The Illegality of UN Secretary General Ban Ki Moon's approach to Sri Lanka

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Since the end of the civil war in Sri Lanka in May 2009, there have been four attempts by the UN, or associated with the UN, to pursue "accountability" with respect to alleged war crimes committed during the last phases of the war. Two of those attempts have been on the personal initiative of the Secretary General. The second of those attempts, the "Petrie Report," a review of the UN's conduct in Sri Lanka during the last stages of the war, paints the blackest picture so far of the goings-on in the island during the relevant period, and concludes that the UN's conduct amounted to a failure of its humanitarian mission. It says, "Seen together, the failure of the UN to adequately counter the Government's under-estimation of population numbers in the Wanni, the failure to adequately confront the Government in its obstructions to humanitarian assistance, the unwillingness of the UN in UNHQ and in Colombo to address Government responsibility for attacks that were killing civilians, and the tone and content of UN communications with the Government on these issues, collectively amounted to a failure by the UN to act within the scope of institutional mandates to meet protection responsibilities."[1]

The stage is now set for the March 2013 sessions of the Human Rights Council. In my view, Sri Lanka's critics will push for an official investigation into the last stages of the war, or, failing that, try to appoint a Special Rapporteur to look into the *possibility* of launching an official investigation. Perhaps it is time there was a "credible" investigation into the matters in question: as the critics point out, if the Government did nothing wrong, it has nothing to worry about, and in fact ought to welcome the opportunity to clear its name once and for all. But that is not my concern in this paper. My focus instead is on a more universal and basic issue. The Secretary General certainly has the discretion and the authority to call for reports on the various subjects with which he has to deal in the course of his duties. No doubt that authority also covers the commissioning of reports to find out where the UN may have "failed" in the past, to extract lessons for the future. But does that discretion or authority extend to commissioning reports designed to be submitted *indirectly*[2] to official organs of the UN, such as the HRC, to compel collective action by the latter organs against a fellow member? Is such conduct fair, or legal? To my knowledge, no one has yet asked this question. The purpose of this paper is to ask it, and answer it.

I argue that the Secretary General's actions are highly illegitimate and in fact illegal under the UN Charter, specifically, Articles 2(7), 99 and 100. If the Secretary General or anyone else thinks that high Sri Lankan officials committed war crimes during the last stages of the war, and they have some evidence to back-up those allegations, they are perfectly free to go before the UN or one of its relevant organs and present such evidence. In such an event, Sri Lanka naturally has a right of response. If, after such response, the relevant UN organ still feels the allegations have merit, it can request or order further inquiries into the matters in question.

The Secretary General's "reports" have never been authorized or requested by the General Assembly, the Security Council, the HRC, or any other such body. Moreover, they have never been filed officially in any such organ. So, Sri Lanka really has never had a proper forum or opportunity

to respond. In this situation, it is not up to the Secretary General to commission report after report on Sri Lanka focusing on alleged "war crimes." Such conduct is highly prejudicial to the country and amounts to harassment. It irreparably damages Sri Lanka's international reputation, and, internally, fosters disunity, disharmony and acrimony between various groups of people, and thereby sets the stage for outside powers and other interested parties to intervene in the country's internal affairs. The purpose of the UN Charter, ultimately, is to protect the interests of its members, and not to be used as an instrument to destabilize nations, or in some other way to bring about their downfall. If the Secretary General's actions lead to a destabilization of Sri Lanka, he is violating both the spirit and the letter of the Charter.

The issue I'm trying to highlight in this essay is relevant not just to Sri Lankans, but to a wider general audience, especially to those concerned for the future of international law. This is for a very simple reason. The norms and principles of international law are today under unprecedented threat. To quote Richard Falk, the renowned expert on international law:

> Among the more serious losses resulting from the September 11 attacks has been the subversion of international law as a source of guidance and limitation in the foreign policy of leading sovereign States, and especially the United States. Of course, this process of erosion preceded the attacks, and even started well before George W. Bush arrived in Washington….What September 11 did was to extend this dangerous form of American lawlessness to the most sensitive area of all—war-making, uses of force in disregard of sovereign rights, and intervention in the internal affairs of foreign countries.[3]

Given this situation, in my view, the UN remains the best and only hope for individual nations, especially weak nations, to gain a measure of fair-play and justice on the world stage. So, the UN itself must be kept honest. In my view, only the friends of international law can now do this: they need to monitor any and all possible instances of UN law-breaking, especially where the latter is done by the highest officials, and ensure that perpetrators, if any, are promptly brought to book.

