broad patterns of the past, including the root causes of the long-running ethno-nationalist conflict, does not exist at present. It would require concrete steps towards building an open society in which human rights are respected, as well as a fundamental shift away from triumphalism and denial towards a genuine commitment to a political solution that recognizes Sri Lanka’s ethnic diversity and the full and inclusive citizenship of all of its people, including Tamils, as the foundation for the country’s future.

International role in the protection of civilians

During the final stages of the war, the United Nations political organs and bodies failed to take actions that might have protected civilians. Moreover, although senior international officials advocated in public and in private with the Government that it protect civilians and stop the shelling of hospitals and United Nations or ICRC locations, in the Panel’s view, the public use of casualty figures would have strengthened the call for the protection of civilians while those events in the Vanni were unfolding. In addition, following the end of the war, the Human Rights

Council may have been acting on incomplete information when it passed its May 2009 resolution on Sri Lanka.

Recommendations

In this context, the Panel recommends the following measures, which it hopes, as a whole, will serve as the framework for an ongoing and constructive engagement between the Secretary-General and the Government of Sri Lanka on accountability. They address the various dimensions of accountability that the Panel considers essential and which will require complementary action by the Government of Sri Lanka, the United Nations and other parties.

Recommendation 1: Investigations

- A. In light of the allegations found credible by the Panel, the Government of Sri Lanka, in compliance with its international obligations and with a view to initiating an effective domestic accountability process, should immediately commence genuine investigations into these and other alleged violations of international humanitarian and human rights law committed by both sides involved in the armed conflict.
- B. The Secretary-General should immediately proceed to establish an independent international mechanism, whose mandate should include the following concurrent functions:
 - (i) Monitor and assess the extent to which the Government of Sri Lanka is carrying out an effective domestic accountability process, including genuine investigations of the alleged violations, and periodically advise the Secretary-General on its findings;
 - (ii) Conduct investigations independently into the alleged violations, having regard to genuine and effective domestic investigations; and
 - (iii) Collect and safeguard for appropriate future use information provided to it, which is relevant to accountability for the final stages of the war, including the information gathered by the Panel and other bodies in the United Nations system.

Recommendation 2: Other immediate measures to advance accountability

- A. The Government of Sri Lanka should implement the following short-term measures, with a focus on acknowledging the rights and dignity of all of the victims and survivors in the Vanni:
 - (i) End all violence by the State, its organs and all paramilitary and other groups acting as surrogates of, or tolerated by, the State;
 - (ii) Facilitate the recovery and return of human remains to their families and allow for the performance of cultural rites for the dead;
 - (iii) Provide death certificates for the dead and missing, expeditiously and respectfully, without charge, when requested by family members, without compromising the right to further investigation and civil claims;
 - (iv) Provide or facilitate psychosocial support for all survivors, respecting their cultural values and traditional practices;
 - (v) Release all displaced persons and facilitate their return to their former homes or provide for resettlement, according to their wishes; and
 - (vi) Continue to provide interim relief to assist the return of all survivors to normal life.

- B. The Government of Sri Lanka should investigate and disclose the fate and location of persons reported to have been forcibly disappeared. In this regard, the Government of Sri Lanka should invite the Working Group on Enforced and Involuntary Disappearances to visit Sri Lanka.
- C. In light of the political situation in the country, the Government of Sri Lanka should undertake an immediate repeal of the Emergency Regulations and modify all those provisions of the Prevention of Terrorism Act that are inconsistent with Sri Lanka's international obligations, and take the following measures regarding suspected LTTE members and all other persons held under these and other provisions:
 - (i) Publish the names of all of those currently detained, whatever the location of their detention, and notify them of the legal basis of their detention;
 - (ii) Allow all detainees regular access to family members and to legal counsel;
 - (iii) Allow all detainees to contest the substantive justification of their detention in court;
 - (iv) Charge those for whom there is sufficient evidence of serious crimes and release all others, allowing them to reintegrate into society without further hindrance.
- D. The Government of Sri Lanka should end state violence and other practices that limit freedoms of movement, assembly and expression, or otherwise contribute to a climate of fear.

Recommendation 3: Longer term accountability measures

While the current climate is not conducive to an honest examination of the past, in the longer term, as political spaces are allowed to open, the following measures are needed to move towards full accountability for actions taken during the war:

- A. Taking into account, but distinct from, the work of the LLRC, Sri Lanka should initiate a process, with strong civil society participation, to examine in a critical manner: the root causes of the conflict, including ethno-nationalist extremism on both sides; the conduct of the war and patterns of violations; and the corresponding institutional responsibilities.
- B. The Government of Sri Lanka should issue a public, formal acknowledgment of its role in and responsibility for extensive civilian casualties in the final stages of the war.
- C. The Government of Sri Lanka should institute a reparations programme, in accordance with international standards, for all victims of serious violations committed during the final stages of the war, with special attention to women, children and particularly vulnerable groups.

Recommendation 4: United Nations

Considering the response of the United Nations to the plight of civilians in the Vanni during the final stages of the war in Sri Lanka and the aftermath:

- A. The Human Rights Council should be invited to reconsider its May 2009 Special Session Resolution (A/HRC/S-11/L.1/Rev. 2) regarding Sri Lanka, in light of this report.
- B. The Secretary-General should conduct a comprehensive review of actions by the United Nations system during the war in Sri Lanka and the aftermath, regarding the implementation of its humanitarian and protection mandates.

The Panel's report and its advice to the Secretary-General, as encapsulated in these recommendations, are inspired by the courage and resilience of victims of the war and civil society in Sri Lanka. If followed, the recommendations would comprise a genuine process of accountability that would satisfy the joint commitment and would set Sri Lanka on the course of justice, dignity and peace.