

Sri Lanka Private Sector Assessment  
of the Panel of Experts' Advisory  
Report to the  
UN Secretary General

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## Introduction

No enemy is worse than bad advice. Sophocles (*Electra*)

1. The objective of this critique is not to add to the cacophony of those that cry foul against the recently made public 'advisory' report by the UN Secretary General's 'Panel of Experts' on accountability in Sri Lanka ("The Advisory"). But rather, to present an objective evaluation of this private advisory that by untenable breach of scope and intent has been released into public domain.
2. This critique (PSC) is a compilation of views raised by a private sector group in Sri Lanka, who are concerned about the content of the advisory and its possible impact on inter-ethnic confidence building and national reconciliation.
3. The PSC is not intended to be a comprehensive analysis, in that it does not address each and every aspect of the advisory, or the historicity of the recounts of recent past which warrant discussion. It only handles a deconstruction of the most obvious and blatant sins of omission and commission and rhetoric, that put this advisory into contentious dispute.
4. This document is predicated on a firm belief that a rights based accountability process is necessary. This is not an attempt at whitewashing or denial of any alleged acts of criminal conduct on the part of any of the parties to the conflict. The private sector denounces violations of human rights of any nature and lobbies with the authorities to ensure that any alleged violations are addressed in the proper manner. It endorses that the dignity of the victims must be at the centre of any solution.
5. The PSC only attempts to critically examine the modus operandi followed by the Panel of Experts (POE) in its inquiry and consequent conclusions. The

objective of this exercise is to draw attention of the UN Secretary General (UNSG) and others involved in the process of considering the content of the Advisory to its obvious lapses and contradictions, which compromise the reliability of the ‘advisory’ opinion.

6. Facts addressed in the PSC are derived in the main, from the advisory itself. The authors have attempted to refrain in the main, from citing new facts not addressed by the POE. In the few instances where new facts are cited (and those are only well established facts which the POE has failed to consider) reliable sources of the information are cited. The format adopted is to pose key questions that probe the veracity, balance, biases and broader context of the advisory.

**A. Has the POE overstepped its mandate in compiling an advisory, which appears to resemble a product of a fact finding inquiry, including factual conclusions on disputed facts?**

7. The UNSG mandated the POE to advise him on the implementation of the commitment made by the President of Sri Lanka to take measures to address grievances in respect of the alleged violations of International Humanitarian Law (IHL) and Human Rights committed during the military operations between the Government of Sri Lanka (GOSL) and the Liberation Tigers of Tamil Eelam (LTTE)<sup>1</sup>, during the final stages of war and to advise the UNSG on the “modalities, applicable international standards... to an accountability process, *having regard* to the nature and scope of alleged violations”.<sup>2</sup>
8. The mandate, as reiterated by the POE throughout the advisory precludes fact finding or investigation.”<sup>3</sup> The POE assures the UNSG that it “has not conducted fact finding as that term is understood in the United Nations

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<sup>1</sup> Para5.1 of the advisory (paragraph numbers and foot notes cited hereinafter refer to paragraphs and foot notes in the advisory unless otherwise indicated)

<sup>2</sup> Para5.2

<sup>3</sup> Para51; see also para21

practice : it does not reach factual conclusions regarding disputed facts, nor did it carry out a formal investigation that draws conclusions regarding legal liability or culpability of States, non-state actors, or individuals”.<sup>4</sup>

9. However, the advisory suggests otherwise. It contains numerous factual conclusions on a number of disputed facts,<sup>5</sup> including conclusions on the culpability of the State,<sup>6</sup> state officials<sup>7</sup> and non-state actors.<sup>8</sup> The POE draws overarching conclusions, for example “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”<sup>9</sup> and “(the military) campaign constituted *persecution* of the population of the Vanni”.<sup>10</sup> In essence the advisory resembles a product of a fact finding inquiry and the assertion that the POE did not draw factual conclusions on disputed facts appears to be false.

10. The methodology by which the POE has arrived at its conclusions as described in the advisory simulates a fact finding inquiry/investigation. For example, the POE’s assessment is based on “a careful examination and weighing of the allegations of fact...”.<sup>11</sup> To this end it examined written sources of information, satellite imagery, photographs and video materials of the final phase of the war and *interviewed individuals*.<sup>12</sup>

11. The POE asserts that it tested the truthfulness of the information it received by considering the “relevance, weight and reliability of each of the sources”

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<sup>4</sup> Para9

<sup>5</sup> For example see para176

<sup>6</sup> For example, see “Recommendations 3 (B): “The Government of Sri Lanka should issue a public formal *acknowledgement* of its role in and responsibility for extensive civilian casualties in the final stages of the war”, executive summary, page viii; “The Government *systematically* shelled hospitals... some of them repeatedly”, para176 (b); “The Government *systematically* deprived persons ..humanitarian assistance .”, para176 (c ); para251; foot note 127

<sup>7</sup> Eg.Para193: “credible allegations *point to* the murder of civilians in widespread shelling of an indiscriminate nature by the SLA”; para247

<sup>8</sup> Eg.Para177

<sup>9</sup> Page ii of the executive summary, para2

<sup>10</sup> Page ii of the executive summary, para3

<sup>11</sup> Para49

<sup>12</sup> *id*

accepting an allegation if it was deemed “relevant and trustworthy”.<sup>13</sup> It considered evidence both “direct and indirect” and assessed credibility and consistency of the sources of information.<sup>14</sup> It claims that many of the allegations appear to meet a “higher standard of proof”.<sup>15</sup>

12. The POE claims that it treated an allegation as credible only when the information was “based on *primary sources* that the panel deemed relevant and trustworthy”.<sup>16</sup> Contrary to this claim, which suggests that the allegations were substantiated by victims and witnesses present on the ground, the POE seems to have relied exclusively on uncorroborated open sources for some of its findings.<sup>17</sup> While it is noted that at this juncture there is no expectation to have the exact identities of the witnesses interviewed disclosed, necessity for confidentiality does not preclude the POE from identifying the categories of the witnesses so interviewed, such as victims, members of the Sri Lanka Army (SLA), Government officials, members of the NGOs/INGOs, journalists etc. Further the POE has classified “*nearly all* of the Panel’s substantive records as strictly confidential.”<sup>18</sup> Therefore, “nearly all” of the material purportedly supporting the POE’s conclusions will remain confidential at least for the next twenty years.<sup>19</sup> While the necessity for such extensive confidentiality for sources providing information to support a *private advisory* to the UNSG can be appreciated, since the advisory has been released into the public domain by the UNSG, “natural justice” necessitates the sources or at the very least the nature/character of those sources to be revealed to the public.

