

# **WAR CRIMES IN SRI LANKA**

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## WAR CRIMES IN SRI LANKA

### EXECUTIVE SUMMARY AND RECOMMENDATIONS

The Sri Lankan security forces and the Liberation Tigers of Tamil Eelam (LTTE) repeatedly violated international humanitarian law during the last five months of their 30-year civil war. Although both sides committed atrocities throughout the many years of conflict, the scale and nature of violations particularly worsened from January 2009 to the government's declaration of victory in May. Evidence gathered by the International Crisis Group suggests that these months saw tens of thousands of Tamil civilian men, women, children and the elderly killed, countless more wounded, and hundreds of thousands deprived of adequate food and medical care, resulting in more deaths.

This evidence also provides reasonable grounds to believe the Sri Lankan security forces committed war crimes with top government and military leaders potentially responsible. There is evidence of war crimes committed by the LTTE and its leaders as well, but most of them were killed and will never face justice. An international inquiry into alleged crimes is essential given the absence of political will or capacity for genuine domestic investigations, the need for an accounting to address the grievances that drive conflict in Sri Lanka, and the potential of other governments adopting the Sri Lankan model of counter-insurgency in their own internal conflicts.

Crisis Group possesses credible evidence that is sufficient to warrant an independent international investigation of the following allegations:

- ❑ **The intentional shelling of civilians.** Starting in late January, the government and security forces encouraged hundreds of thousands of civilians to move into ever smaller government-declared No Fire Zones (NFZs) and then subjected them to repeated and increasingly intense artillery and mortar barrages and other fire. This continued through May despite the government and security forces knowing the size and location of the civilian population and scale of civilian casualties.
- ❑ **The intentional shelling of hospitals.** The security forces shelled hospitals and makeshift medical centres – many overflowing with the wounded and sick – on multiple occasions even though they knew of their

precise locations and functions. During these incidents, medical staff, the United Nations, the International Committee of the Red Cross (ICRC) and others continually informed the government and security forces of the shelling, yet they continued to strike medical facilities through May forcing civilians to abandon them.

- ❑ **The intentional shelling of humanitarian operations.** Despite knowing the exact location of humanitarian operations and food distribution points, the security forces repeatedly shelled these areas, which were crowded with humanitarian workers, vehicles and supplies, and civilians. Many were killed or wounded trying to deliver or receive basic humanitarian assistance, including women, children and infants.

The consequences of the security forces' shelling were made substantially worse by the government's obstruction of food and medical treatment for the civilian population, including by knowingly claiming the civilian population was less than one third its actual size and denying adequate supplies.

The government declined to respond to Crisis Group's request for comment on these allegations.

There is also strong evidence that the LTTE engaged in:

- ❑ **The intentional shooting of civilians.** The LTTE fired on and killed or wounded many civilians in the conflict zone who were attempting to flee the shelling and cross into government-controlled areas.
- ❑ **The intentional infliction of suffering on civilians.** The LTTE refused to allow civilians to leave the conflict zone, despite grave danger from shelling and lack of humanitarian supplies, even when the civilians were injured and dying. The LTTE also forcibly recruited many civilians to fight or serve as labourers and beat some family members who protested the recruitment.

The substantial body of evidence collected by Crisis Group since August 2009 offers a compelling case for investigation of the conduct of hostilities and the role of the mili-

tary and political leadership on both sides. It consists of numerous eyewitness statements that Crisis Group has taken and considers to be reliable as well as hundreds of photographs, video, satellite images, electronic communications and documents from multiple credible sources. But it covers only a small number of the violations allegedly committed and is but a first step in what should be a major effort to examine the last year of the war. Among the other allegations that should be investigated are the recruitment of children by the LTTE and the execution by the security forces of those who had laid down their arms and were trying to surrender.

Much of the international community turned a blind eye to the violations when they were happening. Some issued statements calling for restraint but took no action as the government continually denied any wrongdoing. Many countries had declared the LTTE terrorists and welcomed their defeat. They encouraged the government's tough response while failing to press for political reforms to address Tamil grievances or for any improvement in human rights. The eventual destruction of the LTTE militarily came at the cost of immense civilian suffering and an acute challenge to the laws of war. It also undermined the credibility of the United Nations and further entrenched a bitterness among Tamils in Sri Lanka and elsewhere which may make a durable peace elusive. Now a number of other countries are considering "the Sri Lankan option" – unrestrained military action, refusal to negotiate, disregard for humanitarian issues – as a way to deal with insurgencies and other violent groups.

To recover from this damage, there must be a concerted effort to investigate alleged war crimes by both sides and prosecute those responsible. Sri Lanka is not a member state of the International Criminal Court (ICC), and the UN Security Council is not likely to refer these crimes to the ICC in the short term. While some of the LTTE may go on trial in Sri Lanka, it is virtually impossible that any domestic investigation into the government or security forces would be impartial given the entrenched culture of impunity. A UN-mandated international inquiry should be the priority, and those countries that have jurisdiction over alleged crimes – including countries such as the U.S. where dual nationals or residents may be suspected – should vigorously pursue investigations.

## RECOMMENDATIONS

### To the Government of Sri Lanka:

1. Cooperate fully with international efforts to investigate alleged war crimes, including a UN-mandated international inquiry, guaranteeing free access to the conflict area and effective protection of witnesses.

2. Try LTTE cadres suspected of war crimes in open court, allowing them and witnesses against them full protections required by international law and permitting international oversight, or release them if there is insufficient evidence.
3. Invite the UN special rapporteurs on extrajudicial executions, torture, violence against women, the right to food, the right to health, the protection of human rights while countering terrorism and the situation of human rights defenders, and the special representatives on the human rights of internally displaced persons (IDPs) and on children and armed conflict, to visit Sri Lanka to investigate the conduct of the last year of hostilities.
4. Compile, with the assistance of the ICRC and/or the UN High Commissioner for Human Rights, a full and public register of those killed, wounded and missing from the final months of the war, including the circumstances of their death, injury or disappearance; and issue death certificates and provide financial compensation for civilians killed or wounded and for property destroyed or damaged.
5. Provide ICRC with full access to all places of detention, including where LTTE suspects or surrendees are being held, and allow detained individuals full protections under international law.

### To the United Nations and Member States:

6. Authorise an independent international inquiry into alleged war crimes in Sri Lanka during the last year of the conflict, tasking it to investigate the conduct of both sides, to complete its work within a reasonably short period and to recommend steps to be taken by national and international authorities to ensure accountability for any crimes.
7. Begin inquiries into attacks on UN assets and personnel and into the conduct of the UN during the last year of the conflict, examining the UN's September 2008 withdrawal from Kilinochchi through to its ineffectual attempts to push for a ceasefire and its involvement in Sri Lankan government internment camps.
8. Empower the special rapporteurs on extrajudicial executions, torture, violence against women, the right to food, the right to health, the protection of human rights while countering terrorism and the situation of human rights defenders, and the special representative on the human rights of internally displaced persons (IDPs), to carry out full investigations of the conduct of the last year of hostilities, particularly into alleged extrajudicial executions and torture, and the special representative on children and armed conflict to more completely investigate the recruitment of child soldiers and killing and maiming of children.

9. Make available to any credible efforts to investigate alleged war crimes in Sri Lanka all relevant information within the possession or control of the UN.
10. Ensure that Sri Lankan contributions to UN peacekeeping missions are consistent with universal human rights principles, including by ensuring the systematic pre-deployment screening of Sri Lankan personnel to identify any individuals allegedly involved in war crimes or human rights violations.
13. Support non-frivolous civil suits by or on behalf of alleged victims of the security forces or the LTTE, including by limiting claims of immunity.
14. Grant asylum or other protected status to witnesses and act to preserve evidence of war crimes, particularly by allowing officials to cooperate with credible investigations.
15. Impose targeted sanctions, including travel restrictions, on Sri Lankan officials and members of their families, unless and until the government cooperates with international efforts to investigate alleged war crimes.

**To India, the United States, Canada, Australia, the United Kingdom, France, Other EU Member States, Switzerland and Others:**

**Brussels, 17 May 2010**

11. Do not extradite LTTE suspects to Sri Lanka unless guarantees of humane treatment and fair trials are in place. Instead prosecute in domestic courts where possible and appropriate.
12. Begin investigations into alleged war crimes or human rights abuses in cases where jurisdiction may exist, including where nationals or residents are allegedly involved. Ensure such investigations have sufficient resources and share evidence in the possession or control of governments, including satellite imagery.

## WAR CRIMES IN SRI LANKA

### I. INTRODUCTION

Both sides in Sri Lanka's civil war violated international humanitarian law throughout the 30-year conflict.<sup>1</sup> However the violations became particularly frequent and deadly in the months leading to the government's declaration of victory over the Liberation Tigers of Tamil Eelam (LTTE) in May 2009. There is an increasing body of evidence that the government security forces repeatedly violated the law by attacking civilians, hospitals and humanitarian operations, and that the LTTE violated the law by killing, wounding or otherwise endangering civilians, including by shooting them and preventing them from leaving the conflict zone even when injured and dying. The International Crisis Group believes that tens of thousands of non-combatant Tamil men, women, children and the elderly were killed in the final five months of the war.

In August 2009, Crisis Group began gathering evidence relating to the conduct of hostilities in the final months of the war. It includes eyewitness statements taken and deemed credible by Crisis Group as well as hundreds of photographs, video, satellite imagery, electronic communications and documents from a wide range of sources. The material is far from exhaustive; indeed it covers only a small number of the violations that are likely to have taken place and touches on the alleged roles of only a handful of individuals.

This evidence provides reasonable grounds to believe war crimes were committed by both sides. It also provides reasonable grounds to investigate particular individuals, including top government and military leaders. This also applies to the leadership of the LTTE; most of them were killed in the final days of fighting, but some are in Sri Lankan custody and some may have escaped abroad.

There are compelling reasons to pursue these cases. The alleged crimes are among the worst in recent years with civilian suffering on an immense scale. The military strategy the government chose to destroy the LTTE required a deep erosion of the principle of distinction between combatants and civilians.<sup>2</sup> It is critical that international humanitarian law continue to apply equally in all armed conflicts, including when acts that are considered "terrorist" – such as killing civilians or holding them hostage – occur in the context of armed conflict or the response to such acts takes the form of armed conflict.<sup>3</sup> The pretext of terrorism as a justification for failing to respect international humanitarian law may have significant and damaging fall out. Already discussion has started in several countries about deploying "the Sri Lanka option" in their own conflicts.<sup>4</sup>

<sup>2</sup> The principle of distinction is a fundamental tenet of international humanitarian law. It requires that parties to a conflict must at all times distinguish between civilians and combatants and between civilian objects and military objectives. Attacks may only be directed against combatants or military objectives. Attacks must not be directed against civilians or civilian objects. Jean-Marie Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict", *International Review of the Red Cross* 87, no. 857 (March 2005), p. 198.

<sup>3</sup> See generally, "Terrorism and international humanitarian law", resource page, International Committee of the Red Cross (ICRC), at [www.icrc.org/web/eng/siteeng0.nsf/html/terrorism](http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism).

<sup>4</sup> For discussion of "the Sri Lanka option" see: V.K. Shashikumar, "Lessons from the War in Sri Lanka", *Indian Defence Review* 24, no. 3 (July-September 2009), and "The Rajapaksa Model of Defeating Terror, Securing Peace and National Reconciliation", *Indian Defence Review* 24, no. 4 (October-December 2009), both at [www.indiandefencereview.com](http://www.indiandefencereview.com); Lawrence Hart, "The option no one wants to think about", *The Jerusalem Post*, 9 December 2009, at [www.jpost.com/servlet/Satellite?cid=1259243055252&pagename=JPArticle%2FShowFull](http://www.jpost.com/servlet/Satellite?cid=1259243055252&pagename=JPArticle%2FShowFull); "Government mulls adopting tactics of Sri Lanka", *Bangkok Post*, 23 October 2009, at [www.bangkokpost.com/news/local/26109/govt-mulls-adopting-tactics-of-sri-lanka](http://www.bangkokpost.com/news/local/26109/govt-mulls-adopting-tactics-of-sri-lanka); "Is Than Shwe seeking military advice in Sri Lanka?", *The Irrawaddy*, 12 November 2009, at [www.irrawaddy.org/article.php?art\\_id=17202](http://www.irrawaddy.org/article.php?art_id=17202); "No Sri Lanka solution to Moro conflict", *Inquirer*, 4 October 2009, at <http://newsinfo.inquirer.net/breakingnews/nation/view/20091004-228327/No-Sri-Lanka-solution-to-Moro-conflict>;

<sup>1</sup> See Crisis Group Asia Reports N°135, *Sri Lanka's Human Rights Crisis*, 14 June 2007; N°146, *Sri Lanka's Return to War: Limiting the Damage*, 20 February 2008; N°172, *Sri Lanka: Politicised Courts, Compromised Rights*, 30 June 2009; and N°186, *The Sri Lankan Tamil Diaspora After the LTTE*, 23 February 2010; also Asia Briefing N°99, *Sri Lanka: A Bitter Peace*, 11 January 2010.

The responsibility for seeing justice done will almost certainly fall to those outside Sri Lanka. While LTTE leaders may be prosecuted domestically, it is highly unlikely that government or military officials will be brought to justice. If the increasingly unshakable culture of impunity in Sri Lanka prevails, the deep wounds of the Tamil community are unlikely to heal and the grievances that have fed the conflict will not be resolved. A failure to pursue justice will almost certainly stoke more conflict.

The evidence gathered by Crisis Group has been safeguarded and will be made available to international or national authorities that are able to ensure a credible legal process that includes the protection of witnesses. The identities of witnesses are not revealed in this report. The Sri Lankan government has a long history of intimidation of critics and those with knowledge of atrocities.<sup>5</sup>

This is an unusual report for Crisis Group in that much of it is drawn from eyewitness statements and the analysis is based closely on international law, using the Rome Statute of the ICC as a benchmark. However, it is at its heart about conflict prevention in that justice and accountability will be vital in Sri Lanka if the country is to avoid a resumption of its civil war. Just as violence against Tamils in 1983 lay at the heart of the conflict for 30 years, the killings in the Vanni could drive future violence. Ending the cycle of violence and impunity is essential. None of the evidence collected by Crisis Group has been tested in a court of law and it does not establish the guilt or innocence of any individual. But Crisis Group believes the evidence is sufficient to warrant an independent international investigation.

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“Border tribes ask Pakistan to crush the Taliban”, Associated Press, 21 March 2010; and “B’desb keen to learn counter-insurgency tactics from Lanka”, News 24, 23 March 2010, at [www.news24.lk/20100323673/news/sri-lanka-local-news/bdesh-keen-to-learn-counter-insurgency-tactics-from-lanka.html](http://www.news24.lk/20100323673/news/sri-lanka-local-news/bdesh-keen-to-learn-counter-insurgency-tactics-from-lanka.html).

<sup>5</sup> There are a number of recent cases in which the government is suspected of having intimidated witnesses or critics. For example, the father of one of the five Tamil students killed in Trincomalee on 2 January 2006 was threatened and eventually forced into exile after he spoke to the media and gave evidence that implicated the police in a preliminary judicial hearing. “Injustice fuels Sri Lanka’s cycle of abuse and impunity”, Amnesty International, press release and video of the father, Dr Kasipillai Manoharan, at [www.amnesty.org/en/news-and-updates/report/injustice-fuels-sri-lankas-cycle-abuse-and-impunity-20090611](http://www.amnesty.org/en/news-and-updates/report/injustice-fuels-sri-lankas-cycle-abuse-and-impunity-20090611). Subramaniam Sugitharajah, a Tamil journalist following the same case was murdered in Trincomalee on 24 January 2006. See Committee to Protect Journalists, <http://cpj.org/killed/2006/subramaniam-sugitharajah.php>. The sole witness to the August 2006 murder of ten Muslim labourers outside the south-eastern town of Pottuvil was reportedly coerced into implicating the LTTE. “From Welikade to Mutur and Pottuvil: A generation of moral denudation and the rise of heroes with feet of clay”, University Teachers for Human Rights (Jaffna) (UTHR), Special Report no. 25, 31 May 2007, at [www.uthr.org/SpecialReports/spreport25.htm](http://www.uthr.org/SpecialReports/spreport25.htm). In a case unrelated to Sri Lanka’s ethnic conflicts, a Sinhala victim of police torture, Gerald Perera, was shot dead on 21 November 2004, just days before he was to testify in a fundamental rights case he had filed against seven police officers. “SAARC Human Rights Report 2006”, Asian Centre for Human Rights, at [www.achrweb.org/reports/saarc2006/srilanka.htm](http://www.achrweb.org/reports/saarc2006/srilanka.htm). Finally, 2009 saw several attacks on independent journalists – including the murder of newspaper editor Lasantha Wickramatunga and the bombing of the country’s largest independent broadcasting company. The government has denied responsibility. “Attacks on the press 2009: Sri Lanka”, Committee to Protect Journalists, 16 February 2010, at [www.cpj.org/2010/02/attacks-on-the-press-2009-sri-lanka.php](http://www.cpj.org/2010/02/attacks-on-the-press-2009-sri-lanka.php).

## II. THE WAR AND ITS AFTERMATH

### A. THE DEFEAT OF THE TAMIL TIGERS

By January 2009, the Sri Lankan government had effectively defeated the LTTE. The Tamil fighters were cornered in a small portion of the Northern Province known as the Vanni<sup>6</sup> and were surrounded by more numerous and better armed Sri Lankan government forces.<sup>7</sup> Also in the area were over 300,000 civilians, most of whom had been repeatedly displaced from previously LTTE-held areas.<sup>8</sup> The LTTE by this stage were running short of arms and supplies. Many of their cadres believed the situation was hopeless, and the Tamil civilian population was increasingly resentful of such policies as forced recruitment and the near-complete ban on leaving the Vanni.<sup>9</sup>

The LTTE's dire situation was a result of a series of critical errors made by their leader Vellupillai Prabhakaran. Their

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<sup>6</sup> The Vanni consists of all or part of five administrative districts designated by the government – Kilinochchi and Mullaitivu Districts in whole, and Vavuniya, Mannar and Jaffna Districts in part.

<sup>7</sup> The map attached as Appendix B shows the approximate boundaries of the Vanni and the front lines as of 2 January 2009. It is difficult to know the true number of LTTE cadres and Sri Lankan soldiers who fought in the final months of the war. One knowledgeable witness estimated that there were approximately 8,000 to 10,000 cadres in the LTTE's military wing in September 2008, including Land and Sea Tigers but not the secretive and relatively small Air Tigers and Black Tigers. In an interview published in April 2010, Defence Secretary Gotabaya Rajapaksa said that the combined strength of the army, navy and air force grew from 125,000 in 2005 to 450,000 in 2009, with the army at a strength of 300,000. V.K. Shashikumar, "Winning wars: political will is the key", *Indian Defence Review* 25, no. 2 (April-June 2010).

<sup>8</sup> For a discussion of the size of the civilian population in the Vanni and the controversies around it, see Section III.C below.

<sup>9</sup> Soon after the security forces launched an offensive in the Eastern Province in July 2006, the LTTE increased restrictions on civilians living in LTTE-held areas. They required individuals to apply for passes to travel outside those areas and to leave behind a "guarantor", usually a relative, to ensure their return. The LTTE had similar restrictions in place as early as 1995 but had relaxed them during the ceasefire period. By September 2008, the LTTE had effectively stopped giving passes, except for a few medical cases or the elderly. They also stepped up forced recruitment, more strictly enforcing and at times going beyond the longstanding "one person per family" policy. Many Tamil families went to great lengths to hide eligible children or have them marry early to exempt them. There were very few volunteers in the last year of the war, and many Tamils were taken and sent to the frontlines, often to serve as labourers to build bunkers and other defensive structures. See "Trapped and Mistreated: LTTE Abuses against Civilians in the Vanni", Human Rights Watch, 15 December 2008.

assassination of Indian Prime Minister Rajiv Gandhi in 1991 had come back to haunt them in the form of a Congress government in New Delhi led by his widow. While occasionally calling for restraint and political efforts to resolve Tamil grievances, the Indian government gave tacit support for Sri Lankan military action against the Tigers. The LTTE's intransigence in negotiations and numerous ceasefire violations, including its August 2005 murder of the Sri Lanka foreign minister, Lakshman Kadirgamar, angered governments that supported and funded the 2002-2006 peace process. This lost them much of any remaining international legitimacy, and they were banned as a terrorist organisation by the European Union in May 2006.

Prabhakaran had used the ceasefire in 2002 to purge the Tamil community of anyone seen as a threat. Hundreds of Tamil dissidents across the island were murdered. This left little space for Prabhakaran's ambitious and restless eastern deputy, Colonel Karuna, who split from the LTTE in 2004 along with 6,000 fighters and soon began cooperating with the government. With Karuna's support, Colombo was able to regain control over the Eastern Province by the middle of 2007.

In 2005 the LTTE leader ordered Tamils to boycott the presidential election, resulting in victory for Mahinda Rajapaksa, a politician with a keen ability to tap into growing Sinhala nationalism and resentment. The new administration stepped up arms purchases and began planning for a resumption of war with a commitment to destroy the Tigers. The ceasefire – which was always marred by violations, mostly by the LTTE – started breaking down in 2006 and was formally ended on 16 January 2008 by declaration of the government. This led to the departure of the Nordic observers with the Sri Lanka Monitoring Mission (SLMM).

By then the Sri Lankan security forces had begun pressing north into the remaining LTTE-controlled areas. Prabhakaran had previously always out-manoeuvred government forces, but his desire for the LTTE to maintain the trappings of a state – with a population and standing army holding territory – limited his military options. The LTTE's widely expected return to guerrilla warfare never came.

In addition to having many more personnel, the security forces were also better trained and armed than in earlier stages of the war. They had acquired an array of new weapons, from better artillery to more Unmanned Aerial Vehicles (UAVs) that could monitor the conflict zone and act as forward observers to call in shelling.<sup>10</sup> China and

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<sup>10</sup> According to Defence Secretary Gotabaya Rajapaksa, from 2006 the government acquired UAVs, ships, aircraft, armoured fighting vehicles, radars and a range of artillery pieces and mortars. The previous administration, under President Chandrika

Pakistan stepped in to fulfil much of the weapons demand,<sup>11</sup> and the Pakistani Air Force “extended technical assistance and training”.<sup>12</sup> The security forces had complete air superiority and adopted more aggressive tactics, sending commando units behind LTTE lines and pounding defensive positions with multi-barrel rocket launchers (MBRLs) and aerial attacks. The navy, with intelligence assistance from India and other countries, tracked and destroyed a series of LTTE arms shipments, successfully shutting down the LTTE’s ability to re-arm.

Tougher military tactics were backed by a more aggressive political line, including censoring of military and civilian casualties and attacks on critics of the war. The government pressed for the LTTE to be banned internationally, adopted the rhetoric of the “war on terror” and stepped up security. Efforts at political reform were sidelined with proposals to alleviate Tamil concerns endlessly delayed.

There was a darker side to this: the number of disappearances soared, journalists were killed, beaten or silenced, politicians were threatened, non-governmental organisations (NGOs) attacked and international organisations such as the United Nations intimidated.<sup>13</sup> A government inquiry into alleged abuses by the security forces and the LTTE collapsed and was denounced by a group of prominent international observers who terminated their role in March 2008 finding “a lack of political will to support a search for the truth”.<sup>14</sup> Any criticism of the gov-

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Kumaratunga, had first introduced Israeli-built Kfir jets, Russian MiG 27s, Czechoslovakian-built multi-barrel rocket launchers and UAVs. “Opposition’s claim Mahinda bought only Ammo countered – ‘The Island’”, 4 January 2010, at [www.army.lk/detailed.php?NewsId=1723](http://www.army.lk/detailed.php?NewsId=1723).

<sup>11</sup> “Sri Lanka still sourcing arms from Pak, China”, *The Times of India*, 4 March 2009, at <http://timesofindia.indiatimes.com/India/Sri-Lanka-still-sourcing-arms-from-Pak-China/articleshow/4220337.cms>.

<sup>12</sup> “Pakistan Air Force chief arrives in Sri Lanka”, Sri Lanka Air Force news, 12 November 2009, at [www.airforce.lk/news.php?news=135#](http://www.airforce.lk/news.php?news=135#). The Commander of the Sri Lanka Air Force denied reports that Pakistan Air Force pilots had flown sorties during the war. “Sri Lanka denies Pakistani pilots flew its planes”, *Dawn*, 29 May 2009, at [www.dawn.com](http://www.dawn.com).