The paper consists of 3 Parts. Part 1 discusses the facts, i.e. whether a prima facie case for war crimes can be made even if one accepted the "facts" and scenarios presented in the reports; Part 2 discusses the Secretary General's culpability, and includes a discussion of the applicable law. In Part 3, I propose to discuss remedial measures, in particular, a certain simple if audacious step, which, in my view, will be sufficient by itself to stop this entire campaign for "accountability" in Sri Lanka, whether pursued by the Secretary General or any other UN official, in its tracks.

Part 1: Is there a *prima facie* case for war crimes?

The first and foremost question that needs to be answered is whether or not the Government did, in fact, commit war crimes during the last phases of the war. So, this is the question I take up in this section. For convenience, I shall rely on the basic facts and scenarios given in the Secretary General's reports themselves, so at least with respect to those facts, the reader can rest assured that there is no dispute with the critics of the Government.

What I'm interested in here is to inquire into whether, going on the facts given by the reports themselves, facts considered incontrovertible by the critics of the Government, a normal and reasonable international reader—that is, a person who doesn't have any particular stake in the Sri Lankan situation, whether on the side of the Sinhalese Nationalists, or on the side of Tamil Diaspora

separatists still seething at the defeat of the LTTE—could accept that war crimes were committed. By "war crimes" what is meant here (and this will becomes clear when I discuss some of the specific allegations in a moment) is mainly indiscriminate shelling of civilians and civilian areas.

Now, what would be the criteria that a normal and reasonable person could use to gauge or assess whether such war crimes were committed in a given period of time? I submit the following two are reasonable. First, numbers: for instance, the critics of the government have suggested that "tens of thousands" of civilians were killed during the last stages of the war.[4] When pushed for a specific figure, the number 40,000 is also usually given.[5] If that figure is correct, I think it is safe to presume that war crimes may indeed have been committed, in the sense that civilians may have been indiscriminately targeted.[6] So the first question is whether, in fact, 40,000 or some such large number of civilians was killed.

Second, one can look at the testimony of outside observers. Now, there is a certain impression in the outside world, especially in the West, that the Government simply expelled all foreigners, including foreign correspondents, from the conflict zone, and then proceeded to carry out its military operations. This impression is wrong. Members of the Western Press were certainly not present in the conflict zone in large numbers. But members of the Indian Press were present throughout, and, as for international organizations, the ICRC was also present throughout. It is simply inconceivable that these persons would not have got some inkling if mass and indiscriminate killings of civilians were in fact being perpetrated, and not have said anything about it. So, let's briefly look at each of these matters, starting with the numbers.

a) The numbers

As I said earlier, if "tens of thousands," or "40,000," or some such large number of civilians were killed in the space of about six months, it is a safe bet that indiscriminate targeting of civilians took place, and therefore, it is perhaps reasonable to presume that the types of war crimes that are alleged did in fact take place. So, did 40,000 or some such large number of civilians die during the last stages of the war? For months after the end of the fighting, it was not possible to give a definitive answer to that question. The last full census of the Northern Province was done in 1981, just prior to the start of the civil war, and since then it had been impossible to gain proper access to the region to do another census.

Fortunately, this shortcoming has now been remedied. In November 2011, the Department of Census and Statistics of Sri Lanka completed a full census of the Northern Province. The data is in their website, and the numbers are as follows: there were a total of 22,329 deaths between the years 2005-2009, about half of which (11,172) occurred in 2009.[7] Of that, 2,523 were due to natural causes, while 7,934 are classified as "other deaths" meaning "accidents, homicides, suicides, etc."[8] However, the Census Department also goes on to say, "71% of deaths that occurred in 2009 are reported as due to extraordinary circumstances but majority of deaths prior to and beyond that are reported to be the results of natural causes."[9] The conflict, it should be recalled, ended in late May 2009.

What all this boils down to, then, is that roughly 8,000 persons died in the first five months of 2009 as a result of the conflict, and this is inclusive of LTTE combatants. It is generally understood that around 5,000 LTTE combatants died in the closing phases of the war.[10] That means that at most

roughly *3,000* civilians died in the last phases of the war. That is the inevitable conclusion to which one is led if one starts with the Census Department's numbers.