13. The POE attempts to circumvent the issue of overstepping its mandate by describing the above process as a means of assessing the credibility of the allegations and claiming that in executing its mandate it was required to assess the credibility of the allegations.<sup>20</sup> A mandate that excludes fact

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<sup>13</sup> Para52

<sup>14</sup> *id*

<sup>15</sup> *Id*

<sup>16</sup> Paras52 and 54

<sup>17</sup> Paras149,150, 153; see discussion at paras46-49 of the PSC below

<sup>18</sup> Para23

<sup>19</sup> See para23

<sup>20</sup> Para51

finding/investigation is incompatible with a process of assessing credibility of information. Only a fact finding process/investigation would allow such an assessment to be made.

14. As such, in conducting what appears to be a fact finding inquiry and arriving at factual conclusions on disputed facts, the POE has overstepped its mandate.

15. Further, the POE has overstepped its mandate in relation to the temporal scope of the subject matter they were required to examine, which was “the final stages of the armed conflict” in Sri Lanka.<sup>21</sup> The POE has inquired into alleged human rights violations in time frames outside the mandated period and in areas other than the war zones and unrelated to the conflict.<sup>22</sup> It has further extended its inquiry to subject matter completely outside its mandate by questioning the validity of international practice of countries in conflict also exercised by the GOSL which are well within the norms of conduct of numerous UN states, such as the ability to derogate from specific provisions of human rights conventions and treaties.<sup>23</sup> Just a cursory examination of similar derogations from provisions of human rights treaties by other states, such as the U.S.A. shows the inequity and unfairness in the POE’s approach towards the GOSL.

16. Similarly the POE steps outside the boundaries of inquiry contemplated by the UNSG by criticizing constitutional provisions and the laws of the State.<sup>24</sup> It describes the Emergency Regulations as “*exempting wide swathes of state action from judicial scrutiny*”;<sup>25</sup> criticizes the provisions of the Prevention of Terrorism Act (PTA) which provides for detention up to 18 months at three months interval as “*far reaching*” and blames the GOSL for employing the provisions “before, during and after the final stages of the war”.<sup>26</sup> It reports that the “defining feature of the emergency regime is the *broad exclusion of*

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<sup>21</sup> See para5

<sup>22</sup> Eg,paras63, 64

<sup>23</sup> Para187

<sup>24</sup> Paras347 - 352

<sup>25</sup> Para347

<sup>26</sup> Para350

*resort to judicial remedies for governmental acts or omissions undertaken pursuant to it”.*<sup>27</sup>

17. The POE seems to broach the subject on the basis that the use of conventional mechanisms by states to counter terrorism, such as special powers of arrest and detention of suspected terrorists to be extra ordinary. It seems to insinuate that such measures are devious mechanisms deployed to exclude judicial review of state actions. A comparison of the above Sri Lankan laws criticized by the POE with similar anti-terrorism laws of other states would demonstrate the lack of fairness and equity in the POE’s approach. For example the post 9/11 enacted “USA Patriot Act of 2001” dramatically broadened powers of arrest and detention of law enforcement agencies to arrest and detain *indefinitely* suspected terrorists. Whilst no doubt these measures bear inherent risks of human rights abuse, there is a gaping lacunae in the need to either censure all nations that resort to such imperatives and/or the need for the POE to be grounded in the contingent realities of nations in conflict.

18. Further, the POE’s criticism of the Presidential immunity clause of the Sri Lanka Constitution<sup>28</sup> is deeply troubling given that “head of state immunity” is a universally established legal concept, which has received very limited challenge in the international legal arena to date.

## **B. Are the conclusions drawn by the POE just and fair?**

### Shelling of civilians and humanitarian objects by the Sri Lanka Army (SLA)

19. The POE draws a number of wide and overarching conclusions with respect to the allegations against GOSL forces relating to the shelling of civilians and humanitarian objects.<sup>29</sup>

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<sup>27</sup> Para351

<sup>28</sup> Para347

<sup>29</sup> Eg.paras100, 101, 104, 105, 176(a)(b)

20. The POE concludes that “in practice, ground forces *appear* to have been given significant discretion to use a *barrage* of artillery as they advanced”.<sup>30</sup> It finds that “the Sri Lanka Army advanced its military campaign into the *Vanni* using large-scale and widespread shelling, causing large numbers of civilian deaths”<sup>31</sup> and “*throughout* the final stages of the war, *virtually every hospital in the Vanni*, whether permanent or makeshift was hit by artillery”.<sup>32</sup> The POE thus concludes that the GOSL carried out a deliberate campaign of shelling civilians and humanitarian objects.

21. The attribution of GOSL intent and indifference to collateral civilian death is a total breach of scope and transgresses the basic tenant of fairness and temperance that must be the cornerstone of expert advisory opinions- given the volatility of the angst it will and has created in its wake. For instance, by its own indictment the POE states: “*the LTTE refused civilians to leave using them as hostages, at times even using their presence as a strategic 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 defenses thereby contributing to a blurring of the distinction between combatants and civilians and exposing civilians to additional harm.*”<sup>33</sup> “*It also fired artillery in proximity to large groups of IDPs and civilian installations*”.<sup>34</sup> There seems a strong possibility that this causality of LTTE terror tactics could have contributed rightly or wrongly on the state actors’ conviction that the greater safety and good of the majority of civilians would be met by a quick resolution of the conflict. It is also undeniable that the stated LTTE tactics would have greatly increased the numbers of civilian casualties. The use of terms such as “*persecution*”<sup>35</sup>, “*systematic*”<sup>36</sup>,

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<sup>30</sup> Para60

<sup>31</sup> Executive summary page ii, para3

<sup>32</sup> Para81

<sup>33</sup> Executive summary page iii, para3

<sup>34</sup> Executive summary page iii, para4

<sup>35</sup> Executive summary, page ii, para3

<sup>36</sup> Executive summary, page ii, para5



“purposefully”<sup>37</sup>, “state or organizational policy”<sup>38</sup> and attributing sinister “strategies” to the GOSL,<sup>39</sup> in this context is not merely irresponsible in its lack of cautionary tenor, it is incendiary in its impact. Some degree of clarification and/or retraction maybe thus advisable, if the other substantive issues the POE raises are to be relied upon.