<sup>13</sup> See Crisis Group Reports, *Sri Lanka’s Human Rights Crisis*, *Sri Lanka’s Return to War: Limiting the Damage* and *Sri Lanka: Politicised Courts, Compromised Rights*, all op. cit.

<sup>14</sup> A Presidential Commission of Inquiry was established in 2006 to look into a series of human rights abuses including the killing of seventeen aid workers employed by the French NGO Action Contre la Faim (ACF). Of the sixteen cases referred, only seven were investigated and reports on only five were completed. Not a single case resulted in prosecution. The commission was abandoned in 2009. An International Independent Group of Eminent Persons (IIGEP) was invited by the president to monitor the proceedings but terminated their role in March

ernment led to an accusation of being pro-LTTE from the country’s firebrand, partisan media and outspoken officials. Even a meek comment from the UN’s humanitarian coordinator prompted a Sri Lanka minister to describe him as “a terrorist”.<sup>15</sup> Rajapaksa cloaked himself in a mantle of Sinhala nationalism while his top general during the war, Army Commander Sarath Fonseka, warned minorities of their place in Sri Lankan society.<sup>16</sup>

With the media effectively censored, critics of the war silenced, the international community both cowed and caught up in the “war on terror”, and the Sinhalese population eager for victory, the government pressed ahead without restraint. The strategy from mid-2008 was to corral the LTTE and the Tamil population of the north into an ever smaller area from which independent observers, aid organisations and journalists would be excluded.<sup>17</sup>

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2008 after concluding that the commission did not meet international standards, suffered from conflicts of interest and financial dependence, was not protecting witnesses and victims effectively, lacked cooperation from state bodies and was insufficiently transparent. See Crisis Group Report, *Sri Lanka’s Human Rights Crisis*, op. cit.; “Twenty years of make-believe: Sri Lanka’s Commissions of Inquiry”, Amnesty International, 11 June 2009; and IIGEP, public statement, 15 April 2008, available at [www.ruleoflawsrilanka.org/resources/IIGEPnbspSTM.pdf](http://www.ruleoflawsrilanka.org/resources/IIGEPnbspSTM.pdf).<sup>15</sup> See “Jeyaraj slams Ban Ki-moon”, *The Nation on Sunday*, 19 August 2007, at [www.nation.lk/2007/08/19/news6.htm](http://www.nation.lk/2007/08/19/news6.htm); and “Top Sri Lanka official calls U.N. aid chief ‘terrorist’”, Reuters, 15 August 2007. Office of the Coordinator for Humanitarian Affairs (OCHA) head Sir John Holmes was described as a “terrorist” by Jeyaraj Fernandopulle, a senior government minister and chief whip. The comment was prompted by Holmes’ remark that Sri Lanka had one of the worst records for the safety of humanitarian workers.

<sup>16</sup> Fonseka said, “I strongly believe that this country belongs to the Sinhalese but there are minority communities and we treat them like our people. We being the majority of the country, 75 per cent, we will never give in and we have the right to protect this country.... They can live in this country with us. But they must not try to, under the pretext of being a minority, demand undue things”. Stewart Bell, “Inside Sri Lanka: a life given over to war”, *National Post*, 23 September 2008.

<sup>17</sup> The government justified its efforts to exclude these actors by claiming they were biased toward or supporting the LTTE or that the security risks were too high. A crucial step in this strategy was the government’s order in the first week of September 2008 to the UN and all international humanitarian organisations, with the exception of the International Committee of the Red Cross (ICRC), to leave the remaining areas under LTTE control, claiming it could no longer ensure their safety from the fighting. With little public protest from the UN, all international staff other than from ICRC had left LTTE-controlled territory by the end of September. The last of ICRC’s permanent international staff left in February 2009, though some continued to shuttle in and out of the Vanni to assist in the maritime evacuations of injured civilians. Some national staff of all of these organisations remained behind in the Vanni. While those

After the capture of LTTE headquarters in Kilinochchi in early January 2009, the security forces closed in on the LTTE, eventually trapping them and the civilian population in a few square kilometres of a narrow spit of land on the north-eastern shore.

From January the character of the conflict changed distinctly. As the security forces dramatically reduced the size of the conflict zone, the government unilaterally declared a series of ever smaller so-called No Fire Zones (NFZs) and concentrated the civilian population in them.<sup>18</sup> The government also claimed the civilian population was less than one third its actual size and refused to allow in adequate food and medical supplies.<sup>19</sup> At the same time, the LTTE continued to prevent civilians from leaving, including by shooting dead some of those who tried. While the government publicly condemned the LTTE's actions as "human shielding" and "hostage taking" and claimed the security forces were taking "maximum precautions to avoid civilian casualties",<sup>20</sup> they in fact continued to advance without restraint. They forced the LTTE's front lines back into each successive NFZ, until the government announced Prabhakaran's death and declared the war over on 18 May.

Evidence gathered by Crisis Group provides reasonable grounds to believe that during these months the security forces intentionally and repeatedly shelled civilians, hospitals and humanitarian operations. It also provides reason to believe that senior government and military officials were aware of the massive civilian casualties due to the security forces' attacks but failed to protect the civilian population as they were obliged to under the laws of war.

UN agencies, working closely with officials and aid workers located in the conflict zone, documented nearly 7,000 civilians killed from January to April 2009. Those who

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working for the UN continued with their respective agencies, many of those working for international NGOs were assigned to work for local government officials while still being paid their regular salaries. Since 2006 the government had banned independent journalists from travelling to LTTE-held areas except for guided tours. "Call for journalists to be let into area where 'a major humanitarian crisis' is unfolding with no media presence", press release, Reporters Without Borders, 10 April 2009.<sup>18</sup> The government created three of these areas between January and May and referred to them as both "Safe Zones" and "No Fire Zones". This report uses "No Fire Zones" or the abbreviation "NFZ" throughout. See, eg, "Army expands safe zone for entrapped civilians – Mullaittivu", 22 January 2009, at [www.defence.lk/new.asp?fname=20090121\\_05](http://www.defence.lk/new.asp?fname=20090121_05); and "LTTE clamps on civilian outflow: Mounts artillery batteries inside No-fire zones – Mullaittivu", 31 January 2009, at [www.defence.lk/new.asp?fname=20090130\\_F01](http://www.defence.lk/new.asp?fname=20090130_F01).

<sup>19</sup> See Section III.C below.

<sup>20</sup> See, eg, "Civilian safety is the top priority – Defence Secretary", MOD news, 17 February 2009.

compiled these internal numbers deemed them reliable to the extent they reflected actual conflict deaths but maintain it was a work in progress and incomplete. The final three weeks of fighting alone likely saw thousands of non-combatants killed.<sup>21</sup> UN officials in New York have consistently distanced themselves from the internal figures, even though senior officials and diplomats in Colombo accepted them as credible.<sup>22</sup> Crisis Group's evidence shows that many bodies were never taken to hospitals but instead were buried in shallow graves or collapsed bunkers. Based on the evidence collected to date, Crisis Group believes the total number of civilian deaths in the final five months to be in the tens of thousands.<sup>23</sup>

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<sup>21</sup> Numerous eyewitnesses who were in the last NFZ until the end of the fighting gave independent accounts of bodies of women, children, the elderly and men all over the ground and roads as they were leaving the area to be taken to government camps. They each estimated seeing hundreds of dead civilians. UTHR estimated the civilian death toll from the night of 17 May to the morning of 18 May alone at between 1,000 and 4,000. "A Marred Victory and a Defeat Pregnant with Foreboding", UTHR, Special Report no.32, 10 June 2009, at [www.uthr.org](http://www.uthr.org). One newspaper investigation reported that the last nineteen days of fighting saw more than 13,000 civilians killed. Catherine Philp and Michael Evans, "Times photographs expose Sri Lanka's lie on civilian deaths at beach", *The (London) Times*, 29 May 2009.

<sup>22</sup> Crisis Group interviews, diplomats, Colombo, March-May 2009. In May 2009, the UN spokesperson in Colombo, Gordon Weiss, stated: "Up until a certain point, we had very good evidence to show that there were about 7,000 people that were killed. ... Then the intense battle kicked in and there were many more deaths, but we didn't know exactly how many". "Paper: 20,000 killed in Sri Lanka conflict", CNN, 29 May 2009, at [www.cnn.com/2009/WORLD/asiapcf/05/29/srilanka.death.toll/index.html](http://www.cnn.com/2009/WORLD/asiapcf/05/29/srilanka.death.toll/index.html). More recently, Weiss has estimated that between 30,000 and 40,000 civilians may have been killed. See "War Stories", SBS Dateline, 28 February 2010, at [www.sbs.com.au/dateline/story/transcript/id/600331/n/War-Stories](http://www.sbs.com.au/dateline/story/transcript/id/600331/n/War-Stories). In response, Minister of Human Rights and Disaster Management Mahinda Samarasinghe said "It is not worth commenting on his disclosure, which is completely misleading and false". "Civilian deaths: Gordon Weiss' comment a false utterance – Mahinda Samarasinghe", *Sunday Observer*, 14 February 2010. Foreign Minister Rohitha Bogollagama rejected the claims and said "[Weiss] is someone who has been making such false statement and we wholly reject these claims. He is also someone who has been sent out of the country". "Govt. says Ex-UN spokesman Weiss spreading lies", *Daily Mirror*, 13 February 2010. The UN also responded and further retreated from its own figures, stating: "While we maintained internal estimates of casualties, circumstances did not permit us to independently verify them on the ground, and therefore we do not have verifiable figures of how many casualties there were". "UN statement on former spokesman views", 15 February 2010, at [www.un.lk/media\\_centre/for\\_the\\_record.php](http://www.un.lk/media_centre/for_the_record.php).

<sup>23</sup> While determining a conflict death toll is always a task to be approached with caution, there are multiple reasons to believe

## B. THE AFTERMATH

Over 280,000 Tamil civilians crossed over to government-held areas in the last months of fighting and were unlawfully interned in emergency camps run by the security forces.<sup>24</sup> The camps, located primarily in Vavuniya, were

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that an estimate of tens of thousands of civilians killed is reasonable. First, a comparison of the number of civilians known to be in the Vanni during the fighting with the number known to have reached government internment camps by the end of the fighting provides a rough estimate of those killed or missing. Crisis Group has credible evidence that there were 330,000 displaced civilians in the second NFZ and adjacent areas as of mid- to late-February. At that same time, according to the government, there were between 33,000 and 38,000 internally displaced persons (IDPs) from the Vanni already in camps in government-held areas. That brings the total of known civilians to about 365,000. By the end of the fighting, the highest number of survivors registered in government-run camps was 290,000 as of 26 May 2009. It is not clear to what extent this number includes the more than 10,000 who had surrendered or were detained on suspicion of involvement with the LTTE. There may also have been several thousand people who fled by boat to India or otherwise escaped the war zone but avoided being detained in government camps. Accepting these uncertainties, there is a plausible case that as many as 75,000 persons remain unaccounted for. Even if the figure of 330,000 is reduced by as many as 30,000, or some adjustment to the difference between 330,000 and 290,000 is made to account for civilians who may have been killed lawfully because they were directly participating in hostilities at the time they were targeted – a number Crisis Group believes is very low – or to account for some number that may have avoided the government camps, it is still difficult to arrive at a figure for the killed or missing that is lower than 30,000. Moreover, Crisis Group has evidence from various individuals who were in the NFZs until the very end of the fighting to suggest that the scale of death was much higher than reported at the time, and certainly high enough to triple the UN's internal figure of 7,000. Crisis Group also believes that all but a small portion of these deaths were due to government fire. Eventually, an independent and impartial survey of those still living in the Northern Province will be needed to establish this part of Sri Lanka's history.

<sup>24</sup> For more detail on the internments and releases as of January 2010, see Crisis Group Briefing, *Sri Lanka: A Bitter Peace*, op. cit., pp. 2-9. OCHA in Colombo reported that there were 289,915 individuals in IDP camps and hospitals as of 26 May 2009 (269,417 in Vavuniya District) and 280,812 as of 8 June 2009 (260,295 in Vavuniya District). While a small number entered camps before 2009, the vast majority arrived after January and over 200,000 in April and May alone. See "Vanni IDP Camps and Hospitals Information, as of 26 May 2009", map, UN OCHA, at [www.reliefweb.int/rw/fullmaps\\_sa.nsf/luFullMap/2AF28A9E61C90B68852575C5006955E0/\\$File/map.pdf?OpenElement](http://www.reliefweb.int/rw/fullmaps_sa.nsf/luFullMap/2AF28A9E61C90B68852575C5006955E0/$File/map.pdf?OpenElement); "Vanni IDP Camps and Hospitals Information, as of 8 June 2009", map, UN OCHA, at [www.reliefweb.int/rw/fullmaps\\_sa.nsf/luFullMap/6F6D19343765134DC12575D1003F4526/\\$File/map.pdf?OpenElement](http://www.reliefweb.int/rw/fullmaps_sa.nsf/luFullMap/6F6D19343765134DC12575D1003F4526/$File/map.pdf?OpenElement); and "Vanni IDP Information & Safe Area Declared by the Government of Sri

overcrowded and suffered from severe deficiencies of sanitation, medical care and food. Government intelligence agencies and Tamil paramilitaries repeatedly screened the internees for involvement with the LTTE, leading to reports of abuse.<sup>25</sup> Embassies were for several months denied consular access to foreign citizens held in the camps, and the media were allowed in only for guided tours. The government restricted and tightly monitored access for the UN and humanitarian agencies, and from July 2009 barred the ICRC from the camps in Vavuniya. Restrictions on the ICRC remain in place as of May 2010. Although considerable international pressure led to the release of most of the internally displaced persons (IDPs) by the end of 2009, 80,000 civilians were still in camps as of April 2010.<sup>26</sup>

The government also has detained more than 10,000 individuals allegedly involved with the LTTE in separate camps with no outside access.<sup>27</sup> These detentions are unlawful and pose particularly grave risks given the government's history of alleged enforced disappearances and torture.<sup>28</sup>

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Lanka in Mullaitivu, as of 1 April 2009", map, UN OCHA, at [www.reliefweb.int/rw/fullmaps\\_sa.nsf/luFullMap/657617D099999764C125758C0030BA3E/\\$File/map.pdf?OpenElement](http://www.reliefweb.int/rw/fullmaps_sa.nsf/luFullMap/657617D099999764C125758C0030BA3E/$File/map.pdf?OpenElement).

<sup>25</sup> Eyewitnesses have said that civilians, often young men, were taken, interrogated and beaten or otherwise abused by the security forces or unknown people. There have been similar reports in the media. See, eg, "Traumatised Tamils live in fear of new crackdown in Sri Lanka", *The Guardian*, 5 April 2009.

<sup>26</sup> "Joint Humanitarian Update", Report #23, Office of UN Resident and Humanitarian Coordinator, 27 March-9 April 2010.

<sup>27</sup> The government has released conflicting figures for the numbers of those who surrendered or were detained from among the population of IDPs on suspicion of working with the LTTE. Most recently, Prime Minister D.M. Jayaratne stated that 11,700 LTTE members had surrendered or been arrested, of which 1,350 are due to be prosecuted and another 2,400 had already been "rehabilitated" and released. "Reconciliation Commission to be established", Presidential Media Unit, 5 May 2010, at [www.priu.gov.lk](http://www.priu.gov.lk); and "Tiger military wing forming", *Daily Mirror*, 4 May 2010. Earlier, another official stated that some 12,700 had been detained for their possible links to the LTTE. Palitha Kohona, "The 'Elders' Statement on IDPs in Sri Lanka – Sadly outdated and Inaccurate – Dr. Kohona", *Asian Tribune*, 5 December 2009.

<sup>28</sup> Throughout their arbitrary confinement, the detainees have been denied access to the ICRC, other protection agencies and legal counsel. It remains unclear on what, if any, legal basis they are being held. "Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka", Human Rights Watch, 2 February 2010; Crisis Group Briefing, *Sri Lanka: A Bitter Peace*, op. cit., pp. 8-9; and "Recurring Nightmare: State Responsibility for 'Disappearances' and Abductions in Sri Lanka", Human Rights Watch, 27 August 2008.

Many Sri Lankans were ecstatic about the defeat of the Tigers. Most Tamils in the country and abroad were shocked and dismayed by the treatment of their compatriots in the North. While professing concern about the situation, key members of the international community did little. The Security Council refused to take up the war or the internments, with China, Russia and others saying it was a domestic matter. At the end of May 2009, the UN Human Rights Council (HRC) voted down a proposal for an investigation into alleged war crimes.<sup>29</sup>

International calls for post-war accountability returned after the August 2009 broadcast on British television of video showing what was said to be the execution of eight bound and blindfolded Tamil men by Sri Lankan soldiers in January 2009.<sup>30</sup> The Sri Lankan government immediately denied the charge, denounced the video as a fabrication by pro-LTTE propagandists and attacked Britain's Channel Four for broadcasting unfounded allegations.<sup>31</sup> Technical reports produced by government-hired experts claim to show a series of irregularities with the tape.<sup>32</sup> On 7 January 2010, the UN special rapporteur on extrajudicial executions, Philip Alston, announced that expert analyses commissioned by the UN had found the video to be authentic and called on the Sri Lankan government to allow "an independent" and "impartial investigation into war crimes and other grave violations of international

humanitarian and human rights law allegedly committed in Sri Lanka".<sup>33</sup>

The alleged battlefield execution of the heads of the LTTE political-wing leader, B. Nadesan, and LTTE peace secretariat, S. Puleedevan, along with some 60 of their family and staff, also deserves its own investigation.<sup>34</sup> Allegations that the LTTE leaders and the others were shot while surrendering with a white flag resurfaced in December 2009 when retired Army Commander and then presidential candidate Sarath Fonseka charged that the defence secretary and brother of the president, Gotabaya Rajapaksa, ordered their execution despite earlier promises of protection.<sup>35</sup> Gotabaya and other government officials have rejected the allegations.<sup>36</sup> President Rajapaksa went on

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<sup>29</sup> On 27 May 2009 the Human Rights Council (HRC) passed a resolution tabled by Sri Lanka with 29 in favour, twelve against and six abstentions. Those voting in favour were Angola, Azerbaijan, Bahrain, Bangladesh, Bolivia, Brazil, Burkina Faso, Cameroon, China, Cuba, Djibouti, Egypt, Ghana, India, Indonesia, Jordan, Madagascar, Malaysia, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Uruguay and Zambia. Those voting against Bosnia and Herzegovina, Canada, Chile, France, Germany, Italy, Mexico, Netherlands, Slovakia, Slovenia, Switzerland and United Kingdom of Great Britain and Northern Ireland. Those abstaining were Argentina, Gabon, Japan, Mauritius, Republic of Korea and Ukraine. The resolution praised Sri Lanka and failed to call for any inquiry. The HRC rejected a tougher text proposed by European countries condemning the actions of both sides and calling for unrestricted access to detained civilians and a domestic inquiry into alleged war crimes.

<sup>30</sup> Jonathan Miller, "Execution video: is this evidence of 'war crimes' in Sri Lanka?", 25 August 2009, at [www.channel4.com](http://www.channel4.com).

<sup>31</sup> "This video has been made to discredit the armed forces. This was said to have been filmed at a time when the Tigers too were operating dressed in Sri Lankan military uniforms", Sri Lankan army spokesman Brigadier Udaya Nanayakkara. "Sri Lanka calls 'war crimes' video a fake", 26 August 2009, and "Sri Lanka steps up death video rebuttal", 11 September 2009, both at [www.channel4.com](http://www.channel4.com).

<sup>32</sup> See "Technical analyst exposes 'C-4' gutter journalism", 3 September 2009, at [www.defence.lk/new.asp?fname=20090903\\_05](http://www.defence.lk/new.asp?fname=20090903_05).

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<sup>33</sup> "Deeming Sri Lanka execution video authentic, UN expert calls for war crimes probe", 7 January 2010, at [www.un.org/apps/news/story.asp?NewsID=33423](http://www.un.org/apps/news/story.asp?NewsID=33423). Just weeks earlier, the *Times* of London had published the results of an expert study that also found the video was genuine and had not been faked. Rhys Blakely, "Sri Lankan war crimes video is authentic, Times investigation finds", *The Times*, 15 December 2009, at [www.timesonline.co.uk/tol/news/world/asia/article6956569.ece#cid=OTC-RSS&attr=797093](http://www.timesonline.co.uk/tol/news/world/asia/article6956569.ece#cid=OTC-RSS&attr=797093). The government rejected both findings. The tape gains further credibility from the fact that, until the detention of thousands of suspected LTTE supporters in the final days of fighting, Sri Lanka's 30 years of conflict saw hardly any prisoners of war taken by either side. Alleged battlefield executions were widespread and routine. It is widely believed that there exists additional video footage showing other war-time atrocities, thanks to the widespread use of mobile phones and small video cameras. Crisis Group interviews, diplomats, journalists, human rights advocates, Colombo, November 2009.

<sup>34</sup> Numerous diplomatic and other sources report that just hours before they were shot dead on the morning of 18 May, Puleedevan and Nadesan had secured an agreement from the highest levels of the Sri Lankan government and military to accept their surrender under protection of a white flag. Crisis Group interviews, June, July, November 2009. A particularly comprehensive account of the killings alleges that army special forces were responsible. D.B.S. Jeyaraj, "LTTE leaders who surrendered were killed by Army Special Forces", 28 December 2009, at <http://dbsjeyaraj.com/dbsj/archives/1267>.

<sup>35</sup> "Gota ordered them to be shot" – General Sarath Fonseka", *The Sunday Leader*, 13 December 2009. Fonseka partially retracted his statement a week later, claiming that he had been told by a reporter that the defence secretary had given an illegal order to execute the LTTE leaders but that the order had not been carried out and that the leaders had been killed in fighting. "Clarification by General Sarath Fonseka on our lead story on December 13", *The Sunday Leader*, 20 December 2009. Amantha Perera and Jyothi Thottam, "The Conquerors of the Tigers Now Battle for the Spoils", *Time*, 20 December 2009.

<sup>36</sup> Government officials have offered different explanations for how the LTTE leaders were killed. Sri Lanka's ambassador to the UN Palitha Kohona initially indicated that they had been shot from behind by LTTE fighters. "Tamil Tiger leaders 'killed

to win another six-year term in January 2010, soon after which Fonseka was arrested to face courts martial for conducting political work while in uniform and for fraudulent arms dealing.<sup>37</sup>

An October 2009 report from the U.S. State Department offers a catalogue of reported violations of international humanitarian law (IHL), including government shelling of hospitals and areas with heavy concentrations of civilians and LTTE killing of civilians who attempted to flee areas under their control.<sup>38</sup> The alleged incidents are consistent with thousands of civilian deaths. The U.S. report is careful to note that it does not “reach conclusions as to whether the alleged incidents ... actually occurred” or constituted violations of international law.<sup>39</sup> Unfortu-

nately, few resources were devoted to the congressionally mandated report, and no reference was made to satellite imagery or human intelligence in the possession of different branches of the U.S. government. Even so, the report lists scores of “incidents and conduct which may constitute violations of IHL and/or crimes against humanity” based on eyewitness testimony and reports from credible organisations.<sup>40</sup> The report presents a damning indictment of both sides and makes the case for a serious, well-financed and independent investigation all the more compelling.<sup>41</sup>

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trying to surrender”, Agence France-Presse, 21 May 2009. In an interview rejecting Fonseka’s allegations, Gotabaya Rajapaksa explained: “This was supposed to have happened on the last day – May 18, 2010 [sic] – the day Prabhakaran was killed. The LTTE leaders were now trapped in an area 400 meters by 400 meters, about 200 of them, surrounded by the military. It is late at night, past midnight. Make a mental picture of this. Can you see them coming out with white flags in this dense jungle in pitch darkness? The situation was that some terrorist cadres counter-attacked. Prabhakaran was trying to break out and escape to the lagoon, his son went in another direction. At the same time 10,000 surrendered cadres came down from one side. In this kind of situation in the thick of battle, can you expect a young recruit, barely a month into battle, to recognise a senior LTTE cadre and make a decision as to shoot him selectively or spare him?”, “Some Western powers wanted a regime change in Sri Lanka”, *Asiantribune.com*, 25 February 2010. On 18 December 2009, UN special rapporteur Philip Alston wrote to the Sri Lankan government requesting any information it had on the killings. The text of the letter is available at [www.innerecitypress.com/lanka/alston122109.html](http://www.innerecitypress.com/lanka/alston122109.html).