Now, it is always possible for a critic to say that the Government has fixed the numbers, in other words, that the Census Department has deliberately given a low-count of the total dead in 2009. The fact remains, however, that the Department at least on the face of it has conducted the most scientific and exhaustive survey of the population in the Northern Province so far, and if someone wants to question the Department's figures, it is not enough to give an argument along the lines, "Well, they are the Government's numbers."

The Census Department is run by professionals whose work can be evaluated and assessed by other professionals. If a critic disagrees with the Department's numbers, the thing to do is to conduct a technical evaluation of its numbers and methods, or have an expert do it, and then present some sort of coherent argument as to why exactly those numbers or methods, or both, are wrong. It is not enough simply to present *alternative* figures or numbers.

Meanwhile, there appears to be some independent corroboration for the Department's numbers. First, there is a UN Country Report, completed in 2009, during the conflict itself (but suppressed at the time because the UN felt the numbers couldn't be "verified"), which gives an estimate of the number of persons killed between August 2008-May 13 2009 as 7,721.[11] Obviously, that number is very close to the one generated by the Census Department.

Second, there is a study by the American Association for the Advancement of Science of aerial photographs of the conflict-zone at the very peak of the fighting.[12] The purpose of the study was to find out, among other things, if there was evidence of a rapid expansion of gravesites, or evidence of mass graves, which would indicate that large numbers of people were in fact being killed. The study found little or no expansion of gravesites, and *no* evidence of mass graves,[13] leading to the obvious inference that large numbers of civilians were not being killed. So, all this as I said goes to show that the Census Department's numbers may in fact be right.

To return to the Census Department's numbers, no technical evaluation or assessment of the Department's numbers has yet been conducted by any of the critics, and this includes the Secretary General's experts. For instance, the Secretary General's second report was commissioned nearly a year after the Department put out its figures, but it doesn't say a word about the Department's figures, and instead continues to give its own conjectures about "tens of thousands" killed. In the absence of any coherent and reasonable challenge to the Department's numbers, and given also the corroborative evidence just mentioned, those numbers must stand. So, what does that mean?

It means that 40,000 civilians did not die, nor even 30,000 or 20,000. The actual number is roughly 3,000. Now, that's not a small number. From the standpoint of the victims, it doesn't matter if the total number of dead is 3,000 or 30,000, each unnecessary death in war is a tragedy and a travesty. But the question we are pursuing here is whether war crimes were committed in the sense that civilians were indiscriminately targeted. If the civilian death toll over 6 months was roughly 3,000, and that under the extremely trying conditions under which the last phases of the war was fought (I will get to this in a moment), I for one cannot see how any reasonable person can cay that there is a case to be made here that civilians were indiscriminately attacked

It is convenient at this stage to digress a moment and discuss the aforementioned "trying conditions" under which the last phases of the war was fought, and also discuss in a little more detail the specific nature of the allegations that the Secretary General is making against Sri Lanka. For this purpose, I shall turn to the Secretary General's first report, the "Panel of Experts" report, which deals with the issues in question at length.

The most important thing that a general reader has to understand about the conditions under which the last stages of the war was fought is that the LTTE during this time had taken upwards of 300,000 civilians as hostages and was moving that massive population from place to place as the Sri Lankan army began to close in on it. Here is what the Secretary General's experts say:

> Around 330,000 civilians were trapped into an ever decreasing area, fleeing the shelling but kept hostage by the LTTE.[14]

And then again, specifically with regard to the purposes for which the civilians were used:

> Retaining the civilian population in the area that it controlled was crucial to the LTTE strategy. The presence of civilians both lent legitimacy to the LTTE's claim for a separate homeland and provided a buffer against the SLA offensive. To this end, the LTTE forcibly prevented those living in the Vanni from leaving. Even when civilian casualties rose significantly, the LTTE refused to let people leave, hoping that the worsening situation would provoke an international intervention and a halt to the fighting. It used new and badly trained recruits as well as civilians as "cannon fodder" in an attempt to protect its leadership.[15]

Finally, the following admission by the panel is also crucial:

> From February 2009 onwards, the LTTE started point-blank shooting of civilians who attempted to escape from the conflict zone, significantly adding to the death toll in the final stages of the war. It also fired artillery in proximity to large groups of internally displaced persons (IDP's) and fired from, or stored military equipment near, IDP's or civilian installations such as hospitals.[16]

The important point that emerges from all of the above passages is this: the taking of 300,000-plus civilians was not something that happened spontaneously or on the spur of the moment—for instance, say, when an armed group is being chased and cornered, and, finding themselves out of options, grab a few hostages to try and negotiate their way out of the situation—but was an integral part, indeed the cornerstone, of the LTTE's *strategy* of war during the last phases.