22. The use of emotive and inflammatory language is compounded by euphemisms such as “appear”<sup>40</sup> which indicates speculation. An example of expansive journalistic narratives without specificity being used to leave certain impressions in the minds of the reader can be seen at paragraph 88 of the advisory, which reads that consequent to the SLA shelling “even the vegetation was shredded”,<sup>41</sup> which begs the question what the experts expected a scene of a military offensive to look like. In another instance describing ethnic diversity of demographics it comments negatively 74% are “overwhelmingly Buddhist”<sup>42</sup> as opposed to the possible standard descriptor “predominantly Buddhist”. Examples such as these are numerous .This suggests an anti GOSL bias in the POE’s approach *ab initio*, which is further reflected by the almost facetious manner in which it has reached conclusions adverse to the GOSL conduct, as discussed below.

23. The damning thesis of the POE in respect to shelling is that the SLA set up No Fire Zones (NFZ) in the theatre of war and then shelled them once the civilian population moved into them.<sup>43</sup> The POE concludes that the Government instructed civilians to move into NFZs, “only to be subsequently shelled by the SLA”.<sup>44</sup> It describes this action as a “*cynical manipulation*”,<sup>45</sup> the inference being that the objective of the GOSL was to trap civilians within the

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<sup>37</sup> Executive summary, page iii, para1;

<sup>38</sup> Foot note 127

<sup>39</sup> Para65

<sup>40</sup> Para60

<sup>41</sup> Para88

<sup>42</sup> Para25

<sup>43</sup> Eg.paras80 and 81

<sup>44</sup> Para205

<sup>45</sup> *id*

NFZs and then shell them. The POE arbitrarily concludes that the SLA deliberately and unconscionably shelled civilians within the NFZs.<sup>46</sup>

24. However, an examination of the facts reported in support of the conclusions reveals alternative possibilities that should be considered in an inquiry of this nature under the IHL regime.

25. There are inherent limits of IHL: it does not prohibit the use of violence; it cannot protect all those affected by an armed conflict; it cannot prohibit a party to overcome the enemy; IHL presupposes that parties to an armed conflict have rational aims.<sup>47</sup> The core principle of IHL with respect to the conduct of hostilities is the prohibition of attacks against civilians and civilian objects.<sup>48</sup> Military objects such as combatants, weapons and military installations are legitimate targets.<sup>49</sup> IHL prohibits the abuse of this principle by prohibiting the use of civilians and civilian objects to shield a military objective from attack.<sup>50</sup> Military objectives do not cease to be legitimate objects of attack merely because of the presence of civilians or protected objects,<sup>51</sup> and as such attacks directed at military objectives are not prohibited merely because they may also affect civilians.<sup>52</sup>

26. In a situation where military targets are present in close proximity to or in the midst of civilians/ civilian objects, the civilians/civilian objects become collateral effects/damage of an attack carried out against the military targets. The issue of legality or illegality of that attack turns on the question of proportionality, i.e. if the anticipated collateral effects/damage of an attack

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<sup>46</sup> Paras 176 (a)(b)

<sup>47</sup> See ICRC publication, "How does Law protect in War?, Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law", page 68

<sup>48</sup> Arts 51 (2), 52-56 and 85 (3) of Protocol I and Art. 13 of Protocol II

<sup>49</sup> Arts 48 and 52 (2) of Protocol I; This principle reflects customary international law

<sup>50</sup> Art. 28 of the Geneva Conventions IV and Art. 51 (7) of Protocol I

<sup>51</sup> Art. 52 of Protocol I; See ICRC publication, "How does Law protect in War?, Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law", page 167

<sup>52</sup> See ICRC publication, "How does Law protect in War?, Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law", page 145

“would be excessive in relation to the concrete and direct military advantage anticipated”.<sup>53</sup> To pronounce on the illegality of an attack without carrying out such an assessment is wholly wrong under IHL.

27. The POE reports that the LTTE was present and militarily active within all three NFZs during the relevant period.<sup>54</sup> There is ample evidence noted throughout the advisory of the presence of LTTE cadre, weaponry and military installations in close proximity to and in the midst of civilians and humanitarian objects.<sup>55</sup> It records the LTTE carrying out combat activity within the NFZs such as firing from close proximity to civilians or humanitarian objects,<sup>56</sup> attracting retaliatory fire from the SLA.<sup>57</sup>

28. Based on the IHL principles stated above, the presence of military targets in close proximity to and in the midst of civilians and humanitarian objects is a key factor to be considered in reaching conclusions with respect to the conduct of hostilities by parties in an armed conflict. The POE has inexplicably completely disregarded this factor in reaching conclusions adverse to the GOSL.

29. The following examples demonstrate the cavalier nature in which the POE has made its conclusions disregarding pivotal information in its possession.