<sup>37</sup> Fonseka was arrested on 8 February 2010 following his comments to the media that he was prepared to reveal what he knows should he be called before an international inquiry. “Sri Lanka election loser Sarath Fonseka arrested”, BBC News, 8 February 2010. Fonseka is currently in military detention facing two separate courts martial. On 8 April, Fonseka was elected to parliament as a candidate of the Janatha Vimukthi Peramuna (JVP)-backed Democratic National Alliance. On 6 May Fonseka repeated his support for an international inquiry into alleged war crimes. “Sri Lanka ex-army chief vows to expose war crimes”, Agence France-Presse, 6 May 2010. Alleging an LTTE-led international plot to use Fonseka’s allegations to undermine Sri Lanka’s sovereignty, Gotabaya Rajapaksa is reported to have said that any Sri Lankan promoting an agenda which is detrimental to the country is nothing but a traitor deserving capital punishment. Shamindra Ferdinando, “Traitors should be given Capital punishment”, *Island*, 6 May 2010.

<sup>38</sup> “Report to Congress on Incidents During the Recent Conflict in Sri Lanka”, U.S. Department of State, October 2009. The report was mandated by the 2009 Supplemental Appropriations Act.

<sup>39</sup> *Ibid*, p. 3.

<sup>40</sup> *Ibid*, p. 5.

<sup>41</sup> Congress has mandated a follow-up report from the ambassador-at-large for war crimes issues that would “detail what, if any, measures have been taken by the Government of Sri Lanka and international bodies to investigate such incidents, and evaluate the effectiveness of such efforts”. Division F, Statement of Managers, Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010. The report is due on 16 June 2010.

### III. ACTIONS OF THE GOVERNMENT

Crisis Group has eyewitness testimony or other evidence to support the allegations in this section. Times, locations and other circumstances are provided with as much specificity as possible, but may be clarified as further evidence is discovered. The Sri Lankan government has denied any unlawful conduct in the last months of the war and rejected many of the allegations herein.<sup>42</sup> Yet the evidence Crisis Group has collected shows there are reasonable grounds to believe that the Sri Lankan security forces committed war crimes and that certain individuals should be investigated, including top government and military leaders.

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<sup>42</sup> For example, on 2 February 2010 Defence Secretary Gotabaya Rajapaksa told a BBC correspondent: “Whether it is the United Nations or any other country, we are not – I am not – allowing any investigations in this country. There is no reason. Nothing wrong happened in this country. Take it from me. There will be no investigations for anything in this country”. BBC World News Asia Today, available at [www.youtube.com/watch?v=1DyFQ-xdD-U](http://www.youtube.com/watch?v=1DyFQ-xdD-U). In response to the U.S. State Department’s October report, the foreign affairs ministry issued a media release on 22 October 2009 stating: “During the security operations, the message by the President of Sri Lanka to all ranks of the Armed Forces, was that the military endeavour must at all times be directed against the armed terrorism of the LTTE. Therefore, the Sri Lanka Armed Forces were scrupulous in affording protection to the civilians and safeguarding their welfare”. On 18 May 2009, Minister for Disaster Management and Human Rights Mahinda Samarasinghe announced: “All Tamil civilians have been rescued without shedding a drop of blood”. Ministry of Defence News, at [www.defence.lk/new.asp?fname=20090518\\_02](http://www.defence.lk/new.asp?fname=20090518_02). Sri Lanka’s ambassador to the UN Palitha Kohona took a more measured position in an Australian news program that aired on 28 February 2010, stating: “Now, this is a difficult question to answer because nobody really knows whether war crimes were committed. There is no evidence. There are suggestions, there are allegations but beyond that there’s nothing concrete”. “War Stories”, SBS Dateline, op. cit. Yet Sri Lanka’s High Commissioner to London Justice Nihal Jayasinghe later “[said] inter alia that even though various international organisations and NGOs claimed that innocent lives were lost, [the] Government followed a zero casualty policy”. “SL’s UK High Commissioner protests over UK MP’s comment”, 10 March 2010, [www.priu.lk](http://www.priu.lk). The only senior government official to accept there may have been large numbers of civilians killed in the government offensive is the former secretary to the ministry of disaster management and human rights, Rajiva Wijesinha, who estimated the civilian death toll as between 3,000 and 5,000. He blamed the deaths on the Tigers’ use of civilians as “human shields”. Julian Borger, “Sri Lanka says up to 5,000 civilians died in Tigers battle”, *The Guardian*, 4 June 2009.

This section also outlines how the evidence is relevant to specific international crimes. As a point of reference, it uses the definitions in the Rome Statute of the ICC, which codifies many international crimes reflected in customary law and in national jurisdictions.<sup>43</sup> This is to illustrate the seriousness of the alleged conduct, not to suggest that these are the only crimes that the facts may support or the only facts relevant to possible crimes. The ICC is also not the only potential investigating authority; indeed, it is an unlikely one at present given the requirement for a UN Security Council referral to the ICC. What is needed at this stage is an independent UN-mandated international inquiry to uncover the full range of relevant conduct, to help determine the extent of potential criminal responsibility and to recommend appropriate steps to ensure accountability.

This report does not attempt to identify all individuals whose roles should be investigated or suggest that wrongdoing is suspected across the security forces and government entities involved in the final months of fighting. It also focuses primarily on incidents occurring in the government-declared NFZs, even though Crisis Group has evidence of others outside that time and geographical frame.

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<sup>43</sup> For internal armed conflicts, such as Sri Lanka’s, the Rome Statute codifies Common Article 3 to the four 1949 Geneva Conventions, to which Sri Lanka is a party, and enumerates twelve “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law”. Article 8(2)(c)&(e). While all of these offences were part of customary law when the statute was adopted, the list does not necessarily exhaust those war crimes that another court or investigating body could consider in a conflict like Sri Lanka’s. As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has held, customary law imposes criminal liability for “serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife”. *Prosecutor v. Tadić*, case no. IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995, para. 119; see also para. 96 ff. Thus criminal liability may well extend to war crimes that the Rome Statute specifies only for international armed conflicts as well as other norms. In addition, certain national jurisdictions define war crimes as acts that at the time of their commission constitute war crimes under customary or conventional international law and thus may include acts not specifically defined under the Rome Statute. See, eg, Canada’s Crimes Against Humanity and War Crimes Act, S.C. 2000, c.24. Any jurisdiction or inquiry that investigates alleged crimes in Sri Lanka would need to determine the applicable law based on a full review of relevant facts.

Prior to publication, Crisis Group provided the Sri Lankan government and various Sri Lankan officials with an opportunity to respond to the allegations set out below. No response was received.<sup>44</sup>

## A. ATTACKS ON HUMANITARIAN OPERATIONS

The Sri Lankan government restricted humanitarian operations in the Vanni by ordering the UN and international aid organisations to leave in September 2008. Thereafter, the government limited deliveries of food, medical supplies and medical care to the hundreds of thousands of displaced civilians in the area, resulting in severe shortages.<sup>45</sup> Humanitarian operations also came under fire from the Sri Lankan security forces, killing and wounding civilians including many women and children, and destroying critical humanitarian supplies. One of the earliest of such incidents was an attack in late January 2009 involving a UN operation.

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<sup>44</sup> On 15 April 2010, Crisis Group delivered a summary of the allegations outlined in this section to the Sri Lankan Ambassador in Brussels with a request that copies be forwarded to Secretary of Defence Gotabaya Rajapaksa, Army Commander Jagath Jayasuriya and former Army Commander Sarath Fonseka, who is presently in government custody, as well as the heads of the Ministry of Defence, the Ministry of Disaster Management and Human Rights, the Ministry of Foreign Affairs, the Ministry of Public Administration and Home Affairs, the Ministry of Health Care and Nutrition, the Ministry of Resettlement and Disaster Relief Services, the Ministry of Nation Building and Estate Infrastructure Development, the Armed Forces and the Office of the President. Crisis Group also sent the summary directly to Gotabaya Rajapaksa and Jagath Jayasuriya in Colombo. No response was received to the initial communications or to a follow-up note sent to the Ambassador in Brussels.

<sup>45</sup> While the LTTE controlled the Vanni and provided the police and courts, the Sri Lankan government provided or regulated nearly all other services, including registration of births, deaths and marriages; health and hospital facilities; education; water supply; sanitation; and transport of essential food and non-food items to the area. The government's staff in the Vanni were formally prohibited from communicating with the LTTE but as a practical matter had to liaise with them to carry out their duties. In late 2008 and early 2009, the government was supplying some food for IDPs in the Vanni, but the majority was being provided by the World Food Programme (WFP). The WFP had a series of warehouses in the Vanni where they brought food and then transferred it to local government authorities. The government became increasingly reluctant to allow the WFP to make deliveries. Starting in late 2008, local government officials advised the government and the WFP that the supplies they were receiving were insufficient to satisfy the minimum requirements of the population. Hospitals in the Vanni were also requesting that the government allow in more medical supplies to treat increasing numbers of civilians injured by shelling. These shortages worsened significantly in the following months. See Sections III.B & C below.

Three months before that attack, the national UN staff members who had remained behind after the rest of the UN withdrew to the government-held town of Vavuniya<sup>46</sup> relocated the UN operation from its base in Kilinochchi to Puthukkudiyiruppu (often abbreviated PTK) as the Sri Lankan security forces moved in on Kilinochchi. In PTK, the UN established a communications hub (the PTK hub) as well as a storage post for World Food Programme (WFP) supplies.<sup>47</sup> With the government opposed to internationals staying overnight in the Vanni, the UN staffed the operation only with national staff even though the absence of internationals inevitably put those staff at greater risk.

The PTK hub was located within the Assistant Government Agent (AGA) compound in PTK.<sup>48</sup> The UN provided the GPS coordinates for the hub to the LTTE and to the Ministry of Defence Joint Operations Headquarters (JOH) in Colombo and to the Security Forces Headquarters in Vavuniya (SFHQ-Vanni), which was under the command of Major General Jagath Jayasuriya. General Jayasuriya reported to Lieutenant General Fonseka, who in turn reported to Defence Secretary Gotabaya Rajapaksa, who was responsible to the commander and chief of the defence forces, President Mahinda Rajapaksa.<sup>49</sup>

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<sup>46</sup> At least fifteen Sri Lankan nationals employed by various UN agencies and over 80 of their dependants remained in the Vanni after the UN withdrawal, as did many national staff members of international NGOs. The LTTE had allowed a number of UN national staff to leave the Vanni but generally had denied permission for dependants, so some staff stayed behind.

<sup>47</sup> The PTK hub, located just north of PTK Junction, consisted of two large blocks of land, two WFP storage structures, some pre-fabricated buildings and sheds. The WFP post, located approximately one kilometre west along the A35 road, contained two additional WFP storage structures. Known as Wiik Halls, these storage structures are semi-portable buildings consisting of metal framing covered with plasticised sheeting. They are white with UN signage on the sides and roof.

<sup>48</sup> Each district has a Government Agent (GA), also known as the District Secretary, and an Additional GA, as well as multiple Assistant Government Agents (AGAs), who oversee the administrative sub-units of the districts known as divisions. The AGAs are also known as "divisional secretaries". These officials report to Colombo and are responsible for administering government services in the LTTE-controlled areas.

<sup>49</sup> Major General Jayasuriya was the Vanni commander from August 2007 through the end of the war. President Rajapaksa promoted him to Lieutenant General and appointed him as army commander in July 2009, replacing Sarath Fonseka. According to Gotabaya Rajapaksa: "General Fonseka was responsible for the tactical planning for all areas in the Army. He personally supervised, day and night on how the battle was moving forward. Having him as the Commander of the Army was a decisive factor for us. He is an experienced officer and throughout his career he has been involved in anti-terrorist activities

From October 2008 to January 2009, the UN ran eleven food and supply convoys from Vavuniya to the PTK hub.<sup>50</sup> Each had to be approved by the LTTE and the government. The UN was required to disclose details about the vehicles and personnel in the convoy, the contents of the vehicles, and the route and destination. This information had to be approved by the defence ministry in Colombo and the SFHQ-Vanni.<sup>51</sup>

The security forces supervised the loading of trucks, sealed and guarded the stores, and searched the vehicles before departure to ensure no prohibited items could enter the Vanni. The convoys were also controlled at the Omanthai checkpoint. All of the vehicles used in the convoys were clearly marked and identified.<sup>52</sup> Convoy personnel in-

cluded international and Sri Lankan staff from various UN agencies.

Even though the departure time and route for each convoy had been agreed by the security forces and the LTTE, shells landed close to the convoys on multiple occasions, causing one trip to be aborted. Because the shells were striking on or near LTTE positions, and because the LTTE generally benefited from the convoys,<sup>53</sup> UN staff believed that the shells were fired by the security forces. The UN advised the security forces of the shelling incidents, but they denied it except during the tenth convoy when they claimed the shelling was justified because the LTTE had fired first.

The eleventh convoy was the last the UN attempted. Prior to its departure, UN staff had advised General Jayasuriya on multiple occasions of conditions observed in the Vanni, including at PTK hospital. He was informed of the high number of civilians who had been killed or wounded by artillery fire including women, children and the elderly. In response he said the security forces had fired only on the LTTE, not on civilians. He also said civilians should not be in the front lines as it was hard to distinguish between civilians and LTTE. General Jayasuriya was further informed that an alternative means of supplying and helping the civilian population was needed to alleviate their suffering from starvation, injuries and illness due to the war.

The final UN convoy departed Vavuniya on 16 January 2009. It consisted of light vehicles and over 50 lorries containing WFP-supplied foodstuffs (flour, sugar, dhal, rice and cooking oil) and a few shelter items. The Sri Lankan security forces inspected the entire convoy before departure. The LTTE and security forces agreed to a ceasefire to allow it to pass through the front lines and deliver the aid and return the next day. The convoy arrived in PTK that day and the WFP rations were unloaded into the storage structures.<sup>54</sup>

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and all the major battles during the span of the war. ... President Mahinda Rajapaksa recognised the capability and ability of General Sarath Fonseka and that is why he appointed General Fonseka as the Army Commander. ... General Jagath Jayasooriya who is the Security Forces Commander, Vanni coordinated operations from the beginning until the end. He is the overall commander of the Divisions mentioned above [the 53rd, 57th, 58th and 59th divisions]. His contribution to this campaign has been immense". "Defence Secretary Gotabaya Rajapaksa salutes the war heroes", *Business Today*, June 2009. There have been suggestions of competition between the generals with reports that at some point Fonseka instituted an inquiry against Jayasuriya. "Fonseka challenges impartiality of judges", Express News Service, 22 March 2010, <http://expressbuzz.com/world/fonseka-challenges-impartiality-of-judges/158467.html>; and D.B.S. Jeyaraj, "Rajapakse regime and the Fonseka phenomenon: Genesis of current crisis", 14 November 2009, <http://dbsjeyaraj.com/dbsj/archives/1227>. As for the defence secretary's own role: "Gotabaya says that he along with [Sri Lankan Armed Forces – army, navy and air force] top brass 'read' and analysed the war operations every hour, every day. 'I could understand and gauge the need and requirements. Any military commander will ask for everything, every possible weapon, every possible inventory. My job was to understand the priorities, rationally organize those priorities in terms of what was really required for victory and flush out needs and requirements that had zero relevance to our objectives'". "Winning wars: political will is the key", *Indian Defence Review*, op. cit. For Fonseka's full endorsement of the president and his brother, see V.K. Shashikumar, "Lessons from the War in Sri Lanka", op. cit.

<sup>50</sup> The government required that, once delivered, the senior government official for the area was to sign for and take custody of the foodstuffs and be responsible for their distribution to the IDP population via a system of distribution points.

<sup>51</sup> Some essential supplies proposed by the UN were rejected. For example, the defence ministry refused clearance for 10,000 shelter kits that the UN prepared at the height of the monsoon season in December 2008.

<sup>52</sup> The WFP vehicles were large lorries, which were either white vehicles with UN or WFP markings in large blue lettering or hired vehicles marked with large white banners with blue lettering identifying them as WFP vehicles. There were also a number of light vehicles with UN markings and blue flashing lights

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mounted on the roof. Each convoy included 30-60 large lorries which were led and followed by white UN light vehicles.

<sup>53</sup> The LTTE usually welcomed the convoys because the food would sustain an increasingly frustrated Tamil population, the convoys brought in internationals who could observe and report government shelling and the condition of the civilian population, and the LTTE took some of the food and gave it to their cadres. While the LTTE generally did not take food when it was initially transferred from the government or WFP to local government officials, it did as the food moved to other distribution points. Witnesses reported that LTTE policy after late January 2009 was to take around 25 per cent of the food for their cadres.

<sup>54</sup> There were no security incidents during the journey. However, as the convoy crossed the security forces front line, soldiers walked along the vehicles and advanced toward the LTTE. This did not draw any LTTE fire.

Despite plans for the convoy to return to Vavuniya on the morning of 17 January, the security forces did not give clearance. Instead, amid reports of a planned offensive against PTK and a growing IDP population in the area, they continued to engage the LTTE along the southern front line. Over the next few days incoming and outgoing mortar and artillery fire intensified. The LTTE were launching shells from close to PTK into government-held territory, and incoming shells from the security forces were striking in PTK. UN staff constructed a bunker.

Around that time, the government released information that it was establishing a “No Fire Zone” (NFZ) approximately 7km away from PTK that would include Suthanthirapuram, Udayaarkaddu North, Vallipunam and Thevipuram.<sup>55</sup> When the zone was declared, the LTTE’s western front was at the most only a few kilometres from the zone’s southern boundary, running parallel to the A35 road. It was also widely known that the LTTE had artillery pieces deep in the zone at the time of its declaration but not near the A35 road where most of the civilians were located.<sup>56</sup> The NFZ was within range of the security forces’ artillery and landlocked with no direct access to Vavuniya. The government told the civilian population to move to the NFZ as soon as possible.<sup>57</sup> Spokesperson Brigadier Udaya Nanayakkara was quoted as saying: “We will not fire into that area”.<sup>58</sup>

This initial NFZ and the two that followed were established by the government unilaterally, not by agreement with the LTTE.<sup>59</sup> Thus the LTTE’s presence in the NFZs was not in itself a violation of international law. They did, however, still have an obligation to take precautions to protect the civilian population against the effects of attacks. The government on the other hand assumed a heightened re-

sponsibility to protect the civilian population by designating the NFZs and encouraging civilians to move to them.

The security forces finally granted clearance for the eleventh convoy to return to Vavuniya on 21 January. Because the LTTE refused to allow the UN national staff members and their dependants to depart with the convoy – stopping them at gunpoint – one light vehicle and seven lorries remained behind along with two international staff. The SFHQ-Vanni advised the UN to evacuate PTK because they were intending to launch an attack on the town and the LTTE emplacements around it. The SFHQ-Vanni directed the UN to relocate to the NFZ.

After surveying the NFZ on 22 January and negotiating a departure time with the security forces and the LTTE, the UN moved its staff and their dependants and supplies on 23 January.<sup>60</sup> They relocated to an open sports field north of Suthanthirapuram Junction, which was to be used as a food distribution centre overseen by local government officials.<sup>61</sup> National staff of many international NGOs also set up there. Some ICRC staff relocated from PTK and set up south east of Suthanthirapuram Junction. Civilians were crowding into the NFZ along the A35 road. Thousands were in the immediate vicinity of the distribution centre seeking food and shelter. Individuals present reported seeing UAVs overhead, and the hospital at Vallipunam had been shelled the previous day.

Soon after their arrival UN staff started constructing bunkers for themselves and their dependants and conducted a GPS survey of the site perimeter allowing for a 200m safety buffer zone. The coordinates were communicated that afternoon to the JOH in Colombo and the SFHQ-Vanni in Vavuniya, and to the LTTE. The seven large white lorries and a UN flag identified their presence.

There were no LTTE emplacements within or near the GPS coordinates provided. A small camp of four cadres armed with rifles were just outside of the distribution centre and a *Voice of Tigers* radio station was housed in a shipping container at a corner of the site. There were a few LTTE gun positions within 500m of the centre. However, the vast majority of cadres were located on the front lines – between the security forces and the NFZ – and most of their artillery was located deeper in the NFZ or on the coast at Vellamullivayakkal. In fact, the defence

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<sup>55</sup> The map attached as Appendix C shows the location of this 35.5 sq. km NFZ, which the government formally declared on 21 January 2009. It included a section of the A35 road running west from Manjal Palam Bridge to Suthanthirapuram Junction, as well as the Vallipunam hospital. When the zone was first established, civilians were concentrated around the A35 road and the road heading north from Suthanthirapuram Junction. Much of the rest of the area was jungle and difficult to traverse.

<sup>56</sup> The government accused the LTTE of bringing artillery and other equipment into the NFZ after it was declared. “LTTE clamps on civilian outflow: Mounts artillery batteries inside No-fire zones – Mullaittivu”, 31 January 2009, at [www.defence.lk/new.asp?fname=20090130\\_F01](http://www.defence.lk/new.asp?fname=20090130_F01).

<sup>57</sup> This was communicated in many ways, including over the radio and via leaflets distributed by local government officials in PTK and dropped by the air force.

<sup>58</sup> “250,000 Tamil civilians urged to flee to safety”, Associated Press, 22 January 2009.

<sup>59</sup> Their status therefore was not governed by agreement of the parties under international law, as provided for example in Article 14 of the Fourth Geneva Convention.

<sup>60</sup> Security guards and others had joined the UN staff and dependants bringing the group to over 130. They travelled in the eight remaining vehicles and transported pre-fabricated buildings, bunker-building materials, communications equipment, some medical supplies, food and fuel. Most of the food in the WFP storage facilities in PTK was looted before it could be transferred to the NFZ.

<sup>61</sup> Those officials brought approximately 100 metric tonnes of food to the centre along with various pieces of equipment.

ministry's own website on 31 January showed that the LTTE artillery positions, "plotted with accurate information received from technical and intelligence sources", were deep in the NFZ and far from the A35 road and the food distribution centre.<sup>62</sup> While the UN was marking the northern perimeter of its position, there was LTTE fire out from the NFZ from a short distance away toward the front lines.

Around that time or later the Sri Lankan security forces fired shells into the NFZ striking near the A35 road. Many civilians were killed and wounded. UN staff and others contacted the government and the security forces asking them to cease the bombardment. There was sporadic LTTE fire out from the NFZ, but not from within the distribution centre.

At around 3:00am on 24 January the security forces shelled in and around the distribution centre. A shell landed between 5m and 8m from the UN bunkers, in the middle of some IDP shelters. At least eleven civilians were killed and more wounded in this attack, including women and children. A WFP driver was hit in the back of the head with shrapnel. The decapitated body of a young woman landed in front of the UN bunker. A UN vehicle was damaged by shell fragments and covered with pieces of flesh and other debris from the explosion. The UN bunkers were also damaged. At some point, a family member of a UN staffer was hit in the head by shrapnel while sheltering inside a UN vehicle. Local government officials' vehicles, which had been donated by the NGO CARE, were also destroyed. The shelling caused fear among the civilians who had sought safety in the centre.

Once again, several communications were sent immediately to the Sri Lankan government and security forces asking them to stop firing. Calls were also sent to heads of diplomatic missions who relayed their concerns to the government. The security forces' response was to blame the firing on the LTTE even though it was coming from the security forces' locations. The shelling eventually ceased in the immediate vicinity of the UN position. There was direct communication from UN staff in the NFZ to General Jayasuriya.

During the rest of 24 January, the security forces continued heavy shelling of the NFZ from positions in the south and south east. On several occasions shells landed in the distribution centre killing and injuring people lined up for food. Civilians panicked, and many fled the centre and moved north. The UN and others continued to contact the government and security forces to ask them to stop the

shelling in the NFZ. The concentration of civilians had greatly increased resulting casualties. Shells from multi-barrelled rocket launchers (MBRLs) were also landing in the NFZ.<sup>63</sup> The LTTE was firing out toward the front-lines, from positions between 500m and 2km away from the UN site. Their artillery guns have a minimum range of at least 5km for indirect or arcing fire.<sup>64</sup>

The UN negotiated with the government and LTTE to allow their staff members and dependants to depart the NFZ and return to PTK. Around 11:30am on 25 January the shelling subsided and the UN staff departed, arriving in PTK shortly thereafter. International and national ICRC staff and local government officials also evacuated the NFZ and moved back to PTK at approximately the same time. Along the A35 road, there were many dead and injured civilians, destroyed bicycles and motorcycles, and dead animals. There were LTTE cadres at PTK junction.

In PTK there was comparatively less damage from shelling, though PTK hospital was full of wounded and dying civilian patients. Many had arrived from the areas around Udayaarkaddu, Vallipunam, Kaiveli and Suthanthirapuram – most from within the NFZ. More arrived from the same areas over the next few days. There was no shelling in PTK after UN staff arrived on 25 January through that night.

On 26 January 2009, military spokesman Brigadier Udaya Nanayakkara was quoted: "We are not targeting this safe zone. ... [The LTTE] have moved their weapons to the safe zone and are firing from the safe zone but we don't engage them".<sup>65</sup> On 27 January, *The New York Times* reported that he denied that government artillery had hit a UN compound, stating that either relief and hospital officials had been pressured by the LTTE to lie or the rebels had fired the shells themselves.<sup>66</sup> On 28 January, he reportedly said: "There were no civilians killed... We

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<sup>63</sup> These weapons fire a large number of rockets simultaneously and are designed to completely destroy anything within a targeted area. The security forces' MBRLs have a launch capacity of up to 40 rockets or shells at a time, with a minimum range of approximately 5km. The LTTE were believed to have some MBRLs, but those could launch only six or nine rockets.

<sup>64</sup> The minimum range for the artillery pieces used by both sides through the last five months of fighting was at least several kilometres. Thus any shelling of civilians had to occur from some distance. Artillery pieces can be lowered horizontally to shoot canister balls at close range, but there have been no allegations of this type of fire from either side.

<sup>65</sup> "UN: Trapped civilians in Sri Lanka war a 'crisis'", Associated Press, 26 January 2009.

<sup>66</sup> "U.N. staff and hospital come under shelling as Sri Lanka fights cornered rebels", *The New York Times*, 27 January 2009.

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<sup>62</sup> "LTTE clamps on civilian outflow: Mounts artillery batteries inside No-fire zones – Mullaittivu", MOD news, 31 January 2009, at [www.defence.lk/new.asp?fname=20090130\\_F01](http://www.defence.lk/new.asp?fname=20090130_F01).

are targeting the LTTE. We are not targeting any civilians so there can't be any civilians killed".<sup>67</sup>

At the end of January UN staff again informed General Jayasuriya about the shelling of civilians in the NFZ and the civilian casualties. He maintained that the security forces did not shell them.

The above evidence provides reasonable grounds to believe that individuals within the Sri Lankan security forces committed war crimes, specifically intentionally directing attacks against civilians (discussed in Section III.C below) and "intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance mission in accordance with the UN charter".<sup>68</sup> Such individuals, as well as others who ordered or assisted in the alleged crimes or are otherwise responsible as military or civilian superiors,<sup>69</sup> may be held

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<sup>67</sup> "Sri Lanka UN staff come under fire while in 'safe zone'", Associated Press, 28 January 2009.

<sup>68</sup> Rome Statute, Article 8(2)(e)(iii) provides in full: "Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict". The elements set out below are from the corresponding article in the Rome Statute Elements of Crimes. In general, for all of the unlawful attack crimes discussed herein: "This offence is not limited to attacks against individual civilians. It essentially encompasses attacks that are not directed against a specific military objective or combatants or attacks employing indiscriminate weapons or attacks effectuated without taking necessary precautions to spare the civilian population or individual civilians, especially *failing to seek precise information* on the objects or persons to be attacked. The required *mens rea* may be inferred from the fact that the necessary precautions... were not taken before and during an attack". Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (ICRC and Cambridge University Press, 2003), pp. 131-132, 445 (emphasis in original). Reprisals against civilians in the hands of an adversary acting unlawfully are also clearly prohibited. *Ibid.*, pp. 140-144, 445.

<sup>69</sup> The Rome Statute provides for individual criminal responsibility for anyone who commits a crime; orders, solicits or induces its commission; aids, abets or otherwise assists in its commission; or otherwise contributes to its commission by a group of persons acting with common purpose, with the aim of furthering the criminal activity or criminal purpose of the group or in the knowledge of the intention of the group to commit the crime. Article 25. Under the doctrine of command responsibility, military commanders and civilian superiors can also be held responsible for crimes committed by forces or subordinates under their effective command or authority and control as a result of their failure to exercise control properly. Article 28. For military commanders this requires that the person "knew or, owing to the circumstances at the time, should have known that

criminally liable. The main elements of this crime and a summary of relevant evidence are as follows:

- ❑ **The perpetrator directed an attack.** Witness statements show that the security forces repeatedly launched weapons at the food distribution centre and the UN site therein. The pause in fire after the intense shelling early in the morning of 24 January and multiple calls to the government and security forces to ask them to stop the fire demonstrates that they had control over the frequency and direction of their attacks. The LTTE positions within the NFZ were too close to the centre to fire arcing artillery shells into it, and LTTE in general had little reason to fire on their own fighters or cause the UN and especially internationals to leave.
- ❑ **The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance mission.** The humanitarian nature of the UN operation and food distribution centre was well established. The UN personnel and supplies carried into the area had been approved by the defence ministry and SFHQ-Vanni and inspected by the security forces. The food distribution was being coordinated by the government's representative. Shells struck within metres of UN personnel sheltering in bunkers, injuring at least two people associated with the UN and damaging at least one UN vehicle. Many civilians seeking food, shelter or assistance in the centre were killed and materials were destroyed.
- ❑ **The perpetrator intended such personnel, installations, material, units or vehicles to be the object of the attack.** A number of government and military officials had detailed knowledge of the location of the food distribution centre and the UN personnel, vehicles and materials. The SFHQ-Vanni had directed them out of PTK and into the NFZ. The UN provided GPS data on their precise location, and witnesses saw UAVs flying over the food distribution centre.<sup>70</sup> There was

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the forces were committing or about to commit such crimes" and "failed to take all necessary and reasonable measures" to prevent or repress or investigate and prosecute the crimes; the standard for civilian superiors requires that the person "knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit" crimes that "concerned activities that were within the effective responsibility and control of the superior", and the person "failed to take all necessary and reasonable measures" to prevent or repress or investigate and prosecute. *Ibid.* Most criminal jurisdictions employ similar forms of liability.

<sup>70</sup> Defence Secretary Rajapaksa has emphasised the broad use of UAVs: "We gave all Commanders a direct connection to the UAV. Therefore, all Divisional Commanders could see what was going on in front, in the LTTE controlled areas. Throughout the Humanitarian Operations we gave this facility to the ground Commanders. Therefore, when they were planning and

no warning to the UN, civilians or government representatives who had followed the security forces' instructions to go to the NFZ, that the area would be shelled. After the shelling began, the government and security forces received further confirmation of the location of the centre and UN site and the fact that it was being shelled. As the shelling continued, the government was again advised of the location. Outgoing LTTE fire was sporadic and did not come from within the centre. The LTTE frontlines and vast majority of cadres were outside of the NFZ. While shelling into and around the NFZ caused significant civilian casualties and damage, shelling in the same time period in PTK – which the security forces had told the UN and civilians to leave – was significantly less intense.

- **Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians under the international law of armed conflict.** The UN personnel and material in the food distribution centre were involved in only humanitarian activities, as were the government representatives. At no time did they provide assistance to LTTE cadres or engage in any acts that may have been harmful to the security forces. UN personnel, vehicles and material had been searched and approved by the security forces before going into the Vanni. The government had declared the NFZ with the stated intention of protecting civilians and then directed the UN to relocate its personnel, vehicles and material there. The civilians in the area around the distribution centre were not taking part in the hostilities.
- **The perpetrator was aware of the factual circumstances that established that protection.** The security forces and government approved the UN's location. There were multiple communications confirming that the personnel and materials in the centre were not involved in the conduct of the hostilities.

The seriousness of these allegations warrants a full investigation of events leading up to and after the establishment of the first NFZ. This should include individuals such as Major General Jayasuriya, as the evidence provides reasonable grounds to believe he had knowledge of the nature and location of the UN operation and food distribution centre and control over the security forces. It should also include his military and civilian superiors including General Fonseka and Defence Secretary Gotabaya Rajapaksa.

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executing the operations it was very helpful for the ground Commanders to see in front; to see where the enemy concentrations were, to see and locate where the fire was coming from, to neutralise and act accordingly". "Defence Secretary Gotabaya Rajapaksa salutes the war heroes", *Business Today*, op. cit.

An investigation is particularly warranted because the evidence Crisis Group has collected provides a reasonable basis to believe there was a repeated pattern of attacks by the security forces on humanitarian operations. An example of the many others that have been reported is the 8 April shelling of a large group of women, children and other civilians who had lined up to receive a distribution of milk powder near Ampalavanpokkanai in the second NFZ. Hundreds were killed or injured. The security forces' aerial surveillance vehicles were flying over the location before the attack, and the time and location of the distribution had been communicated to them.

## B. ATTACKS ON HOSPITALS

Dozens of attacks on hospitals and make-shift medical centres were reported in the final five months of the war.<sup>71</sup> The government either denied these incidents entirely<sup>72</sup> or claimed the facilities were being used by the LTTE for military purposes and therefore were legitimate targets. It also rejected reports of mounting civilian casualties and suffering, many of which were coming from medical personnel or witnesses who had been in hospitals. Four government doctors who managed the last medical centres until the end of the fighting were arrested upon leaving the war zone because of the information they had released.<sup>73</sup> Hospitals remain protected under

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<sup>71</sup> Information about hospital incidents was collected in the State Department's October report, as well as in reporting by Human Rights Watch, UTHR and others. See "Report to Congress on Incidents During the Recent Conflict in Sri Lanka", U.S. Department of State, October 2009; "War on the Displaced: Sri Lankan Army and LTTE Abuses against Civilians in the Vanni", Human Rights Watch, February 2009, pp. 16-19 (identifying sixteen reported attacks between 15 December 2008 and 10 February 2009); "Sri Lanka: Repeated Shelling of Hospitals Evidence of War Crimes", press release, Human Rights Watch, 8 May 2009; "Let Them Speak: Truth about Sri Lanka's Victims of War", Special Report no. 34, UTHR, 13 December 2009.

<sup>72</sup> In responding to a question about alleged hospital attacks, Sri Lanka's ambassador to the UN Palitha Kohona stated: "There was only one hospital that anybody had ever marked on a map in that whole area and we have got pictures to show that hospital was never targeted. ... If a hospital had to be shelled ... I know the way we took out LTTE officers, their camps, with such clinical precision – if we wanted to do that to a hospital we could have done that also. Why do a half-hearted job if you wanted to really finish it off?" "War Stories", SBS Dateline, op. cit.

<sup>73</sup> They left the war zone on 15 May 2009 and were detained under the Prevention of Terrorism Act, accused of releasing false information to the foreign media and assisting the LTTE. In an 8 July press conference organised by the government, the doctors said the LTTE had forced them to exaggerate the numbers killed and wounded, and that in fact only 750 civilians had been killed. The doctors were released on bail soon after the press conference and have returned to their jobs but remain under tight government surveillance. A fifth doctor who worked

international humanitarian law, unless the facilities are “used to commit hostile acts, outside their humanitarian function”.<sup>74</sup> The mere presence of wounded combatants or LTTE doctors would have no effect on a hospital’s protected status.

Crisis Group has detailed evidence about a number of these attacks. It illustrates the pattern by which medical staff and civilians were repeatedly forced to abandon hospitals across the Vanni.<sup>75</sup>

### 1. PTK hospital

The PTK hospital compound was a government-run facility staffed by government medical personnel who reported to the health ministry in Colombo.<sup>76</sup> By late January it was the only government-run hospital in the Vanni that was still operating in its original location; all the others had been displaced to makeshift facilities. It was also full of hundreds of civilians, including many women, children and elderly who had been injured in the NFZ. Their wounds appeared to be caused predominantly by shrapnel from exploding shells, and there were many who had lost limbs. Several also had severe burns. Medical staff were overwhelmed and there was a shortage of supplies. A strong smell was coming from the many open wounds, and patients were overflowing onto floors, into hallways and in the driveway. Many died of their injuries while at the hospital.

The LTTE used a small separate area in the PTK hospital compound for injured cadres. Many of those fighters present in late January were suffering from bullet wounds and broken bones. The LTTE area was being used for medical purposes.

When the UN and local government staff had initially moved to the NFZ, they informed Colombo that PTK hospital would remain operational. When they returned to

PTK, they received assurances that the hospital would be protected, even though the security forces had told the government doctors to leave. A 1 February letter from the security forces to the UN distinguished locations outside the hospital premises, where national UN staff were staying, indicating that safety there could not be guaranteed. Later, the security forces again told the doctors to leave and close the hospital, but the doctors informed the government they could not follow these instructions and would remain in the hospital for the welfare of the civilian population.

After 26 January, there was incoming artillery and MBRL shelling around PTK, primarily from the south and east.<sup>77</sup> Some of this landed within 200m of the hospital compound. Information about the UN staff’s location and the shelling were again sent to the government and military. The LTTE were also firing out sporadically from the vicinity of the hospital, but not with heavy weapons and not from within the hospital compound itself. The LTTE denied any firing out from near the hospital as they had denied firing out from the NFZ. On 26 January the UN reported it had been informed of fire that appeared to be from an LTTE position near PTK into the NFZ but witnesses present did not confirm that incident.

On 29 January, the security forces and LTTE allowed the ICRC to evacuate over 200 patients along with their caregivers from PTK hospital to hospitals in government-held Vavuniya. The two international UN staff members who were still in the Vanni also returned to Vavuniya that day. Sustained fighting and LTTE obstruction had prevented the evacuation of patients in the days prior (see Section IV.A below). Even after the evacuation, hundreds of patients remained at PTK hospital with more arriving the morning of 29 January.

That evening President Rajapaksa announced a 48-hour period for the LTTE “to allow free movement of civilians to ensure their safety and security”. He promised all civilians “a safe passage to a secure environment”.<sup>78</sup> The next day Minister of Human Rights and Disaster Management Mahinda Samarasinghe “categorically stated that the Government is determined not to have a Ceasefire” and said that the government was urging the LTTE to let civilians go to the declared “Safe Zone”.<sup>79</sup>

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for the LTTE medical corps and appeared at the same press conference remains in government custody. “Tamil doctors released on bail”, [www.bbcsinhala.com](http://www.bbcsinhala.com), 24 August 2009; and Rajan Hoole, “Doctoring the evidence”, *Himal Southasian*, August 2009, at [www.himalmag.com/Doctoring-the-evidence\\_nw3217.html](http://www.himalmag.com/Doctoring-the-evidence_nw3217.html).

<sup>74</sup> Additional Protocol II to the Geneva Conventions, art. 11. Even then, hospitals cannot be targeted until an effective warning has been given and gone unheeded.

<sup>75</sup> See Appendix E for a map of the permanent and temporary hospitals in the Vanni and the dates they were abandoned.

<sup>76</sup> The PTK hospital compound was located on the PTK-Mullaitivu Road east of PTK Junction. It consisted of a number of buildings, most of which had red crosses on white backgrounds on their roofs. International organisations operating in the Vanni and the government and security forces knew its location well.

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<sup>77</sup> Shelling from the security forces struck in PTK before this. On 13 January, shells landed near and in the hospital killing at least one woman and wounding others, including a little girl. The hospital was damaged. UN officials advised the government about the hospital shelling that day.

<sup>78</sup> “Allow free movement to the civilians in 48 hours – President urges LTTE”, 30 January 2009, at [www.defence.lk/new.asp?fname=20090130\\_01](http://www.defence.lk/new.asp?fname=20090130_01).

<sup>79</sup> “Truce not a ceasefire”, 31 January 2009, at [www.defence.lk/new.asp?fname=20090131\\_01](http://www.defence.lk/new.asp?fname=20090131_01).

Despite the promise of safe passage, incoming shelling around PTK hospital and in other areas including the NFZ continued, with a number of civilians killed. On the morning of 1 February, the government said the LTTE had ignored its “ultimatum” and accused them of setting up a “forward defence line in the outer perimeters of the Safe Zone”.<sup>80</sup> The government also committed to “continue to adhere to the zero civilian casualty (ZCC) policy while engaging in its all out effort to eradicate the terrorists”.<sup>81</sup> That same day the security forces stepped up their assault on PTK, reportedly with plans to take the town by Independence Day on 4 February.

The security forces shelled PTK hospital multiple times on 1 February, striking various facilities including a ward with women and children and a church. International ICRC staff were present at the hospital at the time of the attacks. The organisation took the unusual step of issuing a press release that day stating that the hospital had been shelled, that it still had over 500 in-patients and that injured people continued to arrive.<sup>82</sup> In a statement the following day, ICRC confirmed that at least nine people were killed and at least 20 injured by shelling on 1 February.<sup>83</sup>

On 2 February, Gotabaya Rajapaksa and an interviewer had the following exchange:

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 ... Gotabaya: No hospital should, no hospital should operate now ... Interviewer: if it's outside of the safe zone, 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.<sup>84</sup>

<sup>80</sup> In fact, the LTTE's front line had been only a few kilometres away from the boundary of the NFZ when it was declared and the military had been forcing them back towards it.

<sup>81</sup> “Ultimatum to LTTE expires: terrorists ignore safe passage for stranded civilians”, 1 February 2009, [www.defence.lk/new.asp?fname=20090201\\_01](http://www.defence.lk/new.asp?fname=20090201_01).

<sup>82</sup> “Sri Lanka: Vanni hospital shelled”, press release, ICRC (Colombo/Geneva), 1 February 2009, at [www.alertnet.org/thenews/fromthefield/220224/337f825ea91083b3d1f83a3867f85d31.htm](http://www.alertnet.org/thenews/fromthefield/220224/337f825ea91083b3d1f83a3867f85d31.htm).

<sup>83</sup> “ICRC maintains support for hospital hit by shelling”, interview with Monica Zanarelli, ICRC deputy head of operations for South Asia, 2 February 2009, at [www.icrc.org/web/eng/siteeng0.nsf/html/sri-lanka-interview-020209](http://www.icrc.org/web/eng/siteeng0.nsf/html/sri-lanka-interview-020209).

<sup>84</sup> “Packed Sri Lanka hospital shelled”, Skynews, 2 February 2009, at [http://news.sky.com/skynews/Home/World-News/Sri-Lanka-War-Hospital-In-Puthukkudiyiruppu-Shelled-Killing-Adults-And-Children/Article/200902115214899?lpos=World\\_](http://news.sky.com/skynews/Home/World-News/Sri-Lanka-War-Hospital-In-Puthukkudiyiruppu-Shelled-Killing-Adults-And-Children/Article/200902115214899?lpos=World_)

The defence ministry also issued a statement on 2 February:

While the Security Forces accept all responsibility to ensure the safety and protection of civilians in the Safety Zones, they are unable to give such an assurance to those who remain outside these zones. Therefore, the government, with full responsibility, urges all civilians to come to the Safety Zones; and also states that 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.<sup>85</sup>

The security forces shelled the hospital again from 2-4 February, including an intense attack on the morning of 4 February killing more patients. The UN and others repeatedly advised the government and military of this shelling. A news article on 3 February quoted Gotabaya Rajapaksa as saying: “There are no independent observers, only LTTE sympathisers. Radio announcements were made and movement of civilians started a month and a half ago”.<sup>86</sup>

On 4 February around 300 patients and eighteen ICRC staff fled PTK hospital and went to Putumattalan,<sup>87</sup> along with the remaining UN national staff and dependants. UN staff advised Major General Jayasuriya and the LTTE of their route and location.

Two days later the Sri Lankan Air Force released aerial video footage of PTK hospital dated 5 February and claimed it “clearly shows the buildings of the former Puthukkudiyiruppu hospital with no damages caused due to artillery fire or aerial bombardment”.<sup>88</sup> 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 de-

News\_Third\_Home\_Page\_Article\_Teaser\_Region\_6&lid=ARTICLE\_15214899\_Sri\_Lanka\_War%3A\_Hospital\_In\_Puthukkudiyiruppu\_Shelled%2C\_Killing\_Adults\_And\_Children and [www.youtube.com/watch?v=pKmM2qg95R0&feature=related](http://www.youtube.com/watch?v=pKmM2qg95R0&feature=related).

<sup>85</sup> “Come to Security of Safety Zone – Govt. Urges all Civilians”, 3 February 2009, at [www.priu.gov.lk/news\\_update/Current\\_Affairs/ca200902/20090203come\\_to\\_safety\\_zone.htm](http://www.priu.gov.lk/news_update/Current_Affairs/ca200902/20090203come_to_safety_zone.htm).

<sup>86</sup> “Can't ensure safety of civilians in LTTE areas: Sri Lanka”, IBNLive, 3 February 2009, at <http://ibnlive.in.com/news/cant-ensure-safety-of-civilians-in-ltte-areas-sri-lanka/84336-2.html>.

<sup>87</sup> “Sri Lanka: parties must grant safe passage to stranded patients and medical staff”, interview with Monica Zanarelli, 9 February 2009, at [www.icrc.org/Web/Eng/siteeng0.nsf/html/sri-lanka-feature-090209](http://www.icrc.org/Web/Eng/siteeng0.nsf/html/sri-lanka-feature-090209).

<sup>88</sup> “Former Puthukkudiyiruppu hospital unharmed; Air Force Beechcraft exposes how LTTE has taken UN for ride”, 6 February 2009, at [www.defence.lk/new.asp?fname=20090206\\_03](http://www.defence.lk/new.asp?fname=20090206_03) (last modified 7 February 2009).

tailed information about the nature and location of objects and people in the Vanni.

## 2. Ponnambalam Memorial Hospital

Ponnambalam Memorial Hospital (PMH) was a private hospital located along the Iranaipalai road running from PTK Junction towards the coastal town of Putumattalan. Though it was funded by LTTE supporters outside of Sri Lanka, it treated both civilians and cadres.<sup>89</sup> Witnesses familiar with the hospital often saw ambulances going to and from it and patients on crutches and wheelchairs sitting in the sun in the front yard. They did not see any security in the front of the building or other indications that it was used for military purposes. Outside the hospital was a sign with the name of the hospital and a red cross on white background.

On 6 February, the Sri Lankan Air Force bombed the hospital. The bombing severely damaged the back of the main hospital building and destroyed a large house known as the annex located across the road, which had been used to house patients. At the main hospital, a witness saw bodies under the concrete which appeared to be mostly men in sarongs. Some had plaster casts on their legs or arms. Bed frames and other hospital equipment were visible in the rubble. Large machinery was used to try to move the debris. The site was bombed again later that day. As many as 75 people may have been killed.<sup>90</sup>

The following day the air force announced that “Kfir and F-7 fighter jets ... destroyed a hideout of senior LTTE leader Soosai located 1 Km northeast of Puthukudduyiruppu junction” and released aerial video footage from the operation.<sup>91</sup> Spokesperson Wing Commander Janaka Nanayakkara said sources revealed that Soosai was at the target – an underground bunker and a luxury house – at the time of the attack, but there was no confirmation of his death or injury. The statement further said fighters hit the target a second time after they “observed that the terrorists were making a desperate attempt to dig out the location with three earth moving vehicles”.<sup>92</sup>

This video, also edited, shows a precision airstrike on a large building next to a road. It then shows a backhoe digging through the rubble and a second airstrike destroying it. Witnesses who were at PMH just after the aerial strikes on that day have identified the building in this video as the hospital annex. While LTTE leaders reportedly did

use houses in the area,<sup>93</sup> they did not use the main hospital or the annex. The military’s pursuit of Soosai continued to the end of the war.<sup>94</sup>

## 3. Putumattalan hospital

After evacuating PTK hospital on 4 February, the government medical staff and ICRC established a makeshift facility at the Putumattalan school, which then consisted of four classroom buildings and two temporary shelters. The UN national staff and dependants who were still in the Vanni set up near the school with their UN vehicles and a UN flag. Both organisations provided the government and military with the GPS coordinates for their locations. The hospital also flew a flag with a red cross on white background. Thousands of IDPs set up nearby seeking safety near the UN and ICRC. There were hundreds of patients in the hospital and outside it on mats under trees. People were bleeding from shrapnel wounds and there were not enough bandages to treat them.