30. The POE provides a detailed account of the alleged shelling of the first NFZ by the SLA, with explicit details of the consequences in journalistic tones, without assessing the fact of the presence of LTTE targets within.<sup>58</sup> As reported the LTTE which did not accept the NFZ,<sup>59</sup> were present in the zone<sup>60</sup> and fired artillery from within the zone.<sup>61</sup>

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<sup>53</sup> Prosecutor vs, Galic, IT-98-29-T, para58

<sup>54</sup> Eg.Paras86,94,97,108,109,177(c)

<sup>55</sup> Paras177(c); 239

<sup>56</sup> Eg.paras86,94,97,99,112,177(a)(c)

<sup>57</sup> Para97

<sup>58</sup> Paras84, 85, 86

<sup>59</sup> Para80

<sup>60</sup> Para86

<sup>61</sup> *Id*

31. Focusing on a specific incident, namely the alleged shelling of the area where the UN staff was located within the first NFZ, the POE reports that the LTTE was not present “inside the United Nations hub” and goes onto declare that “the LTTE did fire artillery from approximately 500 meters away as well as from further back in the NFZ *but* the area where the United Nations was based was very clearly civilian.”<sup>62</sup>
32. Characterizing the area in which the UN was located within the NFZ as a “hub” is misleading and gives an impression of a large area with proper UN installations. While the POE fails to provide details of the extent of this so called “hub”, on the basis of its advisory one can reasonably discern that it was probably the “bunker” in which the UN staff took cover from shelling.<sup>63</sup> Considering the size of the entire area that was subject to the offensive and the relatively low presence of the UN at this stage, it is unlikely that there was any significant area allocated as a “UN hub” in the NFZ. As such to assert that the LTTE was not present in the UN “hub” may amount to a misrepresentation of facts.
33. The POE has not carried out an assessment in relation to the distances between the most proximate presence of the LTTE or its weaponry vis-à-vis the “UN hub”. An objective inquiry would have considered those factors and assessed possible margins of error involved in mortar fire, before concluding if the artillery fire from the SLA was deliberate or due to firing errors.<sup>64</sup>
34. Should the POE examine the International Criminal Tribunal for the former-Yugoslavia (ICTY) judgments cited in its advisory such as the cases of

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<sup>62</sup> *id*

<sup>63</sup> Paras 84, 85

<sup>64</sup> For example see the cases of Prosecutor vs. Galic, IT-98-29-T, paras 336, 344, 395-396, 405-406 and Prosecutor vs. Strugar, IT-01-42-T, paras 71-72, 196-204 for the type of assessment required in determining the legality or illegality of an attack

Prosecutor vs. Galic,<sup>65</sup> Prosecutor vs. Dragomir Milosevic<sup>66</sup> and Prosecutor vs Strugar<sup>67</sup> it could have advised itself of these pertinent IHL issues.

35 It is of concern why the POE has totally disregarded IHL principles and opted to proceed on the basis that all artillery fire originating from the SLA positions constituted deliberate attacks against civilians.

36 The failure to assess these issues is surprising considering that the POE was privy to the relevant information. For example, paragraph 94 of the advisory contains a number of factors which could have led to the “PTK hospital” receiving indirect fire from SLA positions. For example PTK “*was a strategic stronghold in the LTTE’s fight against the SLA*”,<sup>68</sup> “*the front line was nearby*”,<sup>69</sup> *there was fierce fighting in PTK*,<sup>70</sup> “*LTTE fired mobile artillery from the vicinity of the hospital*”.<sup>71</sup> These facts demonstrate that PTK was a highly militarized area and the LTTE fire originated from the vicinity of the hospital, which would explain to an impartial audience other possibilities as to why the PTK hospital received shell impacts. Also the comment that the LTTE “*did not use the hospital for military purposes until after it was evacuated*”<sup>72</sup> infers that the POE is in possession of information that the LTTE did use humanitarian objects for military purposes. Yet, the POE chose to ignore the possible alternatives preferring to conclude adversely to the GOSL.

37 Similarly, the advisory contains sufficient information which shows that the LTTE rendered the second NFZ too in its entirety into a military target,<sup>73</sup> which may explain why the second NFZ received artillery impacts. In fact the POE’s awareness of this fact is demonstrated when it reported that the zone

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<sup>65</sup> Ft.nts. 112, 114, 115, 118, 1212, 122

<sup>66</sup> Ft.nts.113, 114,

<sup>67</sup> Ft.nts.111,118,119

<sup>68</sup> Para94

<sup>69</sup> *id*

<sup>70</sup> *Id*, see also para95

<sup>71</sup> Para94

<sup>72</sup> *id*

<sup>73</sup> Eg.para97:“LTTE leadership had a complex network of bunkers and fortifications and where it ultimately made its final stand”, They established a series of defensive bunkers “*throughout the zone*”, *positioning mortars and other artillery among the IDPs*

often received “*retaliatory fire*” from the SLA.<sup>74</sup> However, beyond mentioning “*retaliatory fire*”, the POE does not venture into an assessment of that fact, which has significant implications on the determination of the intent behind SLA artillery attacks.

38 While the POE leaves a simple note to the effect that the “LTTE cadre was not always in uniform at this stage”<sup>75</sup> it fails again to make reasonable correlations to exceptional and possibly extenuating circumstance. It ignores that the failure on the part of the LTTE to distinguish itself could have contributed to the SLA’s inability to distinguish between the LTTE and civilians, a factor, which might mitigate against a proposition that the SLA deliberately targeted civilians.<sup>76</sup>

39 The POE relies on six satellite images contained in Annex 3 of the advisory to support their conclusion that the SLA artillery batteries were “constantly adjusted to increasingly target” NFZs.<sup>77</sup> It is not at all clear how the six satellite images of damage to six hospitals support such a conclusion. There is no indication from the images as to the sources of fire and when each of the damage was caused.

40 The POE narrates events relating to the shelling in the third NFZ during the last six days of the operation, 13-18 May using language and photographs similar to a journalistic reportage.<sup>78</sup> The advisory contains vivid accounts of civilian suffering and deaths due to the shelling by the SLA. The POE reports that the SLA shelled the NFZ with persistence and heightened intensity disregarding calls for a reprieve from doctors and the AGA.<sup>79</sup> Yet, conspicuously absent is an analysis of the importance of the military targets present in the third NFZ and the concrete and direct military advantage

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<sup>74</sup> Para97

<sup>75</sup> *id*

<sup>76</sup> See executive summary page iii, para3, which reflects the POE’s alertness to the fact, yet its failure to factor it in when determining the intent behind SLA artillery fire

<sup>77</sup> para101

<sup>78</sup> Paras115- 123

<sup>79</sup> Para119

obviously anticipated by the SLA in the attacks carried out in the final phase of the operation. In fact this scenario would have been an ideal opportunity for the POE to examine pertinent principles of IHL such as military necessity and proportionality if the task was approached legalistically.