This facility was located in what would become the second NFZ, which came into effect on 12 February.<sup>95</sup> It was a narrow spit of land with the coast on one side and a lagoon on the other. The hospital was about 50m from the lagoon on a high point; those present could see clearly across the lagoon. The roof was also painted with a red cross on white background. The government said the new NFZ was “expected to facilitate flow of humanitarian aid and medical supplies for the people stranded with LTTE”.<sup>96</sup> For the three days before the new NFZ came into effect, the security forces shelled the civilian area in Putumattalan from the south and from Chalai to the north, striking in the immediate vicinity of the hospital and killing and wounding civilians.

There was no LTTE military presence near the hospital. On 10 February ICRC announced that it was evacuating 240 wounded and sick from Putumattalan to Trincomalee and confirmed that shelling had killed at least sixteen

<sup>89</sup> “Let them speak”, UTHR, op. cit., p. 40.

<sup>90</sup> Ibid, p. 41.

<sup>91</sup> “Soosai’s luxury mansion [sic] destroyed in air raid – Puthukudduyiruppu [Video Updated]”, at [www.defence.lk/new.asp?fname=20090207\\_03](http://www.defence.lk/new.asp?fname=20090207_03) (last modified 8 February 2009).

<sup>92</sup> Ibid.

<sup>93</sup> “Let them speak”, UTHR, op. cit., p. 41.

<sup>94</sup> Soosai was the head of the Sea Tigers, believed killed in the final day of fighting.

<sup>95</sup> This twelve-kilometre long zone ran from the north of Vadduvakal past Putumattalan. “No fire zone’ declared further facilitating civilian safety”, 12 February 2009, [www.defence.lk/new.asp?fname=20090212\\_09](http://www.defence.lk/new.asp?fname=20090212_09). See map attached as Appendix D.

<sup>96</sup> Ibid.

patients.<sup>97</sup> Over the next week, it evacuated over 840 more patients and family members.<sup>98</sup>

There was further shelling of Putumattalan hospital and the area around it in the following weeks. In late February a witness heard two artillery shells launched by the security forces from around 12km away. The shells landed 30-40m from his family's tent shelter and close enough for some of the shrapnel to damage the hospital. He and his family were not wounded because they were sleeping in a trench at the time. But at least seven civilians, including two small children, were killed. There was no LTTE presence at the hospital or near the family's shelter at the time of the shelling. In fact, this witness was at the hospital about once a week from late February to early March and never saw any LTTE military presence in or near it.

A second witness who had set up a shelter and bunker about 100m away from the hospital reported that it was shelled around 17 February, killing patients and further injuring others. He saw some patients who were still mobile running away from the hospital as the shelling was continuing. He did not see any LTTE in the area and there was no outgoing fire from the hospital. While he was in Putumattalan the hospital buildings were overflowing with injured people and many were being treated outside in open areas. After the shelling, some injured people were afraid to go to the hospital or to stay after initial treatments.

A third witness who was at the hospital a number of times in late February and early March described severe overcrowding and hundreds of patients with shrapnel wounds. There was no running water and limited anaesthetics, intravenous feeds and blood supply. Dead bodies of patients who had died of their wounds in the hospital were set out in the yard, including women, children and the elderly. This person also witnessed the security forces firing an RPG shell at the hospital from across the lagoon. The round struck a tree at the gate of the hospital and wounded about six people. He knew it came from the security forces front lines because he could see the soldiers filling sandbags and setting up bunkers. Numerous witnesses confirmed that the security forces had moved up to the lagoon across from the hospital after they took PTK on 5 March.

A few days after 10 March, a fourth witness heard MBRL shells launch from the security forces side and explode near the hospital. When he arrived at the hospital the front and roof had been damaged and a number of civilians and medical staff had been killed. A combined artillery and MBRL attack had struck a civilian area outside the hospital earlier that day, killing a number of civilians and injuring more. There were no LTTE positions in the vicinity of the hospital.

Shelling and other attacks continued into late March and April. A shell hit the UN site in March damaging one of the remaining lorries. On or about 24 March, a fifth witness saw intensive gunfire and RPG attacks from the security forces impacting around the hospital. A woman in the hospital had an unexploded RPG lodged in her legs.

Then from 19 April – when the security forces were preparing to cross the lagoon and enter the NFZ – there was intense shelling between Putumattalan and Amparanpokani, with scores of civilian casualties. The hospital was shelled and badly damaged the morning of 20 April, and the security forces and LTTE were fighting in front of it. Many dead and dying civilians were abandoned in or near the hospital as the security forces pushed the LTTE back and essentially split the NFZ in two. Although some 100,000 civilians crossed over to government-controlled areas in the following days, it came at a huge cost. Heavy civilian casualties were incurred in and around the hospital, and medical supplies and equipment were lost or left behind as medical staff again had to evacuate.

#### 4. Mullivaykkal hospitals

Some of the deadliest hospital shellings occurred in the final four weeks of the war, by which time conditions in the remaining NFZs had further deteriorated. Two temporary hospitals were set up in Mullivaykkal. The first was set up at the end of February in the Mullivaykkal Secondary School and operated along with the Putumattalan hospital. The second was set up in another school further to the east after the first came under intense shelling attacks. By late April conditions were terrible. Supplies were grossly inadequate, with no means of sterilisation, no gloves, no blood for transfusions, hundreds of patients lying in the sand or on tarps, and many unclaimed bodies. The smell was overwhelming.

The security forces shelled the first Mullivaykkal hospital on 30 April and more intensely on 2 May. A witness saw a UAV above the area during the latter attack, and many civilians were killed or injured. Medical staff tried to move as many supplies and as many of the injured as possible to the second hospital. On 11 May, the security forces shelled the whole of the Mullivaykkal area. Many civilians died in their bunkers with no one to come collect and bury them. On 12 May, after many of the injured had

<sup>97</sup> "Sri Lanka: ICRC evacuates over 240 wounded and sick from the Vanni by sea", ICRC, 10 February 2009, [www.icrc.org/Web/Eng/siteeng0.nsf/html/sri-lanka-news-100209](http://www.icrc.org/Web/Eng/siteeng0.nsf/html/sri-lanka-news-100209).

<sup>98</sup> "Sri Lanka: ICRC carries on evacuation of sick and wounded by sea", ICRC, 12 February 2009, [www.icrc.org/web/eng/siteeng0.nsf/html/sri-lanka-news-120209](http://www.icrc.org/web/eng/siteeng0.nsf/html/sri-lanka-news-120209); "Sri Lanka: ICRC evacuates more sick and wounded from the Vanni", ICRC, 16 February 2009, [www.icrc.org/web/eng/siteeng0.nsf/html/sri-lanka-news-160209](http://www.icrc.org/web/eng/siteeng0.nsf/html/sri-lanka-news-160209).

been brought to the second hospital, the security forces shelled it. Scores of civilians and medical staff were killed and injured. As one witness said: “These were not LTTE, these were just families, children, old people, it was unbelievable”.

From the evening of 12 May to the end of the fighting, the hospital was essentially paralysed. This left no medical facility for the tens of thousands of civilians still trapped and under intense attack. When the fighting ended and the security forces evacuated the remaining civilians, hundreds of wounded were left behind.

“Intentionally directing attacks against ... hospitals and places where the sick and wounded are collected, provided they are not military objectives” is a war crime.<sup>99</sup> The evidence Crisis Group has collected about the repeated attacks on these hospitals provides reasonable grounds to believe that individuals within the security forces committed this crime, as well as the crime of intentionally attacking civilians (discussed in Section III.C below). Such individuals, as well as others who ordered or assisted in the alleged crimes or are otherwise responsible as military or civilian superiors, may be held criminally liable. The main elements<sup>100</sup> of the crime of intentional attacks on hospitals and a summary of relevant evidence are as follows:

- **The perpetrator directed an attack.** Witnesses observed fire from the Sri Lankan security forces that repeatedly struck these hospitals. The Sri Lankan Air Force admitted bombing the building that witnesses have identified as the PMH annex, and they saw similar damage at the main PMH hospital building. The aerial video footage the security forces released with respect to the PTK hospital and PMH demonstrates their unobstructed access to detailed information about targets and their ability to strike with precision.
- **The object of the attack was one or more hospitals or places where the sick and wounded are collected, which were not military objectives.** ICRC statements and witness accounts confirm that the facilities were being used for medical purposes with hundreds of patients who were not taking any part in the hostilities. Witnesses did not observe any LTTE fire of any kind from within the facilities, nor did they see any heavy weapons fire in the hospitals’ vicinity. Wounded cadres are not legitimate targets.

- **The perpetrator intended such hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.** Government and military officials had information – including aerial images, direct lines of sight, and GPS coordinates and other information from the UN and others – confirming that these facilities were being used for medical purposes. Despite having that information, the Sri Lankan security forces attacked them repeatedly. Government officials stated publicly that the security forces would not accept responsibility for the safety of any civilians outside the NFZs – which would include at least PTK and PMH hospitals and for a time Putumattalan hospital.

Each of these incidents should be investigated. A full examination is all the more important because these were not the only attacks on hospitals.<sup>101</sup> Crisis Group has evidence of others – including the shelling of the hospitals at Vallipunam and Udayaarkaddu in the first NFZ, just after the government declared the area “safe” in January and encouraged civilians, government officials and humanitarian workers to go to it.

### C. ATTACKS ON CIVILIANS

The primary victims of these alleged attacks on humanitarian missions and hospitals were the Tamil civilians who went to these locations seeking food, shelter and medical care. But these were not isolated incidents. Crisis Group has collected evidence that provides reasonable grounds to believe the repeated shelling of civilians in the three NFZs, combined with the obstruction and undersupplying of food and medical care for civilians, was part of the government’s overall military strategy in the Vanni.

The evidence suggests this plan was pursued with knowledge of its consequences, both before it was implemented and as it was being carried out. In particular, there is evidence to support allegations that the government repeatedly insisted there were far fewer civilians in the war zone than it knew to be the case, allocated food and medical supplies according to the lower numbers, and never prepared to receive anywhere near the number of civilians that eventually crossed into government-held areas. It also encouraged civilians to go to smaller and smaller NFZs, concentrating them with the LTTE while knowing that the LTTE would not allow civilians to leave and that many were reluctant to leave in part because they feared the security forces. Finally, it repeatedly shelled the NFZs while making and then failing to respect several public

<sup>99</sup> Rome Statute, Article 8(2)(e)(iv).

<sup>100</sup> Rome Statute Elements of Crimes, Article 8(2)(e)(iv), War crime of attacking protected objects. The elements specifically note that “[t]he presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective”.

<sup>101</sup> See, eg, “Sri Lanka: Repeated Shelling of Hospitals Evidence of War Crimes”, press release, Human Rights Watch, 8 May 2009.

and private commitments to stop using heavy weapons in civilian areas or to allow periods of “safe passage”.

While this pattern of behaviour is illustrated as civilians were displaced through the three NFZs, there is also evidence that the government knew the consequences of its actions before the first NFZ was declared. For example, there is evidence that in mid- to late-2008, General Jayasuriya discussed both the strategy of forcing the LTTE into the area that eventually became the final war zone and plans for creating a NFZ for civilians on that same coastal strip. He suggested the civilians could move north to a place of safety, but failed to explain how.

In this scenario, just as in the events that actually transpired, the civilian population would have to cross the front lines of two opposing forces and somehow get around the LTTE’s well-known policy of not allowing Tamil civilians to leave. While the government consistently portrayed its military actions in the north as a “hostage rescue” or a “humanitarian operation”, it never had a humane plan for separating the civilian population from the LTTE – instead it planned to force them out through intensifying shelling and restricting food, water and medicine.

Indeed, it often described its policies with respect to the civilian population purely in terms of military tactics. For example, a 23 March letter from the JOH to the UN in response to the UN’s call for a humanitarian ceasefire stated: “It is also important to highlight that in spite of several attempts by the LTTE including firing, intimidation and arrest, civilians continue to flee into Security Forces controlled areas through jungle, mine fields and by sea. ... Releasing/fleeing of civilians will no doubt make the LTTE to be [sic] deprived of food and medicine and also get exposed to the attacking Sri Lankan troops. Therefore, if the grip on the LTTE get loosened [sic] at any stage now, it will give them enough opportunities to block more civilians who are fleeing the areas and to consolidate their positions and enhance forced recruitment”.

The government was warned of the risks of its increasingly aggressive strategy early in 2009. A 13 January letter from the UN to the foreign affairs ministry noted that “Since the beginning of the year, we have received a number of reports of civilian injuries and deaths as a result of shelling and aerial bombardments”. The letter specifically addressed two new incidents, the alleged shelling of PTK hospital on 13 January and an attack in Visvamadu. It continued:

As government forces advance and frontlines move rapidly, the risk of harm to civilians increases. The [UN] wishes to take this opportunity to respectfully recall the government of Sri Lanka’s obligations under international humanitarian law. Common Article 3 of the Geneva Conventions and Customary International

Law requires that all efforts be made to protect civilians in situations of armed conflict. Therefore, the [UN] urges the government of Sri Lanka to desist from attacks into areas which are populated by civilians.

The government responded on 15 January: “the Sri Lanka Army categorically denies any involvement in these reported incidents. ... The Ministry of Foreign Affairs wishes to reiterate that the Government of Sri Lanka follows a strict ‘zero civilian casualty’ policy in its current operations aimed at clearing the Vanni region of LTTE terrorism”. The government never stepped back from its “zero civilian casualty” line,<sup>102</sup> despite the fact that the media, UN and other organisations continually reported high civilian deaths and injuries.

### 1. First “No Fire Zone”

At the time the first NFZ was officially declared on 21 January, the government had information from various sources that the total civilian population in the Vanni was likely well over 300,000.<sup>103</sup> While there is always some uncertainty in population figures in conflict situations, the government adopted a gross underestimate. A 31 January defence ministry news bulletin confirms the government’s knowledge of the higher figures and that it was receiving (and rejecting) information from international and Tamil news sources:

Though foreign news agencies and tribal media stooges of the “Sri Lankan victim industry” make repetitive attempts to exaggerate the civilian numbers in the No Fire Zone as being over a quarter million, defence observers citing ground sources and reliable information assert that the true figure may fluctuate around 75,000-100,000 people on a high estimate.<sup>104</sup>

<sup>102</sup> See, eg, “SL’s UK High Commissioner protests over UK MP’s comment”, 10 March 2010, [www.priu.lk](http://www.priu.lk).

<sup>103</sup> Crisis Group has evidence that the government had been advised by credible sources that over 400,000 people were living in the Vanni as of September 2008, including permanent residents and displaced persons, and that the government had not disputed that figure, allocating government services accordingly. While some civilians managed to cross over the frontlines to government-controlled areas and others had been killed by late January, Crisis Group believes there were still well over 300,000 civilians in the Vanni when the first NFZ was established. Many international humanitarian organisations estimated 250,000 IDPs. See, eg, “Sri Lanka: 250,000 people in war zone need food”, WFP, 6 February 2009.

<sup>104</sup> “LTTE clamps on civilian outflow: Mounts artillery batteries inside No-fire zones – Mullaittivu”, 31 January 2009, at [www.defence.lk/new.asp?fname=20090130\\_F01](http://www.defence.lk/new.asp?fname=20090130_F01).

While this statement referred only to the population in the NFZ, the government consistently provided the same figure for the entire Vanni.<sup>105</sup> It then made decisions about food and medical supplies based on this false number, resulting in severe shortages. Information about those shortages was communicated to the government and military in public and private statements by numerous organisations, including the UN.

While sticking to its claims about the size of the civilian population, the government proceeded to shell multiple civilian targets in the first NFZ. These included not only the food distribution centre near Suthanthirapuram Junction and the Vallipunam and Udayaarkaddu hospitals, but other significant locations such as Thevipuram Common Hall in early February and clusters of civilian shelters. Crisis Group has multiple credible accounts of shelling originating from behind the security forces' front lines and striking civilian bunkers, trenches and tents, killing and wounding civilians and destroying their remaining supplies; in these cases, the witnesses did not see any LTTE artillery or other bases near their locations, and they often saw government UAVs overhead. Civilian casualties from these attacks were being reported to the government publicly and privately by many sources.

## 2. Second "No Fire Zone"

The situation in the second NFZ (from mid-February to early May) followed a similar pattern but the consequences were much more severe as the security forces' advance concentrated the LTTE and the civilian population in a much smaller area – only fourteen square kilometres, with most civilians in a strip the size of Central Park in Manhattan. Despite being advised in February and March by sources on the ground in the Vanni that the population in the remaining area was 81,000 families or 330,000 people, the government continued to understate the population, offering estimates around 70,000 through early April.<sup>106</sup>

Officials in Colombo were also informed of the deteriorating conditions for civilians: most people were living under trees and temporary tarpaulin sheets; there was a

severe shortage of medicines, especially anaesthetics, antibiotics, analgesics and IV fluids; there was a shortage of food resulting in at least thirteen deaths from starvation; and that the number of civilian casualties was constantly increasing. Eyewitnesses present in the second NFZ have confirmed these conditions and provided dozens of examples of casualties due to shelling and death or suffering due to lack of food and medical care.

Yet the government's response to this information was not to increase supplies but to threaten those who had emphasised the need to provide for a much larger number of civilians. In a March letter the government warned:

Please be noted that when you furnish information to various sources especially in regard to IDPs, it should be authentic and should not be disputed by any quarters. You should also bear in your mind that in the event of your giving wrong information to any sources especially in regard to IDPs figures, government will be reluctantly compelled to take disciplinary action against you.

The government also refused to send anaesthetics and other critical medical materials, just as medical staff at the Putumattalan and then Mulliyavaiakkal hospitals were performing more and more surgeries without anaesthetics to save patients' lives. Much of this medical treatment was required because the government continued directing artillery and other attacks at civilian shelters and bunkers. Crisis Group has eyewitness testimony and other evidence regarding a number of such attacks, in which many women, children and the elderly were killed and wounded. In addition to refusing to authorise adequate food and medical care, the government also interfered with the delivery of supplies and the evacuation of the wounded by the ICRC, which had been permitted to operate a ferry but often encountered shelling and fighting at agreed delivery times.

The government's story with respect to the population in the Vanni changed after the security forces crossed the lagoon and split the NFZ on 20-21 April. The shelling that preceded their advance was extremely intense and killed many civilians. But by creating an opening that allowed around 100,000 of civilians to cross to government-held areas in only a few days in April, the government's population claims – down to 15,000 to 20,000 in the NFZ as of 27 April<sup>107</sup> – were increasingly untenable. Nearly 100,000 more civilians entered government-held camps from the NFZ after 1 May.

<sup>105</sup> "The actual number of civilians trapped in the Vanni is less than 100,000". "'Tell the whole truth' says Secretary Defence", 7 February 2009 (courtesy: *Daily News*, last modified 26 February 2009), [www.defence.lk/new.asp?fname=20090207\\_01](http://www.defence.lk/new.asp?fname=20090207_01).

<sup>106</sup> "UAVs show frantic Tiger attempts to bury weapons", *The Nation*, 15 February 2009, at [www.nation.lk/2009/02/15/militarym.htm](http://www.nation.lk/2009/02/15/militarym.htm) ("no more than 75,000"); "Foreign Minister briefs diplomatic community on the current situation in the North", 18 February 2009, [www.defence.lk/PrintPage.asp?fname=20090218\\_07](http://www.defence.lk/PrintPage.asp?fname=20090218_07) ("around 70,000"); "Troops manoeuvring to open main road access to NFZ; hostage rescue mission continues", 19 April 2009, [www.defence.lk/new.asp?fname=20090419\\_03](http://www.defence.lk/new.asp?fname=20090419_03) (nearly 70,000).

<sup>107</sup> "The humanitarian mission will continue", 27 April 2009, at [www.defence.lk/new.asp?fname=20090427\\_08](http://www.defence.lk/new.asp?fname=20090427_08) ("the remaining 15,000 to 20,000 people held hostage").

Under growing international pressure to limit civilian casualties, the government made a series of public and private commitments to cease the use of “heavy weaponry”. These commitments were broken, then repeated, then broken again.<sup>108</sup> Gotabaya Rajapaksa told the BBC on 23 April 2009, just after troops had entered the second NFZ: “We are going very slowly towards the south of the no-fire zone to rescue the remaining civilians. Our troops are not using heavy fire power, they are using only guns and personal weapons”.<sup>109</sup> But on 27 April, after more heavy weapon use was reported, the Sri Lankan Presidential Secretariat stated: “Our security forces have been instructed to end the use of heavy calibre guns, combat aircraft and aerial weapons which could cause civilian casualties”.<sup>110</sup> There exists ample eyewitness evidence that heavy weapons continued to be used regularly even after government assurances they were not.<sup>111</sup>

### 3. Final “No Fire Zone”

The final NFZ that the government declared on 8 May was only a few square kilometres. In it were approximately 100,000 civilians, and whatever LTTE cadres remained. The next ten days saw some of the most intense shelling and fighting of the entire conflict. Witnesses have described scenes of immense devastation and civilian suffering. The security forces were firing from the west across the lagoon, from the air and from the ocean.

For days those civilians who had bunkers were trapped in them, unable to go out to cook or get food or water. On 14 May ICRC announced that for the third consecutive day it had been unable to evacuate any of the wounded because of continuous heavy fighting.<sup>112</sup> Those fortunate enough to survive and emerge after the security forces took the area saw hundreds, perhaps thousands of severely wounded and dead civilians – women, children, the elderly and men – on the ground. Many more are believed to have been killed or buried alive in bunkers or left to die without medical treatment.

It is a war crime to “[i]ntentionally direct[] attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”.<sup>113</sup> The evidence Crisis Group has collected about the repeated attacks in the NFZs provides reasonable grounds to believe that this crime was committed by individuals in the Sri Lankan security forces. Such individuals as well as others who ordered or assisted in the alleged crimes or are otherwise responsible as military or civilian superiors may be held criminally liable. Much of the evidence discussed in the preceding subsections is relevant to the main elements<sup>114</sup> of this crime. In summary:

- ❑ **The perpetrator directed an attack.** Witnesses have described dozens of occasions over five months in which the security forces fired heavy weapons that struck civilians or civilian objects in the NFZs. In many of these instances, it was physically impossible for the LTTE to direct heavy weapons fire at these targets given their proximity. The LTTE also had strong motivations not to target their own families and supporters and give them more reason to want to leave the NFZs.
- ❑ **The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.** Witnesses have provided evidence that the people killed or wounded in these attacks had not taken up arms and were not engaged in acts that adversely affected the military operations of the security forces. Many of them were children, women, the wounded and the elderly who were undernourished, without proper shelter and had been on the run for months.
- ❑ **The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.** The government and military had directed the civilian population to go to the NFZs. They had knowledge from multiple sources about the civilian nature of the targets of their attacks, including aerial images, direct lines of sight and many communications from the UN, ICRC and others. These were not one-off shelling incidents. It was a pattern of behaviour over months in which the government and security forces were told repeatedly that they were shelling civilians and they chose to continue doing so and simply say they were not.

This alleged course of conduct and individuals responsible for it must be investigated. It resulted in some of the worst human suffering the world has seen in recent years and presents a clear challenge to international humanitarian law. The government’s alleged actions concerning the

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<sup>108</sup> “Sri Lanka admits bombing safe zone”, Al Jazeera, 2 May 2009.

<sup>109</sup> “Colombo rejects UN civilian plea”, BBC, 23 April 2009.

<sup>110</sup> “Sri Lanka: Government admission shows need for UN inquiry”, press release, Human Rights Watch, 27 April 2009.

<sup>111</sup> Government officials have suggested that the announcement of the end of shelling in the NFZ in late April was motivated by the Indian government’s request to defuse tensions in Tamil Nadu before India’s general elections. “Winning wars: political will is the key”, *Indian Defence Review*, op. cit.

<sup>112</sup> “Sri Lanka: humanitarian assistance can no longer reach civilians”, ICRC, 14 May 2009, at [www.icrc.org/web/eng/siteeng0.nsf/html/sri-lanka-news-140509](http://www.icrc.org/web/eng/siteeng0.nsf/html/sri-lanka-news-140509).

<sup>113</sup> Rome Statute, Article 8(2)(e)(i).

<sup>114</sup> Rome Statute Elements of Crimes, Article 8(2)(e)(i), War crime of attacking civilians.

supply of food and medical care to civilians, including alleged attacks on humanitarian operations and hospitals, deserve separate attention. They not only exacerbated the alleged crimes described above, they may also provide distinct grounds for criminal liability and certainly raise the question of whether individuals may also be responsible for crimes against humanity.<sup>115</sup>

#### IV. ACTIONS OF THE LTTE

The evidence Crisis Group has collected also provides a strong basis for allegations of war crimes by the LTTE and its leadership. These alleged crimes are largely an extension of the rebels' long history of imposing controls on the Tamil civilian population in the areas they held, forcibly recruiting adults and children, and brutally repressing dissent. As the security forces continued to advance into the Vanni and demand that the LTTE allow civilians to cross into government-controlled areas, the Tigers tightened their hold on the population. Even when their military defeat was clear at the beginning of 2009, they failed to take actions that could have protected civilians, such as agreeing to open a humanitarian corridor or attempting to negotiate a surrender.

The security forces' continual shelling of and advance into the NFZs, along with growing frustration and disillusionment with the LTTE, convinced many civilians that the risks of being forced back into increasingly unsafe areas were greater than those of crossing the frontlines and submitting to a government with a history of violence against Tamils. In response, the LTTE gave orders to its cadres to turn civilians back from crossing and, if they refused, to fire upon them. They also prevented the departure of some who were severely wounded and seeking medical care, and continued to forcibly recruit civilians to serve as fighters or labourers on the frontlines.<sup>116</sup> Many of these individuals were killed in the fighting.

Eyewitness statements describe these events in detail, providing reasonable grounds to believe that LTTE cadres committed war crimes at the direction of their superiors. That evidence is summarised below, again using definitions in the Rome Statute of the ICC for illustration. These allegations should be investigated even though many of those most responsible are dead, as should other potential LTTE crimes during this time period including the recruitment of some children.<sup>117</sup> Additional credible

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<sup>115</sup> The Rome Statute defines "crime against humanity" as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". Article 7.

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<sup>116</sup> Although it is difficult to ascertain how many civilians were forcibly recruited in the final months of fighting, in part because many ran away and returned to the civilian population when possible, Crisis Group believes the number was likely in the thousands.

<sup>117</sup> "Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities" is a war crime. Rome Statute, Article 8(2)(e)(vii). The eyewitnesses Crisis Group interviewed provided a few accounts of LTTE recruitment of children believed to be fifteen or younger mostly in the last two months of fighting. There is further evidence of recruitment of sixteen and seventeen year olds, and an incident in which LTTE recruiters took a group of fifteen year olds but parents protested and were able to take the children away. The LTTE has a long history of

evidence about the LTTE's abuses would likely come out if there were an international investigation that could provide protection to Tamil civilians or former cadres who were in the conflict zone. At present they have little incentive to assist the government or put themselves at risk of reprisal from LTTE sympathisers or punishment by the government or by foreign host governments who have banned the LTTE.

## A. MURDER AND CRUEL TREATMENT OF CIVILIANS

In early January, an LTTE colonel addressed a meeting of officers and cadres and instructed them not to allow any Tamils to leave the Vanni to go to government-controlled territory. He further ordered that if Tamils were found trying to cross they were to be stopped and if they refused or resisted, the cadres were to shoot in the ground in front of them regardless if the bullets might ricochet up and hit them. The LTTE had for some time a policy that Tamils who were from the Vanni could not leave without permission. From January there was an order to prevent all Tamils from leaving regardless of the circumstances and to use lethal force to do so.<sup>118</sup>

The motivation of the LTTE high command was clear to many Tamils in the conflict zone, and to the government. The LTTE wanted to keep the civilian population in the Vanni as long as possible,<sup>119</sup> not only to maintain the outward signs of a state with a population, but because they knew the security forces would continue to advance without regard to civilian casualties. Their calculation, ultimately an incorrect one, was that escalating civilian casualties would eventually get the attention of the international community to broker a ceasefire so the LTTE could regroup or perhaps enter negotiations. The high command thus resorted to killing and injuring civilians to scare them into staying in a shrinking and increasingly deadly conflict zone. The inevitable result was that the LTTE was de-

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recruiting children and likely continued to do so to some degree through the end of the war. The "Karuna faction" which broke from the Tigers in 2004 and has since aligned with the government also has been implicated in child soldier recruitment.

<sup>118</sup>The LTTE had previously permitted firing on Tamils who were trying to escape by sea, but not those trying to flee by land.

<sup>119</sup>In addition to doing so by force, the LTTE also did so by encouraging provision of humanitarian supplies. While evidence suggests that the LTTE took some food (but not medicine) for its own cadres, see footnote 53 above, LTTE-linked humanitarian organisations, such as the Tamil Relief Organisation (TRO), played a critical role in feeding the population.

ploying ever closer to and sometimes among civilians, in clear violation of international humanitarian law.<sup>120</sup>

There have been many reported incidents of LTTE cadres shooting civilians.<sup>121</sup> Crisis Group has eyewitness accounts of the following:

- ❑ On or about 4 February close to the A35 road near Udayaarkaddu in the first NFZ, hundreds of civilians were trying to cross the frontlines to the west. A group of LTTE cadres pulled up in front of them and told the civilians to go back. When they kept moving, the cadres fired shots into the air; when they still did not stop, the cadres fired into the ground. Over ten civilians were wounded and one was killed; the crowd immediately scattered. A cadre called the deceased a betrayer of the nation.
- ❑ One night in March, a group of men, women and children were trying to cross the lagoon from the area near the hospital and UN compound in Putumattalan. LTTE cadres came up from the south and started firing on them with rifles. Five or six people were killed on the spot, another six were seriously injured and later died in the hospital, and more than 50 were wounded.
- ❑ Another evening in late February or March, some civilians tried to escape from the second NFZ to the north towards Chalai. The LTTE opened fire on them and killed around seventeen men, women and children. A group of people later brought some of the bodies to beach to show ICRC staff who were coming by boat to evacuate severely wounded people from the Putumattalan hospital.

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<sup>120</sup>The government and others have referred to the LTTE's actions as "human shielding". While this is accurate in the general sense, the actions likely do not amount to the war crime of human shielding. That crime requires the perpetrator to "intend[] to shield a military objective from attack or shield, favour or impede military operations". Rome Statute, Elements of Crimes, Article 8(2)(b)(xxiii). This would apply only if the LTTE expected the presence of civilians to deter the security forces from advancing, which the evidence suggests was not the case. Indeed, they did not necessarily want it to deter them. Notably, the Rome Statute's definition of this crime applies only to international armed conflicts. Under customary international law, it is also a crime in internal armed conflicts. Even though these actions may not constitute the war crime of human shielding, they are clearly relevant to other potential crimes under the Rome Statute and customary law, such as "cruel treatment" as discussed below, and should be investigated accordingly.

<sup>121</sup>See, eg, "War on the displaced", Human Rights Watch, pp. 5-10; "Let them speak", UTHR, both op. cit. There is also evidence of incidents in which LTTE officers or units allowed civilians to cross. In some cases, the cadres joined them.

- Around the third week of March, a family with a two-year-old girl and a twelve-year-old girl ran for the lagoon. LTTE cadres came up from the south and shot the twelve-year-old in the leg. Challenged by a witness, a cadre said, “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”.

The LTTE also subjected civilians to violence in other ways. For instance, in late March, hundreds of people were trying to escape west across the lagoon from a point north of the Putumattalan hospital and UN compound. The LTTE was believed to have learned about the attempt in advance and set up sentry points near the water. When the people tried to cross, the LTTE surrounded them and separated the men from the women and children. Some of those who were not married were forcibly recruited as cadres, including some children believed to be around fourteen years old. The remaining men were sent to build bunkers for the LTTE, while the remaining women and children were allowed to leave. The families protested, and the LTTE beat them with sticks and PVC pipes.

Another incident of violent forced recruitment of youths, again with some perhaps as young as fourteen, occurred on approximately 18 March at the Catholic Church in Valayanmadam. The LTTE took hundreds to training camps in Mullivaikal, and again beat protesting parents with sticks and PVC pipes. Outside of Crisis Group’s evidence, there have been some reports of the LTTE shooting and killing civilians who resisted or protested recruitment.<sup>122</sup>

There is also evidence of incidents in which, when it suited their tactical purposes, the Tigers showed little concern for wounded and dying Tamils.<sup>123</sup> On 27 January, the two international UN staff who had been in the first NFZ were attempting to depart PTK for Vavuniya. They had arranged a departure time and safe corridor with the security forces and the LTTE. Some 300 wounded people had been loaded into the UN lorries and ambulances to be transported to the hospital in Vavuniya. Many had lost arms or legs. But when the convoy reached PTK junction, the LTTE told them they could not leave because of the fighting. UN staff advised the LTTE that the wounded people had already been loaded into the lorries and might die if they did not leave immediately. The LTTE still refused. One woman died while waiting to be unloaded, and others died once they returned to PTK hospital.

<sup>122</sup> See, eg, “Let them speak”, UTHR, op. cit., pp. 57, 59.

<sup>123</sup> In addition to the 27 January incident mentioned here, reports have alleged that the LTTE refused to allow civilians who had been wounded by LTTE fire to leave on the ICRC ships, in order to suppress information about LTTE crimes. Ibid, p. 55.

While it is difficult at this stage to estimate the number of civilians who were killed or wounded by the LTTE,<sup>124</sup> the lives of hundreds of thousands were unlawfully and needlessly put at risk because of the LTTE’s brutal policies and refusal to acknowledge defeat. The evidence outlined above provides reasonable grounds to believe that LTTE leaders and cadres committed, or ordered the commission of war crimes, specifically “[v]iolence to life and person, in particular murder of all kinds [and] cruel treatment”.<sup>125</sup> The main elements of these crimes<sup>126</sup> and a summary of relevant evidence are as follows:

- **The perpetrator killed one or more persons.** Eyewitness testimony establishes that LTTE cadres shot and killed numerous civilians who were attempting to flee the conflict zone. It also shows that LTTE commanders gave orders for cadres to do so.
- **The perpetrator inflicted severe physical or mental pain or suffering upon one of more persons.** There are many accounts showing that the LTTE shot and wounded civilians attempting to escape to government-held areas, forcibly recruited members of families into fighting often leading to their deaths, and generally endangered the civilian population by not allowing anyone to leave an area that the LTTE knew was going to see significant civilian casualties. All of these actions were taken with the knowledge that they would inflict severe physical or mental pain or suffering on civilians.
- **Such person or persons were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.** The people fired on by the LTTE as they were attempting to escape, the family members of those forcibly recruited, and the population in the conflict zone in general were civilians. Indeed, the LTTE often retaliated against civilians precisely because they refused to fight for them or were otherwise acting against their interests.

<sup>124</sup> While many such incidents have been reported, restricted access to survivors in the north has made it difficult to obtain comprehensive information. In addition, there has been at least one report of medical staff in the LTTE-controlled areas reportedly recording some LTTE bullet injuries as shell injuries because of intimidation by the Tigers. “Let them speak”, UTHR, op. cit., p. 68. This underlines the need for a thorough investigation of the causes and circumstances of all civilian casualties.

<sup>125</sup> Rome Statute, Article 8(2)(c).

<sup>126</sup> Rome Statute Elements of Crimes, Article 8(2)(c)(i)-1 and 8(2)(c)(i)-2.

- **The perpetrator was aware of the factual circumstances that established this status.** The LTTE had effective control over the population and knew that those killed or wounded in attempting to flee, and the vast majority of those put in danger by the LTTE's policies, were civilians.

## V. THE CASE FOR INVESTIGATIONS

### A. THE LEGAL CASE

The gravity of alleged crimes and evidence gathered to date present compelling reasons to pursue credible investigations and, where appropriate, prosecutions. This is not a case of marginal violations of international humanitarian law or aggressive military action with "collateral damage". There is evidence that provides reasonable grounds to believe both sides condoned gross and repeated violations that strike at the heart of the laws of war. Failure to pursue accountability under these circumstances will deliver a significant setback to efforts to regulate the conduct of war and deter atrocities.

All of the alleged crimes described in this report have a common element: calculated killing, wounding or endangering of civilians. While there were significant stretches of lawful combat in earlier stages of the hostilities, it grew increasingly infrequent, culminating in a brutal few weeks in May. Both sides had taken actions to create an environment where lawful military operations would be difficult and resource intensive. Instead of stepping up to that challenge the evidence suggests that they effectively discarded the legal framework and relied to a significant degree on unlawful operations. Their preferred narratives of the final months mostly point fingers at each other.<sup>127</sup>

Knowledge and intent are always difficult to prove, especially when allegations implicate top leaders in the military and government who may have ordered criminal acts or knew (or should have known) about them and failed to stop them. But there already is significant evidence to support further investigation. More is likely to emerge if credible investigations continue and those close to mili-

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<sup>127</sup> In a 22 October 2009 open letter to internally displaced Tamils, President Rajapaksa stated: "I am aware that the sufferings your family have undergone are many, and for very long too. These hardships were imposed on you and all other Tamil citizens who have suffered alike, by a ruthless organization that was committed to terror to achieve its narrow objectives, for which the Tamil people were made unwilling pawns. They claimed to be the liberators of the noble Tamil community. As their strategies began to fail, you were herded from place to place, and denied the food, medicine and other essentials that were sent for you. Your children, and even the elders among you, were compelled to carry arms for these forces of terror. I fully understand that this was not the aspiration of the Tamil people of our country. Finally, you were made displaced persons in your own motherland, after holding you as human shields and hostages for the safety of those who shed so much blood of your own people. Your innocence in all this is recognized today". "You are on the threshold of a new beginning in life – President tells IDP families", 22 October 2009, at [www.priu.gov.lk](http://www.priu.gov.lk).

tary and government officials have more reason to talk. Beyond the alleged crimes discussed above, allegations of further violations already have been made – including the recruitment of children by the LTTE and the execution by the security forces of those who had laid down their arms and were trying to surrender. These also should be investigated.

The public record, some of which is highlighted in the preceding sections, lends further support to the case for credible investigations. A number of official statements and actions made it clear that there could be no ceasefires under any circumstances. While this was often cast in terms of a rejection of “negotiations” with the LTTE, it was in fact a rejection of any ceasefire regardless of the humanitarian consequences. Responding to international concerns about the humanitarian situation, President Rajapaksa was quoted: “we will finish off the LTTE, we will finish terrorism and not allow it to regroup in this country ever; every ceasefire has been used by the LTTE to consolidate, regroup and re-launch attacks, so no negotiations”.<sup>128</sup>

Other statements also illustrate this policy of rejecting restraint under all circumstances. For example, an unidentified Sri Lankan minister was quoted: “That there will be civilian casualties was a given and [President] Rajapaksa was ready to take the blame. This gave the Army tremendous confidence. It was the best morale booster the forces could have got”.<sup>129</sup> Minister for Human Rights and Disaster Management Mahinda Samarasinghe was quoted as suggesting this new tolerance for civilian casualties is what distinguished this campaign from those of prior administrations: “Human rights violations during war operations and the humanitarian crisis that engulfs civilians caught in the cross fire have always been the trigger points to order a military pull-back... The LTTE would always play this card in the past. They would use the ceasefire to regroup and resume the war”.<sup>130</sup>

By refusing to declare a ceasefire or otherwise change military operations to avoid civilians casualties, as the evidence provides a reasonable basis to believe is the case, the government effectively took the position that violations of the laws of war were necessitated by the military advantage obtained. This is not only legally untenable, but also belied by the possibility of alternative strategies for destroying the LTTE militarily.

Finally, there is evidence that provides a reasonable basis to believe that military and government officials made false statements about a number of issues, including the

size of the civilian population in the war zone, whether and how Sri Lankan security forces were using heavy weapons in the final months and weeks of hostilities, and how many civilians were killed. This only reinforces the case for examining precisely what did happen and identifying those responsible for any wrongdoing.

## B. THE POLICY CASE

Sri Lanka’s peace will remain fragile so long as the many credible allegations of violations of international humanitarian and human rights law by senior government and LTTE leaders are not subject to impartial investigation. The truth of what happened during the course of the war, especially in its last months, must be established if Tamils and Sinhalese are to live as equal citizens. The Sri Lankan state has proven repeatedly that it cannot be trusted to investigate fairly allegations against its own officials and security forces. International investigations are the only credible means of finding out the truth, and will be necessary to help re-establish a degree of the rule of law in an increasingly authoritarian state.

### 1. The vicious cycle of impunity

Prosecutions of the security forces for earlier alleged crimes against civilians have been few and far between. Prosecutions of LTTE members for violent acts over the decades have been almost as rare, in part because of their reliance on suicide attacks but also because of the failures of the justice system. Almost all alleged crimes during the civil conflict have gone unpunished.

At the same time, levels of violence increased at each stage of Sri Lanka’s war. Indeed Crisis Group believes that a significant share of conflict deaths occurred between 2006 and 2009.<sup>131</sup> Violence has also nurtured grievances in all

<sup>128</sup> V.K. Shashikumar, “Lessons from the War in Sri Lanka”, op. cit.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Any count of those killed during Sri Lanka’s quarter century of fighting can at best be a gross estimate, as there has never been any attempt by the government or an independent authority to compile an accurate figure. At the start of the 2002 peace process, the consensus was that 65,000-70,000 had been killed in the preceding nineteen years of fighting. It is likely that about the same number were killed in the period between late 2005, when active insurgency and counter-insurgency recommenced, and the end of the war in May 2009. The government actively prevented the release of information on deaths and injuries in the final years of war and acknowledges only about 6,000 military personnel killed in the final three years of fighting. V.K. Shashikumar, “Winning wars: political will is the key”, *Indian Defence Review*, op. cit. Retired military officials and sources close to the government, however, report the real figure is in the range of 15,000-20,000. Thousands of LTTE fighters, many of them recent conscripts, also died in the last three years of fighting; then army commander, Sarath Fonseka estimated 22,000 were killed, though this figure is likely high. Shamindra

communities. Many Tamils are quick to point to the violence of 1983 that launched the conflict into full-scale war as the moment they came to believe they could never be safe living in a Sinhala-dominated state.<sup>132</sup> LTTE suicide bombers and assassins deepened the emergence of a culture of violence that now pervades society. Sinhala politicians excoriate those who make any comparison between the two sides, but it is incontrovertible that both have chosen violence and intolerant nationalism over justice and respect for dissent and human rights. Each failure to hold perpetrators accountable has led to a lowering of restraints and a worsening of abuses.

## 2. The risks of renewed conflict

The international community has particular reasons to be concerned about any resurgence of violence that might be fed by the defeat of the LTTE and the humiliation of Tamil civilians. Most of the drivers of Sri Lanka's conflict have not been resolved and some new sources of resentment have emerged. While the government's security apparatus is powerful and pervasive enough to suppress any rapid re-emergence of violent resistance, it will not be able to do so indefinitely so long as legitimate grievances are not addressed.

A quarter of the Sri Lankan Tamil population lives abroad. This million-strong diaspora is a reservoir of separatist aspirations and has been willing to fund violence in the past. A new generation has been politicised by the final months of the conflict. The defeat of the LTTE has left many shocked and directionless; as yet it is unclear whether the inchoate fury and sense of humiliation will coalesce into a renewed support for violence.<sup>133</sup> If it did, it would only take a small portion of the diaspora to fund and propagate a new insurgency.

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Ferdinando, "Mission Accomplished: Army 60 years today", *Island*, 10 October 2009.

<sup>132</sup> The best estimates of the number of Tamils killed in the government-assisted pogrom of July 1983 range from 1,000 to 4,000. The two weeks of brutal violence began in Colombo after the funeral of thirteen Sinhalese soldiers killed in an LTTE ambush in the northern Jaffna peninsula. Hundreds of Tamil businesses and homes were burned to the ground. Hundreds of thousands were made refugees and many soon left the country, giving birth to the Tamil diaspora. Thousands of new recruits joined the various Tamil militant groups then operating in the north and east of Sri Lanka. See Nira Wickramasinghe, *Sri Lanka in the Modern Age* (Colombo, 2006), pp. 285-7.

<sup>133</sup> For a detailed analysis of current political thinking within the Tamil diaspora, see Crisis Group Asia Report N°186, *The Sri Lankan Tamil Diaspora after the LTTE*, 23 February 2010.

## 3. The Sri Lankan model: assault on international humanitarian law

Since the end of the war, a number of commentators and officials have expressed admiration for the way the government defeated the LTTE. "The Sri Lanka option" – a tough military response, a refusal to countenance a political solution, the dismissal of international concerns and a willingness to kill large numbers of civilians – has been discussed as an answer to insurgencies and violent groups in a number of countries including Israel, Myanmar, Thailand, Nepal, Pakistan, India, Colombia and the Philippines.<sup>134</sup>

Sri Lanka co-opted the language of the "war on terror" from the administration of President George W. Bush and took it to its limits by insisting there should be no restraints in its fight against the LTTE. A complex political issue was reduced to a problem of terrorism. No proposals were offered to address minority concerns. While the government received support from China, India, Pakistan and others, most Western governments also went along with this strategy. Even as they mentioned the importance of human rights, they did not demand real reforms as a price of their support.

The Sri Lankan government's conduct of the final months of the war, however, deviated far from the tactics, some unquestionably unlawful, used in the "war on terror" by larger governments. The large-scale civilian casualties in the Vanni – of a much greater magnitude than the better known events in Gaza in January 2009 – were more than the "collateral damage" that Western governments have come to defend as a necessary if regrettable aspect of counter-insurgency. The evidence Crisis Group has collected provides a reasonable basis to believe they were instead the result of a deliberate policy, formulated at the highest levels of the government, to violate the most basic laws of war, with attacks against hospitals, medical centres, humanitarian workers and against a group of civilians effectively defined on an ethnic basis. The "Sri Lankan model" of counter-insurgency sets a dangerous precedent that should be rejected clearly.

## 4. Undermining the United Nations

The credibility of the United Nations was also badly damaged by its actions and its inaction during the final months of fighting. Even as the Security Council continued its thematic discussions on the protection of civilians in armed conflict, it failed to act on Sri Lanka despite its knowledge of the extensive civilian casualties and suffering.<sup>135</sup>

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<sup>134</sup> Op. cit., footnote 4.

<sup>135</sup> The Security Council met only informally in basement briefings on Sri Lanka throughout the last five months of fighting,

UN agencies in Sri Lanka allowed themselves to be bullied by the government and accepted a reduced role in protecting civilians, most notably with their quick acceptance of the government's September 2008 order to remove all staff from the Vanni. The Human Rights Council chose not to defend international law but instead passed a resolution praising the conduct of the government. All of this has eroded further the standing of the UN and its agencies in Sri Lanka and elsewhere.

## C. THE POLITICS OF ACCOUNTABILITY

### 1. Domestic dead-ends

There is virtually no chance of any meaningful domestic investigation, much less the prosecution, of alleged crimes committed by the security forces under the current government. This is not for lack of relevant legal framework. Instead, in the words of one diplomat in Colombo, "the regime isn't going to disembowel itself".<sup>136</sup>

The government already has conclusively demonstrated its unwillingness to investigate security force abuses, including by ensuring the failure of the presidential commission of inquiry established in early 2007.<sup>137</sup> Govern-

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receiving briefings on the humanitarian situation from Under Secretary-General John Holmes. The Security Council held thematic debates on the protection of civilians in armed conflict on 14 January and 11 November 2009. Sri Lanka was discussed in both meetings along with other conflict situations. In Resolution 1894, passed on 11 November, the Security Council reiterated "its willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed". The situation in Sri Lanka was never put on the Security Council's agenda.

<sup>136</sup> Crisis Group interview, Colombo, November 2009.

<sup>137</sup> Op. cit., footnote 14. Regarding the presidential commission, International Independent Group of Eminent Persons (IIGEP) – which included members from Bangladesh, India, Japan and Malaysia, as well as Western countries – stated: "The IIGEP has, however, found an absence of will on the part of the Government of Sri Lanka in the present Inquiry to investigate cases with vigour, where the conduct of its own forces has been called into question". IIGEP, public statement, 15 April 2008. For a comprehensive and devastating study of the history of failure of Sri Lankan commissions of inquiry, see Kishali Pinto-Jayawardena, *Post-War Justice in Sri Lanka: Rule of Law, The Criminal Justice System and Commissions of Inquiry Since 1977*, (Geneva, January 2010). The "committee of experts" appointed by the president to review allegations in the October 2009 U.S. State Department report cannot be taken as anything other than a public relations gesture. Composed of retired officials and prominent figures, some known to be close to the government, the committee was originally mandated to report to President Rajapaksa by the end of 2009. Its deadline was extended until the end of April and then again until the end of July 2010. Little is known about what investigations it may

ment officials have consistently claimed there were no civilian casualties at all in the last months of fighting.<sup>138</sup> They have actively obstructed access to information about what happened during those months and harassed and intimidated those seeking the truth or with stories to tell.<sup>139</sup> Under these circumstances, the only purpose of a domestic investigation of the security forces' conduct would be to further consolidate this obstruction or to buy time until international concern has waned. Given the history of denial, obstruction and lies by the Sri Lankan government, there is every reason to believe this is the case with the commission on "reconciliation" and "lessons learnt from the recent conflict" proposed by President Rajapaksa on 6 May 2010.<sup>140</sup>

There is greater possibility for domestic investigation of alleged LTTE crimes but serious concerns about its credi-

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have pursued. A government statement claims that it has "held several sittings and examined public officials including high ranking officers of the armed forces and medical officers" and plans to "examine the Commissioner-General of Essential Services" about allegations that "the government failed to provide sufficient food and medical supplies to people in IDP camps and those who were trapped in the No-fire zones". "Committee on US State Department Report gets time till end July", 12 May 2010, at [www.priu.gov.lk](http://www.priu.gov.lk).