41 The most important military target for the GOSL forces in the entire war, namely the senior LTTE leadership, including the leader himself, Prabhakaran were present within the third NFZ.<sup>80</sup> Additionally, “hard core” LTTE cadre and LTTE communication systems were located within the zone.<sup>81</sup> The third NFZ was merely a narrow strip of land containing only three square kilometers.<sup>82</sup> The LTTE was still active militarily within the NFZ and heavily resisted, including through suicide missions.<sup>83</sup> They were still armed with heavy weaponry and shelled even civilians who attempted to escape the zone.<sup>84</sup> In these circumstances given the restricted battle area and the volume of civilians present, one does not have to be an expert in military affairs nor IHL to appreciate the quantum of collateral damage that could have entailed in a legitimate military attack against the LTTE.

42 The POE has completely disregarded the above factors in reaching their conclusions. Instead, the POE reports “as the SLA neared the hiding places of the senior LTTE leadership, its offensive assumed a new level of intensity, *in spite* of thousands of civilians who remained trapped in the area”.<sup>85</sup>

43 Further, the facts reported may indicate how and why gatherings of civilians may have been collateral damage. For example in the executive summary, the POE reports that the LTTE “fired artillery in proximity to large groups of IDPs.”<sup>86</sup> The POE has failed to assess these factors in reaching their conclusions.

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<sup>80</sup> Paras117, 120, 121

<sup>81</sup> Para120

<sup>82</sup> Paras115, 120

<sup>83</sup> Paras117, 119

<sup>84</sup> Para119

<sup>85</sup> Para117

<sup>86</sup> Executive summary, page iii, para4

44 The myopic and blinkered bias in which the POE drew their conclusions is further illustrated in its constant tendency to determine the source of fire in a given artillery attack to be SLA positions without a reasonable basis.<sup>87</sup> Determining a source of artillery fire is a complex exercise as reflected in trial proceedings in the international tribunals.<sup>88</sup> In the absence of crater analyses, the POE ought to have assessed other relevant factors, which would assist in determining origin of fire, such as the witnesses' (assuming there are witnesses to such facts), capacity to observe the directions of fire in terms of his/her vantage point etc.<sup>89</sup> Given the LTTE's tendency to shell civilians,<sup>90</sup> and the desperate need it must have been in during the final phases to obtain international assistance to halt the SLA advance, the POE ought to have considered alternative possibilities such as the LTTE shelling on civilian gatherings to implicate the SLA and discredit it in the eyes of the international community.<sup>91</sup> Regardless, the POE has jumped into conclusions on the origin of fire without exploring these possible alternative explanations.

45 The above reflects that the POE has drawn unfair and unjust conclusions without assessing all relevant information and considering all possibilities and interpretations of events.

Executions, disappearances, rape and sexual violence committed after cessation of hostilities by GOSL forces

46 The POE draws a sweeping conclusion that "Sri Lankan soldiers" executed prisoners of war,<sup>92</sup> principally on the basis of the "Channel 4" footage

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<sup>87</sup> Eg.Paras91, 105

<sup>88</sup> For example see Prosecutor vs. Galic, IT-98-29-T, paras328, 334,335, 341, 377 378-380, 393; Also Prosecutor vs. Dragomir Milosevic; Prosecutor vs. Strugar; Prosecutor vs. Ante Gotovina et al

<sup>89</sup> See Prosecutor vs. Galic,IT-98-29-T, paras340, 402 and Prosecutor vs, Strugar,IT-01-42-T, paras 63, 67, 106 for the type of assessment required

<sup>90</sup> Para119

<sup>91</sup> It is not an unknown phenomenon in conflicts, where a party attacks civilians within territory of its own control for propaganda purposes. For eg. see Prosecutor vs, Galic IT-98-29-T Para 206.

<sup>92</sup> Paras149, 150



broadcast in 2009 and 2010. A greater part of the narrative of this specific allegation in the advisory is a description of footage shown on “Channel 4”.<sup>93</sup> It is startling to note that a panel of experts advising the UNSG would reach conclusions on the culpability of members of the armed forces of a sovereign state for serious crimes, relying principally on an uncorroborated journalistic product.

47 The lack of reliability of the POE’s observations is reflected in the fact that it refers to the Channel 4 footage as “authenticated footage”<sup>94</sup> when the very source it cites in support for authenticity, Mr. Philip Alston, UN Special Rapporteur on extra judicial executions, merely states the following regarding the video: “*while there are some unexplained elements in the video, there are strong indications of its authenticity*”.<sup>95</sup> The statement attributed to Mr. Alston is by no means an authentication of the video. On the contrary it casts some degree of doubt regarding the authenticity of some elements in the video.

48 The POE has relied on the “Channel 4” video as the basis for a number of their conclusions.<sup>96</sup> Considering the controversy surrounding the authenticity of the video footage and the international furor raised in the wake of its screening, it was counterproductive for the POE to regurgitate the same disputed sources of information with no new or discerning perspectives. The anti GOSL bias of the POE is further reflected in the fact that it interprets the unauthenticated footage and photographs which depicts persons in uniforms of the SLA as “Sri Lankan soldiers”<sup>97</sup> without considering alternative possibilities such as imposters staging the activity to discredit the GOSL.