<sup>138</sup> In a July 2009 interview, President Rajapaksa stated "There was no violation of human rights. There were no civilian casualties". He also rejected the UN's civilian casualty figure: "Seven thousand? No way. In the eastern province, zero casualties. I won't say there are zero casualties in the north. The LTTE shot some of them when they tried to escape". "Mahinda Rajapaksa: The Man Who Tamed the Tigers", *Time*, 13 July 2009.

<sup>139</sup> Tamils in the north are still generally unable to receive death certificates for their family members killed in the fighting; divisional level population registers have not publicly been compared with lists of those in the camps to produce a list of those missing or killed; humanitarian workers and journalists have been blocked from visiting the location of the last months of fighting or from discussing the war-time experiences of those detained in camps for the displaced; witnesses, independent journalists and rights advocates have been repeatedly threatened and forced into exile; the national Human Rights Commission has been crippled by the non-appointment of the constitutional council and by deliberate government interference.

<sup>140</sup> Among other things, the commission promises to "search for any violations of internationally accepted norms of conduct in such conflict situations, and the circumstances that may have led to such actions, and identify any persons or groups responsible for such acts". There is no indication the commission intends to investigate or hold anyone to account for possible violations of domestic or international law. "President to initiate study on post-conflict lessons learnt and reconciliation", 6 May 2010, at [www.priu.gov.lk](http://www.priu.gov.lk). And there is no reason to believe it is anything other than another Sri Lankan commission that will take "a long time to achieve nothing". "Sri Lanka: Government proposal won't address war crimes", press release, Human Rights Watch, 7 May 2010.

bility. The government's record regarding LTTE prosecutions is mixed. Although some accused of high-profile bombings of civilians and killings of government ministers have been tried in criminal courts, in general impunity prevails.<sup>141</sup> Hardly any cases involving Tamil or Muslim victims have been pursued.<sup>142</sup> The government is now holding about 10,000 people in connection with alleged LTTE crimes, most of those having been detained in the immediate aftermath of the war.<sup>143</sup> Most have not been charged. If they ever are, incentives to plead guilty to less serious offences to avoid spending further time in custody – regardless of the merits of the cases – will likely be high. There is no evidence that the government has capacity or interest in conducting fair and expeditious trials or pursuing cases against the LTTE that may bring attention to crimes committed by the security forces.<sup>144</sup>

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<sup>141</sup> In October 2002, LTTE leader Vellupillai Prabhakaran and his intelligence chief Pottu Amman were convicted in absentia and sentenced to 200 years in prison for the 1996 truck bombing of the Central Bank building in Colombo. Four others were also convicted. The attack killed 78 people and injured more than 1,300. "Prabhakaran, five others get 200 year sentence", Daily News, 1 November 2002. Prabhakaran and Pottu Amman were also indicted for the August 2005 assassination of then foreign minister Lakshman Kadirgamar. The trial of two remaining accused is ongoing. Harischandra Gunaratna, "Four accused in Kadir assassination killed in Eelam War IV", *Island*, 8 May 2010.

<sup>142</sup> The two notable exceptions are the convictions of six Sri Lankan soldiers for the 1996 rape and murder of eighteen year old Krishanti Kumaraswamy in Jaffna and the convictions of five Sinhalese, including two police officers, for the 2000 massacre of 28 Tamil detainees in the village of Bindunuwewa. In the latter case, all five convictions were eventually overturned. Pinto-Jayawardena, op. cit.

<sup>143</sup> Most surrendered or were separated from the mass of displaced after being identified as suspected LTTE fighters or supporters in the final days of fighting and in the weeks immediately after. These so-called "surrendees" and "separatees" are being held without charge or legal rights in closed camps, mostly near Vavuniya. Another group of detainees, estimated to range from 500 to 1,500, are being held under the Prevention of Terrorism Act or emergency regulations in prisons and detention centres in the south of the country; some have been held awaiting indictment or trial for years. The government has announced that 1,350 of those detained after the war will be prosecuted; some of these have already been transferred to regular prisons. "Tiger military wing forming", *Daily Mirror*, 4 May 2010.

<sup>144</sup> The fact that within Sri Lanka, the only war-related crimes likely to be prosecuted will be those by the LTTE requires special attention to procedural safeguards in those proceedings. Any senior LTTE leaders in government custody should be tried – but with the involvement of a neutral third-party so that process is, and is seen to be, fair.

## 2. International action

Pushing for accountability from outside is necessary but carries risks. Advocates of any process of transitional justice will face real dilemmas: the war and those seen as the architects of the military victory have been extremely popular among Sinhalese; there was virtually no independent media coverage of the reality of the war; and the Rajapaksa government and military have cultivated a strong, xenophobic version of Sinhala nationalism. As a result, most Sinhalese have no clear idea of the civilian costs of the war, some refuse to know, and others, including at the highest levels of government, are implicated and will actively try to block efforts at accountability, both to protect themselves and because they feel their actions were justified.

Any investigations or reported investigations will be painted by the government, military and Sinhala nationalists as part of a pro-LTTE international conspiracy against Sri Lanka.<sup>145</sup> Politicians will also attempt to use any evidence of international investigations as weapons against their opponents.<sup>146</sup> The absence of all but a handful of high-ranking Tiger leaders alive to be tried makes it more likely that any process of international justice will be seen as biased against the government and Sinhalese.

Nonetheless, fears that international efforts for accountability could threaten Sri Lanka's political stability or undermine President Rajapaksa's ability or willingness to make forward-looking political reforms are baseless.<sup>147</sup>

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<sup>145</sup> The Sri Lankan government angrily rejected as "totally uncalled for and unwarranted" the UN Secretary-General's plan to appoint a panel of experts to advise him on options for accountability for possible violations of humanitarian and human rights law in Sri Lanka. An official statement by the president's office claimed that "the allegations about Sri Lanka were motivated misrepresentations by apologists of the LTTE, and by some Non-Government Organizations that due to being so misguided or otherwise, were clearly working on agenda that was directed against Sri Lanka. [sic] There are also sections of the western world being increasingly subjected to electoral pressure by the same apologists of the LTTE". "'Special Panel on Sri Lanka uncalled for and unwarranted' – President to Ban Ki-moon", 6 March 2010, at [www.priu.gov.lk](http://www.priu.gov.lk).

<sup>146</sup> Op. cit., footnote 37. The bitter rivalry between Sarath Fonseka and the Rajapaksas and the divisions within the military this has encouraged could yet lead to the release of more information regarding allegations of war crimes against both parties.

<sup>147</sup> These are fears being stoked by the government itself. For example, the statement issued by then Foreign Minister Bogolagama on 18 March 2010 rejected the UN Secretary-General's proposal to name a panel to advise him on options for accountability in Sri Lanka. The foreign minister warned that "such unreasonable moves on the part of [the international community] feed public resentment which then erodes the consensus needed to facilitate processes for national reconciliation. This has seri-

President Rajapaksa, his family and his supporters have too firm a grip on power to be threatened or undermined by more radical Sinhala nationalists, should the government choose to initiate reforms. (Indeed, it is the extremists who currently depend for their power on the Rajapaksas, not the other way around.)

Moreover, Rajapaksa shows no inclination to initiate any of the reforms needed to address the underlying causes of Sri Lanka's 30 years of ethnic conflict and war or the damage it has done to the country's liberal and democratic institutions. There is no serious prospect of constitutional reforms to devolve power to Tamil-speaking areas in the north and east or other reforms to address the grievances and marginalisation of minorities that drove the war. The president has long-ruled out any form of federalism or devolution on ethnic lines. Even the long-promised full implementation of the Thirteenth Amendment, with its very limited devolution of power, seems increasingly unlikely. Nor are there any signs the Rajapaksa administration will relax its grip on power through the re-establishment of an effective Constitutional Council, the depoliticisation of the police and judiciary, or the demilitarisation of the north and east.<sup>148</sup> Instead, the only constitutional changes likely are those designed to further entrench the power of Rajapaksa, his family and his party, through allowing the president a third term in office and re-establishing a qualified first-past-the-post electoral system.

In this context, a long-term plan for sustained and graduated pressure on accountability for alleged war crimes and grave violations of human rights law offers the international community the only serious leverage they have to push the Rajapaksa government towards meaningful political reforms.<sup>149</sup> Without such pressure, the authoritarian

and strongly Sinhala nationalist character of the government will likely deepen and with it the anger and humiliation of many Tamils and the possibility of renewed violence.

A crucial step in gaining Sinhalese and Muslim support for accountability procedures is to persuade important sections of the Tamil diaspora to accept publicly the crimes committed by the LTTE in the final stages of the war and in the preceding years. Gaining acknowledgement of the serious nature of LTTE violations by significant numbers of diaspora Tamils will be difficult, but it would assist in opening up the space for Sinhalese to admit the crimes done in their name. While many Tamils see themselves as the only victims in Sri Lanka's decades of ethnic war, it is crucial that advocates of accountability recognise and respond to the sense of embattled identity and victimhood that exists among many Sinhalese and Muslims.<sup>150</sup>

Ultimately, for Sri Lanka to remain a viable multicultural society and to rebuild its democratic institutions there needs to be a deeper, non-judicial, non-punitive, truth and reconciliation process.<sup>151</sup> It should offer Tamils a means by which their suffering and humiliation can be recognised and assurances given that a new state is being built in which their personal and collective security will be protected. Without this, separatist sentiments among many Tamils and the risk of continued violence will remain, even as there is likely to be a more or less steady exodus of Tamils and an increasingly mono-ethnic Sri Lanka. A viable truth and reconciliation process should also aim to establish the fact and legitimacy of Sinhalese and Muslim suffering and fears and offer assurances that the threat to the integrity of the island is no longer there. For this, the

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ous ramifications for Sri Lanka's political stability". "Remarks by Hon. Rohitha Bogollagama, Minister of Foreign Affairs to the media on 18th March 2009", at [www.slmfa.gov.lk](http://www.slmfa.gov.lk).

<sup>148</sup> Parliament's decision on 5 May 2010 to remove or relax some of the many emergency regulations – including the power to impose curfews, restrict political meetings and publications, search private premises and require house owners to report to the police the names of those living in their properties – is positive. The state of emergency, however, remains in force and with it sweeping powers of arrest and detention without trial. "Parliament approves Emergency with lesser regulations – Majority of 118 votes", 5 May 2010, at [www.priu.gov.lk](http://www.priu.gov.lk).

<sup>149</sup> Pressure on accountability might make it harder to make progress on some short-term issues the UN, India and Western donors have prioritised – e.g., improvement in access to or conditions for IDPs returning home in the Northern Province. Pressure for accountability from Western governments and the UN could cede more space to China and other non-Western donors. But Chinese influence is already growing and cannot be tempered without Western donors spending huge amounts of money and abandoning important political principles.

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<sup>150</sup> The LTTE's expulsion of nearly 100,000 Muslims from the Northern Province in 1990 was Sri Lanka's only large-scale act of ethnic cleansing. Many Muslims remain in refugee camps to this day and the social and political scars remain deep. Tens of thousands of Sinhalese from the north and east were also forcibly displaced by fighting in the 1980s and 1990s; many Sinhalese civilians were killed by LTTE attacks over the years. See Crisis Group Asia Report N°141, *Sinhala Nationalism and the Elusive Southern Consensus*, 7 November 2007 and Crisis Group Asia Report N°134, *Sri Lanka's Muslims: Caught in the Crossfire*, 29 May 2007.

<sup>151</sup> The JVP politburo has stated that "a genuine national 'truth and reconciliation commission' should be established to look into injustices various communities have been subjected to and aiming at removing resentments among communities". Currently, the JVP is the only political party to call for a truth commission. "A practical initiative to overcome challenges Motherland is confronted with after defeating separatist terrorism", 27 May 2009, at [www.jvpsrilanka.com](http://www.jvpsrilanka.com).

many crimes of the LTTE, against all ethnic communities, need to be established.<sup>152</sup>

Donors should, however, be careful about offering political or financial support for any such process prior to the conditions being in place within Sri Lanka for it to be accepted as fair by majorities of all three communities. Under the current government, any truth and reconciliation process is likely to produce little truth and even less reconciliation: there would be little point to a wider process of truth-seeking. Equally important, no government-run truth and reconciliation process – such as the “lessons learnt” panel proposed by President Rajapaksa – should be allowed to substitute or undercut support for an international process of accountability.

That said, there are a number of steps the government might be persuaded to take that could help lay the groundwork for a more meaningful process of reconciliation. These would include: issuing death certificates and compensation for civilians killed or wounded and for property destroyed or damaged; compiling a full register of those killed, wounded and missing, with assistance of the ICRC; allowing full ICRC access to surrendees, suspected LTTE cadres, and the displaced still in camps and those returned to their home districts; establishing fair and speedy trials, with international observers, for anyone charged with LTTE-related offences; releasing all those suspected of involvement with the LTTE who are not to be charged.

## VI. THE OPTIONS FOR JUSTICE

There are limited options in the near term to prosecute individuals responsible for alleged crimes by the Sri Lankan forces and the LTTE. Government authorities have little interest in pursuing justice, and scope for criminal action by international or foreign authorities is narrow. Yet pressing ahead now – prioritising a UN-mandated international inquiry – is one of the few ways to generate pressure for a comprehensive accounting in the future.

### A. INTERNATIONAL INQUIRY

A UN-sponsored international inquiry should be the first step in producing a comprehensive and credible record of the final months of Sri Lanka’s war. The Human Rights Council is almost certain not to establish its own inquiry following its May 2009 resolution praising the government’s defeat of terrorism, and action is equally unlikely from the Security Council. The Secretary-General, however, has authority to authorise his own inquiry and should be strongly encouraged to do so.

The inquiry should be tasked to investigate the conduct of both sides, to complete its work within a reasonably short period and to recommend steps to be taken by national and international authorities to ensure accountability for any crimes. The commission would report to the Secretary-General and should have a strong emphasis on collecting and preserving evidence. To make all of this happen, UN officials and member states must go beyond statements calling for domestic measures of accountability and vigorously support the Secretary-General in setting up a robust inquiry.<sup>153</sup> As evidence continues to emerge, pressure to pursue further inquiries should increase.

<sup>152</sup> Any senior LTTE leaders currently in government custody should be subject to trial. Ideally this will be done with some involvement of a neutral third-party so that process is seen to be fair.

<sup>153</sup> On 5 March 2010, the spokesperson for Secretary General Ban Ki-moon announced that Ban had informed President Rajapaksa of his intention to establish a panel of experts to “advise him on the way forward on accountability issues related to Sri Lanka”. The next day Rajapaksa’s office released a statement calling the plan “both unprecedented and unwarranted as no such action had been taken about other states with continuing armed conflicts on a large scale, involving major humanitarian catastrophes and causing the deaths of large numbers of civilians due to military action”. “Special Panel on Sri Lanka uncalled for and unwarranted’ – President to Ban Ki-moon”, 6 March 2010, at [www.priu.gov.lk](http://www.priu.gov.lk). The government went on to oppose the move publicly as an unacceptable infringement on Sri Lanka’s sovereignty. The Sri Lankan diplomatic offensive continued when it persuaded the Non-Aligned Movement to write to the Secretary-General challenging his authority to establish such a panel and accusing him of interfering in the domestic affairs of a member state. On 16 March 2010 Ban defended his right to establish the panel, referring to Ban’s and

There is also an important role for other UN entities. The special rapporteurs on extrajudicial executions, torture, the right to food, the right to health, the protection of human rights while countering terrorism, the situation of human rights defenders, and violence against women should apply along with representatives of the secretary-general on the human rights of IDPs and on children and armed conflict to form a joint mission to Sri Lanka to investigate the last months of the conflict.

## B. THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court (ICC) has little role to play in Sri Lanka at present. Because Sri Lanka is not party to the Rome Statute and is unlikely to change that stance in the foreseeable future, the only way for the ICC to exercise jurisdiction over the alleged crimes of both the Sri Lankan security forces and the LTTE is by UN Security Council referral.<sup>154</sup> Securing such a referral will be difficult, as long as the government has the support of Russia and China and other permanent members of the Security Council remain ambivalent about accountability.<sup>155</sup>

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Rajapaksa's May 2009 joint statement according to which "the Secretary-General underlined the importance of accountability process for addressing violations of international humanitarian and human rights law" and the government promised to "take measures to address those grievances". Ban explained that the panel "will advise me on the standards, benchmarks, and parameters, based on international experience, that must guide any accountability process such as the one mentioned in the joint statement...I'd like to make it clear that there will be no delay in the establishment of the panel". "Secretary-General's press conference", 16 March 2010, at [www.un.org/apps/sg/offthecuff.asp?nid=1391](http://www.un.org/apps/sg/offthecuff.asp?nid=1391). To date, there has been no announcement of the terms of reference for the panel, its membership or when it will begin work, though there is scepticism it will go beyond considering domestic options available to the Sri Lankan government. Crisis Group interviews, diplomats and UN officials, March-April 2010.

<sup>154</sup> The ICC has jurisdiction over genocide, war crimes and crimes against humanity. The Security Council, acting under Chapter VII of the UN Charter, can refer to the ICC prosecutor any situation in which one or more of such crimes appears to have been committed. Rome Statute, Article 13. States party to the Rome Statute may also refer situations to the prosecutor "requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged", but the exercise of jurisdiction is limited to cases in which the conduct in question occurred on the territory of, or the person accused is a national of, either a state party or a state not party that accepts jurisdiction with respect to the crime in question. *Ibid*, Articles 12-14. The prosecutor may also initiate investigations independently, but the exercise of jurisdiction is similarly limited. *Ibid*, Articles 12-13, 15.

<sup>155</sup> The jurisdiction of the UN Security Council to refer cases to the ICC is premised on threats to international peace and security. The Security Council did not acknowledge such a threat at

Should this change – for instance, in response to growing evidence of abuses – the ICC could play an important role in ensuring some accountability. Its jurisdiction extends to genocide, war crimes and crimes against humanity committed after 1 July 2002.<sup>156</sup>

## C. FOREIGN JURISDICTIONS

Apart from international options, many countries have laws that would permit them to prosecute alleged crimes committed in the final months of the war. Nearly all of these jurisdictions, however, require a direct connection with the alleged perpetrator – such as citizenship at the time of the crime or the presence in the jurisdiction later – before prosecution is allowed. Citizenship of the victim at the time of the crime may also be sufficient basis. Governments are often reluctant to proceed in these cases, which present uncomfortable diplomatic issues and difficulties in terms of evidence gathering.

Nevertheless, investigations and prosecutions by national authorities outside of Sri Lanka will be needed if meaningful accountability is to be achieved. Non-frivolous civil law suits brought by or on behalf of victims in foreign courts should also be encouraged. These measures are warranted as a matter of law and policy. The alleged crimes at issue were on a massive scale and threaten to undermine core principles of international humanitarian law. Moreover, some of the most serious alleged offenders are citizens or residents of foreign countries.

### 1. Criminal prosecutions

The U.S. has a crucial role to play in this regard. Gotabaya Rajapaksa is a naturalised U.S. citizen, and former Army Commander Sarath Fonseka, is a permanent resident.<sup>157</sup> As a matter of policy, the U.S. should fully investigate war crimes and crimes against humanity allegations against its citizens and residents on the basis of any available theory of responsibility, and where appropriate prosecute. The scope of U.S. law is unfortunately narrow, but there is a clear legal basis to investigate at least the following: the war crimes of murder, intentionally causing serious bodily injury, and cruel or inhuman treatment, to

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the height of the conflict in Sri Lanka and is unlikely to intervene in regard to past events unless there were a fresh threat to peace.<sup>156</sup> In the unlikely event Sri Lanka were to accede to the Rome Statute in the future, ICC jurisdiction would begin only after that accession, unless the government specifically accepted jurisdiction back to an earlier date but no earlier than 1 July 2002. Rome Statute, Article 11.

<sup>157</sup> Gotabaya and Fonseka have been the focus of a campaign by the organisation Tamils Against Genocide (TAG) to have them prosecuted in the U.S. for genocide, torture and war crimes. See [www.tamilsagainstgenocide.org](http://www.tamilsagainstgenocide.org).

the extent the alleged perpetrator is a U.S. citizen;<sup>158</sup> torture where the alleged offender is a U.S. citizen or someone who comes into U.S. territory,<sup>159</sup> and the use or recruitment of child soldiers under the age of fifteen where the alleged offender is a U.S. citizen, a permanent resident or present in the U.S.<sup>160</sup> Prosecutors in the Department of Justice (DOJ) unit responsible for these crimes<sup>161</sup> should consider all available theories of liability to pursue alleged crimes within U.S. jurisdiction, including any involving the LTTE if responsible individuals are in or travelling to the U.S.

There also should be a full investigation of the immigration and citizenship status and records of Gotabaya and

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<sup>158</sup> The definitions of these crimes, respectively, under the U.S. War Crimes Act (WCA) are: “[t]he act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause”; “[t]he act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war”; and “[t]he act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control”.

<sup>159</sup> The U.S. torture statute (18 USC 2340, 2340A) defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control”.

<sup>160</sup> The U.S. child soldiers statute (18 USC 2442) provides: “Whoever knowingly (1) recruits, enlists, or conscripts a person to serve while such person is under 15 years of age in an armed force or group; or (2) uses a person under 15 years of age to participate actively in hostilities” shall be punished. “Participate actively in hostilities” is defined as “taking part in – (A) combat or military activities related to combat, including sabotage and serving as a decoy, a courier, or at a military checkpoint; or (B) direct support functions related to combat, including transporting supplies or providing other services”. Where the offense occurs outside of the U.S., there is jurisdiction if the alleged offender is a U.S. national, a permanent resident, or present in the U.S. irrespective of nationality.

<sup>161</sup> DOJ announced the creation of a new unit to prosecute war criminals and human rights violators on 30 March 2010. The Human Rights and Special Prosecution Section (HRSP) has received new funding and staff to work on these cases. To date there has been only one conviction under any of the U.S. war crimes, torture or child soldiers statutes. U.S. citizen Roy M. Belfast Jr. (aka Chuckie Taylor), the son of former Liberian President Charles Taylor, was convicted in 2008 of committing torture in Liberia between April 1999 and July 2003. HRSP announced its first arrest on 5 May 2010 – a U.S. citizen and former Guatemalan special forces soldier arrested in Florida for allegedly lying about his participation in a massacre in Guatemala on his application for naturalisation.

Fonseka, and monitoring of the travel to the U.S. of any other alleged offender. The Department of Homeland Security, and in particular its Immigration and Customs Enforcement (ICE) agency, is responsible for ensuring that those who violate human rights in other countries are not permitted to seek refuge in the U.S. It should work closely with DOJ to make effective use of its investigative capacity. Diplomatic concerns should not be allowed to obstruct legitimate investigative steps, particularly when it concerns a person who has sought and received the benefits of U.S. permanent residence or citizenship.

Many other countries have adopted legislation that would permit prosecution of a broader range of crimes than those recognised under U.S. law. These generally include the offences outlined in Sections III and IV above. But most of these countries do not have a known citizenship or residence link with individuals who have been implicated in alleged abuses. The focus in these jurisdictions therefore should be on gathering evidence and monitoring the travel of alleged perpetrators. Given their large Sri Lankan communities, Australia,<sup>162</sup> Canada and the UK<sup>163</sup> in particular should be actively gathering and sharing information regarding specific alleged crimes and individuals that may come within the reach of their authorities. There should also be a concerted effort in these and other countries to provide assistance and protection to potential witnesses, granting asylum and special visas where warranted.