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<sup>93</sup> *id*

<sup>94</sup> Para149

<sup>95</sup> Foot note 87

<sup>96</sup> Eg.Paras149, 150, 153

<sup>97</sup> Para149

49 In its executive summary, the POE speculates that during the post war screening, “some women *may* have been raped”.<sup>98</sup> This indicates that the POE has not received information of rape of women, beyond the insinuations made in the Channel 4 Video. This fact is confirmed by the POE’s speculation; “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...”<sup>99</sup> Any reasonable individual/body would have taken the absence of reports to be a factor which may indicate the lack of credibility of an allegation. Yet, the POE not only concludes that GOSL forces raped Tamil women without reports to such effect, but takes pain to explain the possible reasons for the absence of such information. This reflects the POE’s partiality and the fact that it pursued a specific agenda against the GOSL in carrying out its task.

50 The lack of specificity and objectivity in the approach of the POE is also reflected in its sweeping assertions, such as “rape or sexual violence may have occurred, either prior to or *after execution*.”<sup>100</sup> Another example is the statement that “detention of the IDP population lasted for months or in some cases *years*”<sup>101</sup> which leaves the impression of a number of years when it has been less than two years from the conclusion of hostilities to the time of the publication of the advisory. More important there is no allusion to the demining and the lack of housing that precludes faster rehabilitation and that in some instances it is the volition of the IDP to stay within a free movement compound as opposed to purported incarceration.

51 Significantly all acts of a criminal nature are attributed to the GOSL<sup>102</sup> or the Sri Lanka police (CID or TID)<sup>103</sup> or the SLA.<sup>104</sup> Yet, positive acts which bear

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<sup>98</sup>Executive summary page iii, para2

<sup>99</sup> Para152

<sup>100</sup> Para153

<sup>101</sup> Para158

<sup>102</sup> Eg.para176(d)

<sup>103</sup> Eg.Para153

<sup>104</sup> Eg.Para150

evidence of a humanitarian approach on the part of the GOSL or its forces towards the civilians are attributed to “individual soldiers”,<sup>105</sup> to counter inferences favourable to the GOSL. For example “those who managed to escape were helped by *individual SLA soldiers*”.<sup>106</sup>

52 In this context it is puzzling as to why the POE, which has shown a steep inclination to rely on video footage, did not consider it fit to assess video footage available in the public domain,<sup>107</sup> showing large numbers of SLA soldiers rescuing civilians in the midst of artillery and gun fire, some carrying the injured through the melee. Examination of such information may have led a reasonable person/body to conclude alternatively that such rescues were consequent to a collective effort.

The GOSL excluded the international monitors from the theatre of war as a strategy to conceal crimes

53 The panel concludes that the GOSL excluded the international community from the conflict zone altogether “as part of a strategy”.<sup>108</sup> While the panel does not provide any information to substantiate this conclusion, the facts reported does not necessarily lead to such a conclusion.<sup>109</sup> The panel draws a sweeping conclusion to the effect that the GOSL was “unwilling” to guarantee the safety of members of international organizations in the war zone<sup>110</sup>, blatantly rejecting the possibility that the GOSL may have been unable to “guarantee” anyone’s safety in the theatre of war, in the midst of a military offensive. The panel’s preference to jump to conclusions adverse to the GOSL, refusing to take the judicious approach it claims to have taken in assessing information leaves room for doubt of its impartiality.

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<sup>105</sup> Para119

<sup>106</sup> *id*

<sup>107</sup> Eg. Footage broadcast by ITN on or about 16<sup>th</sup> May 2009

<sup>108</sup> Para65

<sup>109</sup> Para74:On 8 Sept 2008, the GOSL requested the UN and the INGOs to leave the area as it could not guarantee their safety any longer.

<sup>110</sup> Para74

54 The POE reports that the GOSL “strategy” to deliberately exclude international organizations from the theatre of war, “represented a pivotal point in the final stages of 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”.<sup>111</sup> In other words the POE concludes that the GOSL excluded the international community from the theatre of war as “a strategy” to conceal the crimes that were to be committed by its forces.

55 However, in another part of the advisory, the POE contradicts this observation when it draws very serious conclusions with respect to alleged artillery attacks on civilians by the SLA based on observations of the very same international organizations that were reportedly absent in the theatre of war.<sup>112</sup> The POE in fact provides explicit details of consequences of the shelling in emotive language based on purported observations of members of the UN.<sup>113</sup> The POE reports not only the presence of the “United Nations contingent” in the NFZ during the relevant period but also the ICRC,<sup>114</sup> and relies on photographs taken by the “UN international staff” during this period to draw its conclusions.<sup>115</sup> Contradictions such as these raise issues of reliability of the advisory.

#### **Does the POE demonstrate bias?**

56 In addition to the instances noted above which reflects bias, the following two factors may demonstrate that the POE has pursued an agenda based exercise in carrying out its task.

57 The POE takes to interpret events refusing to take information at its face value unlike an independent impartial body. For example it reports that “the

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<sup>111</sup> Para76

<sup>112</sup> paras84, 85, 86 and 87

<sup>113</sup> Para85

<sup>114</sup> Paras87, 91

<sup>115</sup> Foot note 41

Government regularly dropped leaflets urging civilians to leave the area”.<sup>116</sup> Instead of taking this as evidence of the Government’s declared intent to minimize civilian casualties which is the most proximate conclusion any reasonable person could draw, the POE goes to great lengths to rebut that inference.<sup>117</sup>

58 Having acknowledged the reasons why the civilians could not have left in response to the Government’s leaflets, such as “LTTE pass system”, that most people were reluctant to leave as “Vanni was their home” and many had moved with the LTTE since 1995,<sup>118</sup> the POE speculates further that “from experience” civilians feared what would happen to them if they crossed over to the Government held areas, feared internment, white vans, being raped or tortured by the SLA.<sup>119</sup> The POE fails to explain the basis for this conclusion.

59 The agenda of the POE to conclude adversely against the GOSL regardless of the facts placed before them is easily discernible in the manner it reaches its conclusion on the civilian casualty figures. As demonstrated throughout the advisory, the POE was extremely receptive to information emanating from UN sources and drew wide conclusions solely on the basis of information received from the UN staff.<sup>120</sup> Yet, in order to escalate the numbers of civilian deaths in the conflict the POE does not hesitate to reject official estimates on civilian casualties emanating from UN sources, without reasonable grounds.

60 The UN Country Team for Sri Lanka “in a document that was never released publicly” estimated a total figure of 7,721 killed and 18,479 injured from August 2008 up to 13 May 2009, after which it became too difficult to count.<sup>121</sup> These figures were collated pursuant to a survey conducted via

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<sup>116</sup> Para71, see foot note 28

<sup>117</sup> See para71

<sup>118</sup> Para71

<sup>119</sup> *id*

<sup>120</sup> Eg.Paras84-87

<sup>121</sup> Para134

local networks within the war zones.<sup>122</sup> The High Commissioner for Human Rights made a public statement that 2800 civilians may have been killed and more than 7000 injured since 20th January, many of them inside the NFZs.<sup>123</sup> It is not clear when the High Commissioner made this statement, although the response by the Government<sup>124</sup> indicates that the statement must have been made on or before 15 March 2009. Since the estimates provided by the UN Country Team are for the period up to 13 May, it can reasonably be concluded that the figures provided by the OHCHR are included therein.

61 Regardless of the above official estimates, the POE starts off its analysis with the statement that “there is no authoritative figure for civilian deaths or injuries in the Vanni in the final phase of the war”.<sup>125</sup> Then it adopts a mechanism to escalate the figure by noting that while the number calculated by the UN Country Team provides “a starting point, *but it is likely to be too low*”.<sup>126</sup> The POE concludes that “in reality, the total number could easily be *several times* that of the United Nations figure”.<sup>127</sup>

62 The POE lists two factors that could have rendered the casualty figures “several times” higher than the UN figure.<sup>128</sup> The POE argues that firstly, the UN figures only account for the casualties observed in the LTTE-controlled areas and many casualties may not have been observed at all.<sup>129</sup> Unless there is an allegation that any one of the factions shelled/shot civilians in areas under the control of the GOSL, the civilian casualties in the final phase of the war ought to have been within LTTE-controlled territory. And considering the extensive net-work of observers utilized in the UN survey within the

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<sup>122</sup> *Id*

<sup>123</sup> Para136

<sup>124</sup> Reported at foot note 79

<sup>125</sup> Para132

<sup>126</sup> Para135

<sup>127</sup> *id*

<sup>128</sup> *id*

<sup>129</sup> *id*

LTTE-controlled territory,<sup>130</sup> the figures observed ought to be taken as authoritative, leaving perhaps a narrow margin for the unaccountable.

63 The second factor contemplated by the POE is indeed reasonable.<sup>131</sup> The number of civilian casualties after 13 May must have grown rapidly considering the intensity of the fighting and the narrow strips of land in which the civilians were trapped. Yet what the POE has failed to take into account is that the UN figures are for the period August 2008 up to 13 May 2009, a period of nine months during which there was intense fighting including shelling by both parties. In such context to guesstimate that the figures for the last five days of the operation could be “several times” higher than the total figure for nine months amounts to a wild speculation without any reasonable basis.

64 The POE refers to numerous baseless formulas adopted by “some”<sup>132</sup> and imprecise or inflammatory language used by the UN in the public domain such as “heavy toll”,<sup>133</sup> “unacceptably high”<sup>134</sup> and “blood bath”<sup>135</sup> to justify its conclusion that the figures ought to be “several times” higher than the UN Country Team estimates. It then makes a quantum leap and asserts that “multiple sources of information indicate that range of up to 40,000 civilian deaths cannot be ruled out at this stage”.<sup>136</sup>

65 It is significant that the POE did not think it fit to take seriously figures provided by none other than the UN Country Team consequent to perhaps the only proper and official survey conducted into this matter and has opted to rely on unnamed “multiple sources”. Even if all the factors listed by the POE as reasons for escalation of the casualty figures are taken on board, still it is

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<sup>130</sup> See para134

<sup>131</sup> Para135

<sup>132</sup> Para133

<sup>133</sup> Para136

<sup>134</sup> *id*

<sup>135</sup> Foot note 79

<sup>136</sup> Para137

highly improbable that the final civilian casualty figure could be over 500% more than the UN estimate (40,000 as opposed to 7721). Yet, the POE's preference to rely on such an improbable figure rejecting the results of an authoritative survey by the UN team perhaps reflects the very essence of the "expert" exercise it has carried out.

66 Having escalated the figures as aforesaid, the POE then draws an untenable conclusion that "most civilian casualties in the final phases of the war were caused by Government shelling".<sup>137</sup> A conclusion of this nature could only have been made pursuant to a survey of the civilian casualties and the causes of their death. Such a survey would also require an assessment of the civilian/combatant status of the deceased considering the POE's own finding that during the final phase of the conflict the LTTE cadre was indistinguishable from civilians as they were not always in uniform.<sup>138</sup> Considering the POE's own claim that there is "no authoritative figure of civilian deaths",<sup>139</sup> it begs the question how the POE arrived at this conclusion.

67 The POE allocates an entire section to an analysis of the effectiveness of the LLRC,<sup>140</sup> concluding that the LLRC "is deeply flawed".<sup>141</sup> It was imprudent for a panel of experts to express a judgment call of this nature prematurely without waiting to consider the report of the Commission.

68 The POE deals an egregious blow to any civilized individual/ body that respects human rights by describing the LTTE "as the *most disciplined and most nationalist*" of the Tamil militant groups.<sup>142</sup> The LTTE has been described by the US Federal Bureau of Investigation (FBI) in its January 10, 2008 report as one of the most dangerous and deadly extremist outfits in the world. They are known to have 'inspired' terrorist networks worldwide,

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<sup>137</sup> Executive summary page ii, para4

<sup>138</sup> Para97

<sup>139</sup> Para132

<sup>140</sup> Paras290-345

<sup>141</sup> Para345

<sup>142</sup> Para31



including the al-Qaeda and are also credited for introducing suicide bombing. It has been proscribed in 32 countries including India, U.S., U.K. Canada, Australia and the EU. It has decimated the alternate democratic Tamil political voices and had held at ransom many liberal disenfranchised Tamil speaking citizens who would have preferred a political resolution to the conflict. It held at bay for three decades an entire nation and posed a serious international risk with its terrorism training, human and drug trafficking and arms dealing. The LTTE has been convicted by Indian Courts for the assassination of the Indian Premier, Rajiv Gandhi and as such, it is perhaps one of the very few, if not the only terror group to have assassinated a head of state of another country. Thus to describe the LTTE as “disciplined”, particularly in the backdrop of the POE’s own findings that the LTTE killed civilians who were attempting to flee the area,<sup>143</sup> forcibly conscripted children,<sup>144</sup> used civilians as “cannon fodder”,<sup>145</sup> forced the already traumatized civilians to dig trenches<sup>146</sup> etc. amounts to a grave blow to the very principles of humanity and the dignity of all those who have suffered at the hands of the LTTE.