## 2. Civil suits

Governments should support civil law suits against alleged perpetrators. These proceedings offer not only the possibility of some monetary compensation for victims, but also an opportunity to present their side of the story.

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<sup>162</sup> Palitha Kohona – a dual citizen of Australia and Sri Lanka – has been mentioned in connection with the surrender negotiations that allegedly preceded the killing of LTTE leaders and their families in May. “There was a general query about surrendering and I told them that I was the wrong person, that I had nothing to do with surrendering and asked them to go and deal with the matter in the way it ought to be dealt with”, he said, denying having any role in arranging anything and indicating he did not think anyone else was involved in such a surrender either. “Sri Lanka war crimes allegations surface”, ABC News, 7 December 2009. Foreign secretary at the time, he is now Sri Lanka’s ambassador to the UN. Previously, he was a senior official with the Australian Department of Foreign Affairs and Trade.

<sup>163</sup> In July 2008, the UK released former LTTE commander Karuna (now government minister) after he served half of a nine-month sentence for possessing illegal documents. Despite extensive allegations of war crimes and crimes against humanity, the Crown Prosecution Service said the evidence submitted was insufficient to convict him of any criminal offence “UK: Abusive ex-commander allowed to return to Sri Lanka”, press release, Human Rights Watch, 3 July 2008; “Former Tamil Tigers commander leaves UK after war crimes inquiry dropped”, *The Guardian*, 4 July 2008.

The U.S. has a strong record of allowing victims of human rights abuses committed abroad to sue those responsible. Victims or their families who are in the U.S. after the abuses can sue in federal court for actions that violate the “law of nations”.<sup>164</sup> The defendants in these cases can be direct perpetrators or those up the chain of command. Since 1980, courts have found people liable for actions including war crimes and crimes against humanity.<sup>165</sup> There is also a separate law that specifically permits law suits for torture and extrajudicial killing.<sup>166</sup>

Victims of crimes committed in Sri Lanka could file suits against suspected government or military officials or LTTE members under these laws. There may also be some scope for suing entities directly linked to the LTTE. In general the defendant has to be present in the U.S. to initiate a proceeding. A separate challenge in cases involving allegations against current or former officials of foreign governments is the possibility that the executive branch of the U.S. government may take the position that certain officials are from suit. Given the scale of reported abuses in Sri Lanka, the U.S. government should be reluctant to interfere in any cases.<sup>167</sup>

Civil suits are less common in other countries, but a strong effort should be made to support them where possible.

<sup>164</sup> Alien Tort Statute (ATS), 28 USC 1350.

<sup>165</sup> For example, *Doe v Karadzic*, filed in 1993 when Karadzic was in New York, sought compensation under the ATS for genocide, war crimes and crimes against humanity, including mass rapes of Bosnian women. The allegations against Karadzic were based on command responsibility. He eventually defaulted in 1997. A jury reached a verdict of \$4.5 billion in 2000. Further information is available at <http://ccrjustice.org/ourcases/past-cases/doe-v.-karadzic>. Under a 2004 Supreme Court decision, the international rules at issue in these cases have to be “specific, universal and obligatory”. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). In that case, the Supreme Court found that the norm against arbitrary arrest and detention was not actionable under the ATS.

<sup>166</sup> Torture Victims Protection Act (TVPA), 28 U.S.C.1350 note.

<sup>167</sup> In a case involving the ATS and TVPA, the U.S. Supreme Court is currently considering whether the Foreign Sovereign Immunities Act (FSIA), 28 USC 1604, immunizes from suit former government officials acting in their official capacity. *Samantar v Yousuf*, No. 08-1555 (argued 3 March 2010). If the Supreme Court were to find that the FSIA applies to foreign officials, it could significantly limit the scope of liability under the ATS and TVPA. Notably, the U.S. government submitted a brief arguing that immunity of foreign officials acting in their official capacity is governed not by the FSIA but by “principles adopted by the executive branch, informed by customary international law”. Brief for the United States as Amicus Curiae Supporting Affirmance, January 2010.

## VII. THE POLICY RESPONSE

There is a clear case for investigations and, where appropriate, prosecutions. There is no shortage of evidence or witnesses, indeed there are hundreds of thousands of civilian witnesses among those who were shelled in the Vanni. What is in short supply is political will to act, both in Sri Lanka and abroad.

Key international actors – the United States, India, Canada, Switzerland, France, the United Kingdom, other EU member states and Australia – need to devote resources and political backing to the issue of accountability for alleged war crimes in Sri Lanka. These recommendations should apply to all countries involved:

- ❑ Countries should not extradite LTTE members to Sri Lanka where they stand little chance of a fair trial but they should be willing, wherever possible, to prosecute them.
- ❑ Countries whose citizens or residents have been involved in senior positions in the Sri Lankan government or security forces or the LTTE should open investigations into their conduct.
- ❑ Governments, particularly the United States, should provide investigating authorities with any evidence of war crimes, including satellite imagery and intercepts, and should allow officials to provide testimony.
- ❑ Countries should not stand in the way of civil suits, including on questions of immunity for officials.
- ❑ Countries should facilitate the freezing of assets where warranted.
- ❑ Units charged with investigating war crimes need to have sufficient funding and political backing to operate. This is certainly not the case at the moment in most of these countries.
- ❑ Governments should be willing to grant asylum or emergency visas to witnesses to alleged war crimes to ensure evidence is preserved. Given the longstanding history of abuses against witnesses in Sri Lanka, it is vital that more governments adjust policies to accommodate emergency cases.
- ❑ Governments with missions in Sri Lanka should step up monitoring of human rights abuses against potential witnesses.

International organisations have a responsibility to respond to allegations of war crimes. The United Nations has privileged access to those displaced rather than pressing for justice. It has done too little to protect its national staff in Sri Lanka and allowed the government to intimidate

and expel international staff.<sup>168</sup> By complying with Sri Lankan government's demand to withdraw from the Vanni it undermined its humanitarian mandate. By allowing the LTTE to control the movements of its national staff, it undermined their safety.

The United Nations, backed by member states, should:

- ❑ Support consistently, publicly and at the highest level an international investigation into alleged war crimes in Sri Lanka. No domestic inquiry under the present government would be credible and no such effort should receive UN support.
- ❑ Open an inquiry into the conduct of the UN in Sri Lanka from January 2008 until January 2010, examining the UN's withdrawal from Kilinochchi through to its ineffectual attempts to push for a ceasefire towards the end of the war and its involvement in Sri Lankan government internment camps.
- ❑ Open an inquiry into alleged crimes against UN staff by both the government of Sri Lanka and the LTTE.

## VIII. CONCLUSION

Evidence gathered by Crisis Group shows that there are reasonable grounds to believe the Sri Lankan security forces and LTTE committed war crimes during the final stages of the conflict and that the violations during this period were worse than at any other time during the long civil war. The scale of civilian deaths and suffering demands a response. Peace in Sri Lanka requires some measure of justice. Even if this takes time, future generations will almost certainly demand to know what happened in the Vanni from January to May 2009.

Evidence secured so far touches on just a handful of potential crimes. Many others were likely to have been committed during the period from January to May 2009. A long history of other atrocities by both sides has never been investigated and the victims of Sri Lanka's conflict have been denied justice. This has eroded faith in the judicial system, the government and the security forces and has damaged Sri Lanka's democracy. All Sri Lankans, not just Tamils, have a right and responsibility to demand that justice be done.

The international community has a responsibility to uphold the rule of law, the reputation of international agencies and respect for international humanitarian law, most importantly the protection of civilians lives. Many countries facilitated or permitted the conditions under which these alleged crimes were committed. They did little to speak out against them and even less to prevent them. Even at this late stage, they have a responsibility to press for investigations and prosecutions as an integral part of their efforts to support the people of Sri Lanka in rebuilding their country.

**Brussels, 17 May 2010**

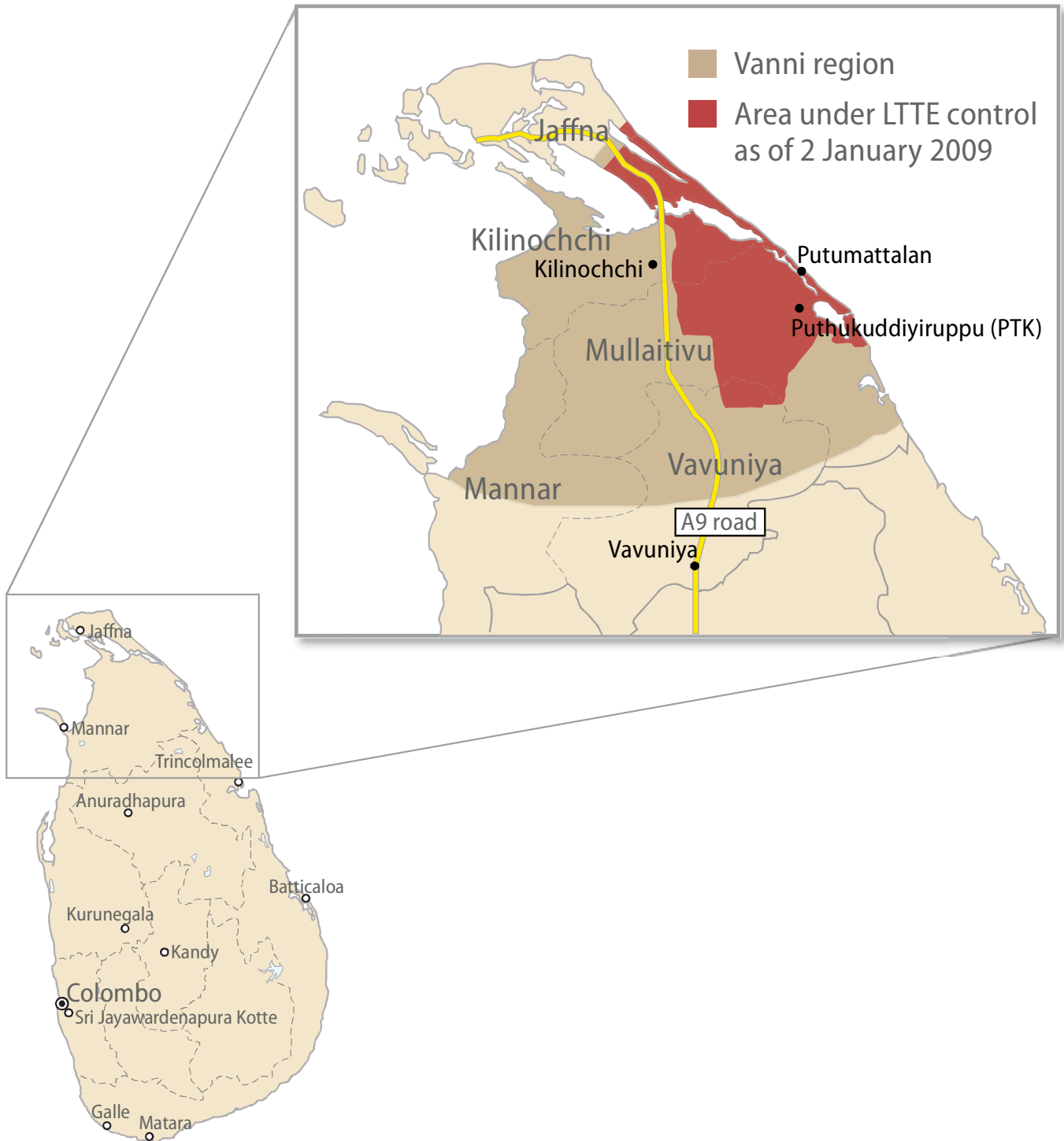
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<sup>168</sup> In June 2009, two Sri Lankan employees of the UN were abducted and reportedly tortured by the Sri Lankan security forces before the government admitted eight days later that they were in its custody on suspicion of working with the LTTE. The UN was slow to react and made no serious protest at their mistreatment. "L'ONU tarde a se saisir du cas de deux de ses employés emprisonnés au Sri Lanka", *Le Monde*, 10 September 2009. Despite the July 2008 judgment by the UN's general counsel that Sri Lankan visa rules violated the rights and privileges of the UN as established in the UN charter, there was no effective protest and UN staff appointments have been repeatedly and routinely blocked by the Sri Lankan government. The visas of a number of international staff – including UNICEF spokesperson James Elder and UN country team spokesperson Gordon Weiss – were cancelled or not renewed in retaliation for their statements on injuries and deaths to civilians. "Unicef worker James Elder expelled from Sri Lanka over media comments", *The (London) Times*, 7 September 2009.



## APPENDIX B

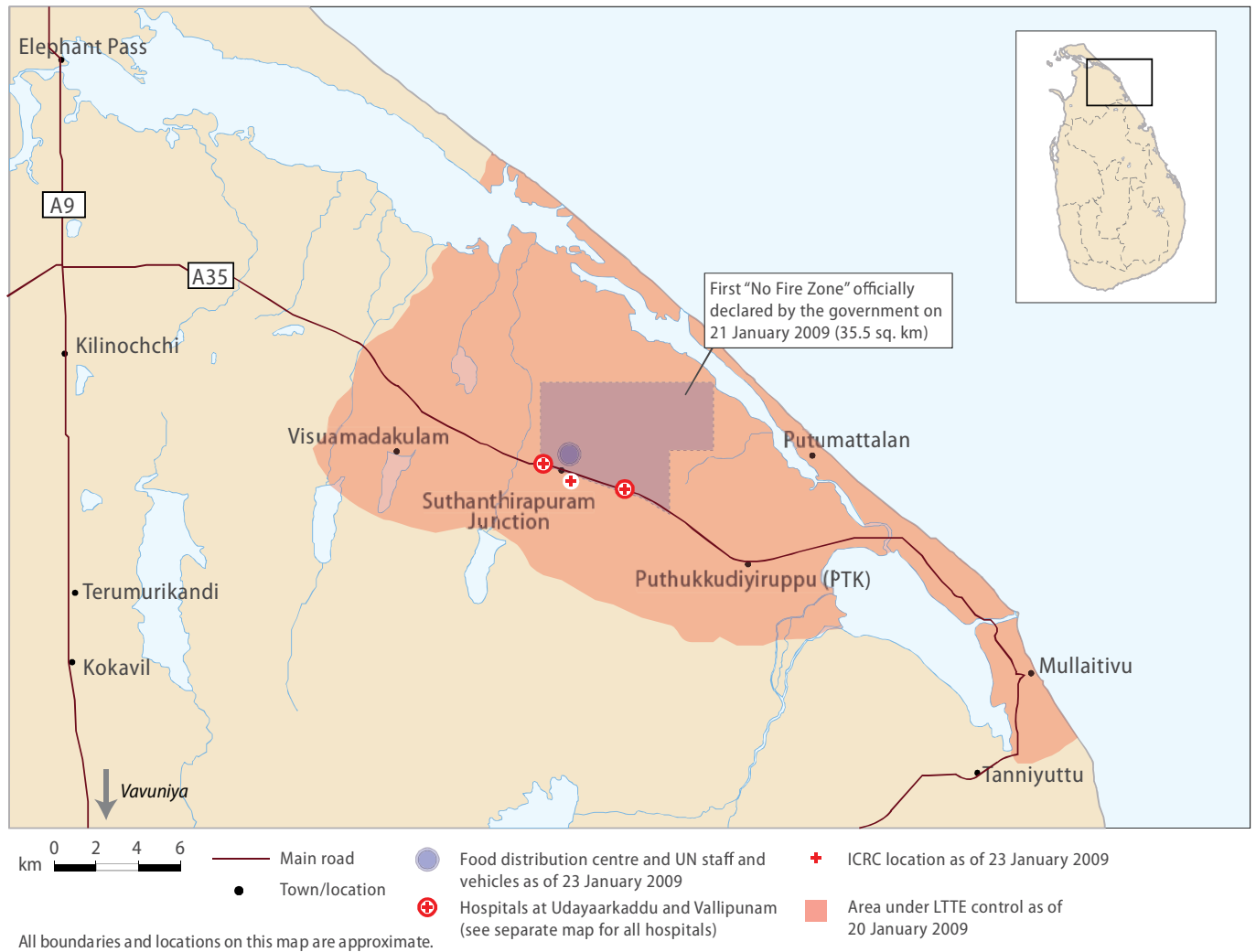
### MAP OF THE VANNI AND FRONT LINES OF BATTLE AS OF 2 JANUARY 2009



*All boundaries and locations on this map are approximate.*

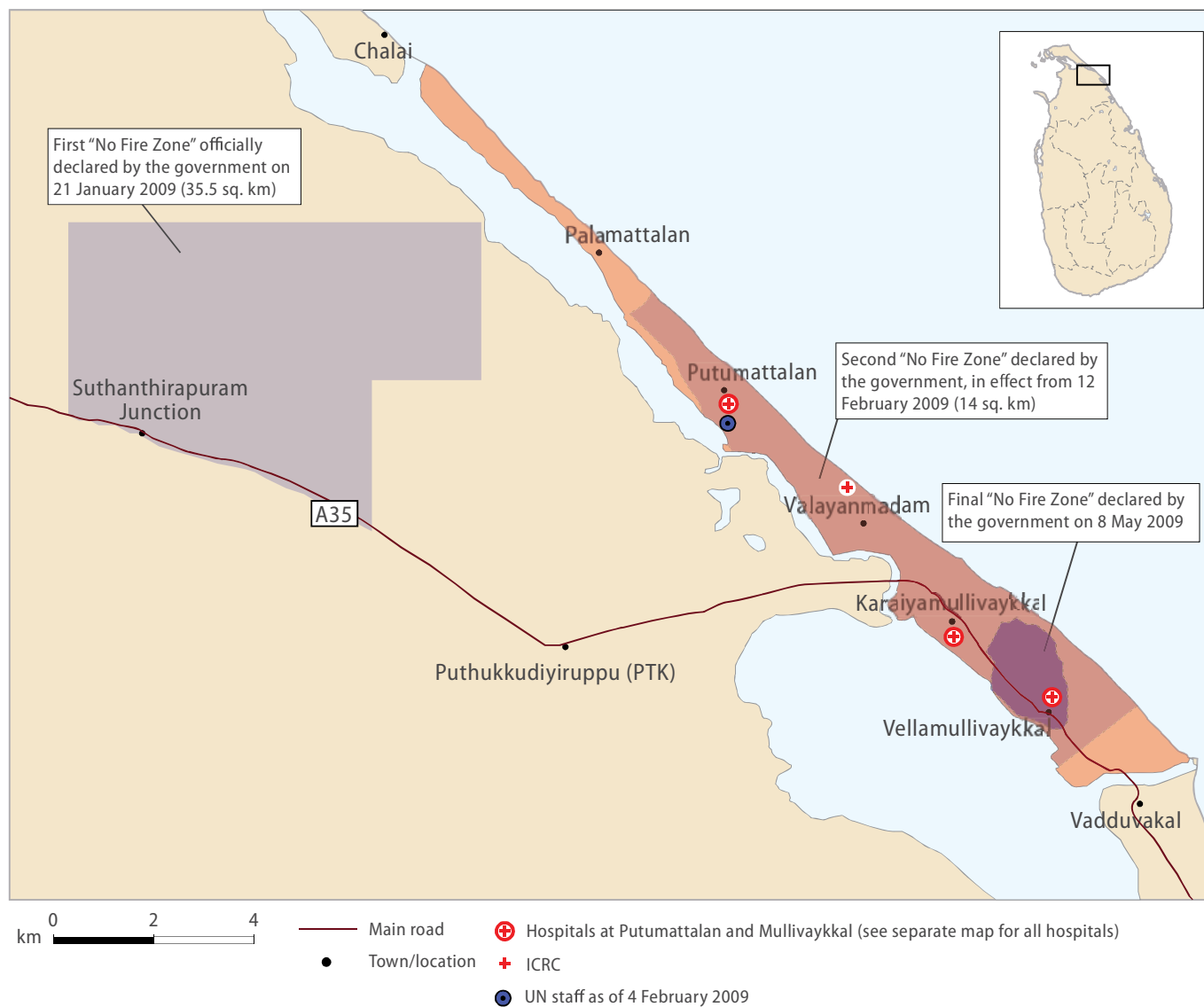
## APPENDIX C

### MAP OF THE FIRST “NO FIRE ZONE”



## APPENDIX D

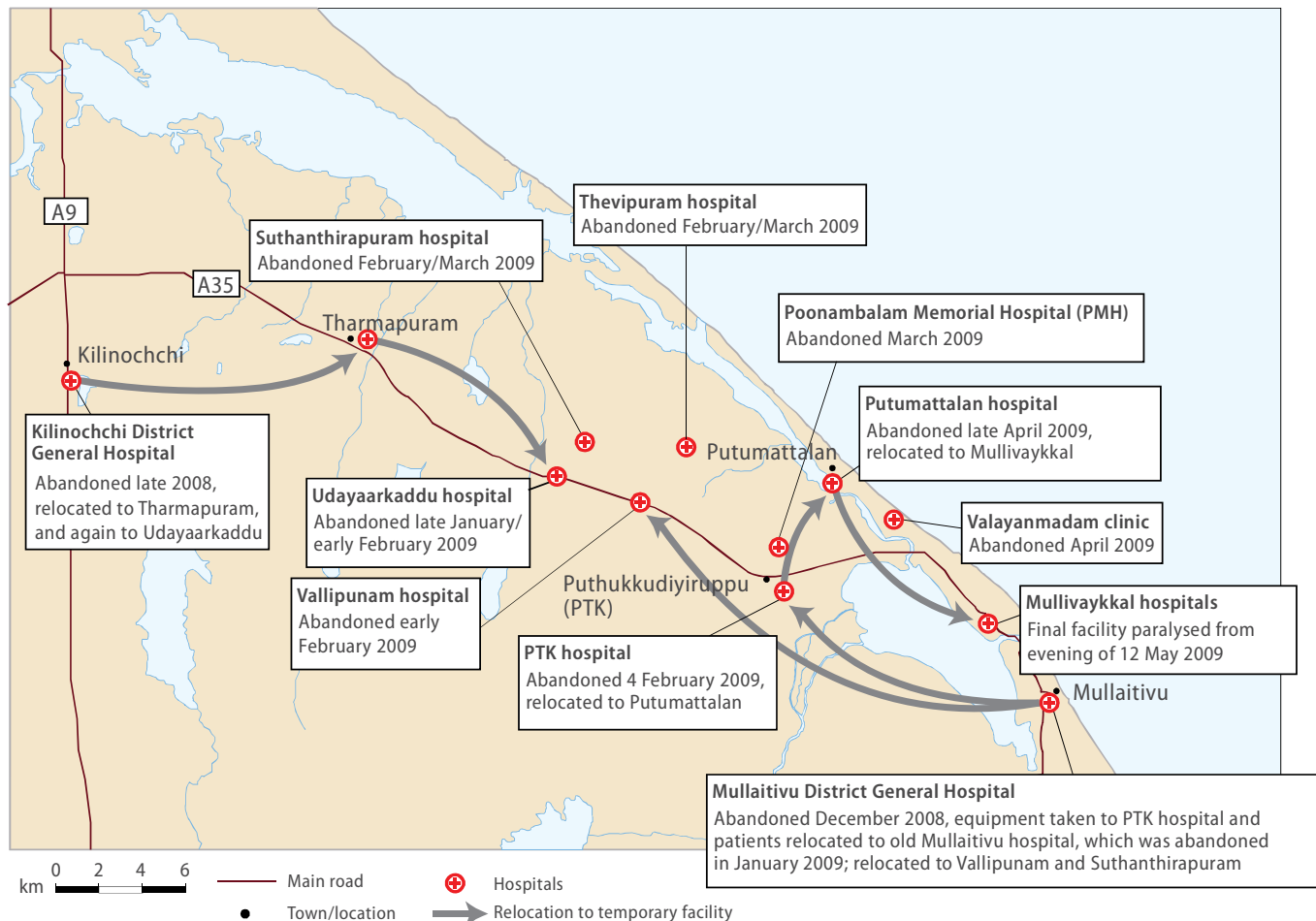
### MAP OF THE SECOND AND THIRD “NO FIRE ZONES”



All boundaries and locations on this map are approximate.

## APPENDIX E

### MAP OF HOSPITALS IN THE VANNI FROM LATE 2008



All boundaries and locations on this map are approximate. Information about hospital relocations and abandonments is based on the best information available at the time of publication.

## APPENDIX F

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