69 This statement has shocked not only the Sri Lankan nation but also members of the international community. For example speaking on the POE’s findings, the Russian Ambassador to Sri Lanka, H.E. Vladimir Mikhaylov observed: “And to describe the LTTE as the most disciplined and nationalist militant group, it is very strange to describe not as a terrorist organization which it was recognized by many governments all over the world. I may say that immediately I was reminded of the SS Squads of Adolf Hitler was even more disciplined. But it is not the major characteristic of such organizations”.<sup>147</sup>

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<sup>143</sup> Para 177(b) & (f)

<sup>144</sup> Para 177(d)

<sup>145</sup> Para 177(a)

<sup>146</sup> Para 177(e)

<sup>147</sup> <http://www.news.lk/features/political/18011>

## **Conclusion**

70 All wars are intrinsically evil and the civilians are inevitably innocent victims of war. As such, all parties to a conflict must abide by the cardinal principle that civilians and civilian objects should not be the object of attack in the conduct of hostilities. It is thus critical that an international authority such as the United Nations oversees the arena of IHL to ensure universal compliance. But if the UN system is to remain relevant and realistic in a post conflict discourse, it must be consistently fair in its censure. Time and again this balance is lacking in the POE advisory.

71 The post conflict progress made by the peoples of Sri Lanka is evident. According to both the UNESCAP in its' latest economic and social survey as well as the Asian Development Bank, Sri Lanka's post-conflict economy is expected to grow at 8% in 2011. Last year's growth (2010) at over 8% was the highest post-independent growth rate for Sri Lanka. The country has now reached middle income status and the GDP per capita is expected to reach US \$ 4000 by 2016. It is envisaged that investments will be increased to about 33 per cent of the GDP with sustained commitment of public investment of 6-7 percent of GDP to support increased private sector investment. The IMF has classified Sri Lanka as an "Emerging Asian Economy" along with China, India, Thailand, Philippines, Malaysia, South Korea, Indonesia, Hong Kong and Taiwan. Sri Lanka is also undertaking important infrastructure development projects, integrating all parts of the country and expanding our connectivity to the world. Sri Lanka has given priority to the development of areas of the country which have lagged behind due to conflict and neglect. With the return of post-conflict stability, remittances from Sri Lankan workers overseas as well as income from tourism has risen. Many Sri Lankans who had sought refuge in western capitals are now returning to the North and East. In 2010, the Sri Lankan Stock Market was recorded as one of the fastest growing Stock Exchanges in the world.

72 For several decades, the LTTE had prevented the population of the North & East from exercising their democratic rights including the right to participate in free and fair elections. With the end of the conflict, the population living within the formerly LTTE controlled territory had the opportunity to elect their own local governments. In the recent most elections held in the North, the Tamil National Alliance swept into power. Additionally, in other parts of the country stringent security controls, such as military barriers and security check points have been greatly relaxed, enhancing people's freedom of movement and establishing a sense of personal security and wellbeing.

73 Sri Lanka's Private Sector, has contributed greatly in steering the nation's economy through turbulent periods spanning over three decades. The resilience of the Private Sector backed by sound economic policies ensured that the country did not buckle under the pressures of waging a three-decade war against terrorism, a southern youth uprising and a devastating Tsunami, and spared the population from the ravages of war, such as famine, disease and degradation of the entire social structure as experienced by other war-torn nations. Economic stability will be pivotal to reparative justice and sustainable regeneration. Confidence building will be critical to investment appetite and the pace of change. The UN and the International Development Community must give peace a chance.

74 In this backdrop, the Sri Lankan Private Sector has observed with deep concern the exchanges between the GOSL and the international community on the issue of accountability without a resolution. While the quandary snowballs out of proportion, the negative impact of the measures taken by the international community so far to censure the GOSL is felt not at the level of the GOSL but at ground level by the citizens of the country. For example deprivation of the GSP Plus taxes by the EU is felt at the level of the small holder apparel manufacturers/exporters and the contemplated US economic sanctions, if implemented will greatly affect the population.

75 It is in this context that we commenced this critique: to explore its merits, demerits and the impacts on the future of sustainable peace, reconciliation and racial equity. The UN surely knows that a bridge of trust can only be built on commonalities and shared aspirations. Demonizing the GOSL war strategy will only fester old wounds. It is time to move on in constructive ways. The interim note of LLRC has some realistic suggestions. It is far from perfect, but it may be a step in the right direction.

76 We believe that the only pragmatic and sustainable mechanism that will have collective agreement amongst the nation's fractured communities and its incumbent leaders, is one that uses a diverse representation of domestic public, private and ethnic composition. Sri Lanka has the intellectual and moral capital to formulate a process that is equitable and conforms to International standards and conventions and has buy-in with the people for a sustainable solution that does not flare up again.

77 It is our view that if the UN or any other body has concerns over a certain lacunae in the response and preparedness for accountability within the Government -the most appropriate mechanism for the crafting of this process is a public- private partnership with both civil society and media as part of the stakeholder participation. Further a capacity building of existing mechanisms such as the LLRC or a new body with appropriate oversight may be more effective, if we can focus on ensuring it is resourced with capable, committed and independent leadership of moral and intellectual stature.

A tall order but not an impossible one.

The people of Sri Lanka can and will rise to this momentous chance at true and lasting peace and reconciliation.