So, it is under this that one has to look at the specific charges or allegations as to war crimes. The Secretary General's experts list five categories of alleged violations committed by the Government: i) killing of civilians through widespread shelling; ii) shelling of hospitals and humanitarian objects; iii) denial of humanitarian assistance; iv) human rights violations suffered by victims and survivors of the conflict including both IDP's and suspected LTTE cadre; and v) human rights violations outside the conflict zone, including against the media and other critics of the Government.[17] Of these, the categories that pertain to this paper are the first three.[18] So, let's look a bit more closely at the specific allegations as to the first three categories.

On the issue of "widespread shelling" the report says:

> The Government shelled on a large scale on three consecutive No Fire Zones, where it had encouraged the civilian population to concentrate, even after indicating that it would cease the use of heavy weapons. It shelled the UN hub, food distribution lines and near ICRC ships that were coming to pick up the wounded and their relatives from the beaches.[19]

On the "shelling of hospitals," the report says,

> The Government systematically shelled hospitals in the frontlines. All hospitals in the Vanni were hit by mortars and artillery, some of them were hit repeatedly, despite the fact that their locations were well-known to the Government.[20]

Finally, on "denial of humanitarian aid," the report says,

> The Government also systematically deprived people in the conflict zone of humanitarian aid, in the form of food and medical supplies, particularly surgical supplies, adding to their suffering. To this end, it purposefully underestimated the number of civilians who remained in the conflict zone. Tens of thousands lost their lives from January to May 2009, many of whom died anonymously in the carnage of the final days.[21]

To repeat, then, there are three main accusations being leveled against the Government with respect to the fighting itself: i.e. that it shelled indiscriminately in and around civilians, that it shelled hospitals, and that it denied the civilians humanitarian aid in the form of food and medicine. Now the Government denies each of these accusations (I will get to that in a moment) but let's just look at the accusation as to indiscriminate shelling. It seems to be this really is the overriding accusation being leveled against the Government. (I will turn to the other two in my summary.) So, the primary question is whether, given the ground conditions that existed during the relevant period, the Government did in fact shell indiscriminately? And this brings us back to the numbers.

To return, the numbers, as we saw, are that roughly 3,000 civilians perished during the period in question. To repeat what I said earlier, if the civilian death toll over 6 months was roughly 3,000, and that under the extremely trying conditions under which the last phases of the war was fought, I for one cannot see how any reasonable person can say that there is a case to be made here that civilians were targeted indiscriminately. It is simply not a picture consistent with that of an army on the rampage, engaging in atrocity after atrocity, including targeting civilians indiscriminately.[22]

b) Testimony of outsiders

I shall now turn to the testimony of certain outsiders who were either present in the conflict zone for extended periods of time during the fighting, or visited the conflict zone during the fighting briefly, but had a chance to make first hand observations. This type of testimony is also very useful in gauging what may have been really going on in the conflict zone during the relevant period, particularly in gauging whether the picture painted by the numbers may be accurate or not. As I said earlier, members of the Western Press were not present in the conflict zone in large numbers, though there were a few, but members of the Indian Press were present, particularly correspondents from *Frontline*, the respected Indian news magazine, and also from *All India Radio/Doordarshan*. And as for international organizations, ICRC was present throughout.

I'll cite just three examples of comments and observations, two from the senior journalist B. Muralidar Reddy, of *Frontline*, who was present in the battlefield right up to the end of the war on May 19, 2009, and one from David Gray, a *Reuters* correspondent, who was taken on a tour of the battlefield about a month previously, in April. (I've pulled these at random from the internet: there are many others, but constraints of time and space don't allow citing them all here.) The observations quoted give a dramatic and at times poignant glimpse into the realities of the battle-zone, and need no additional commentary. I'll simply highlight certain points which I think are important as I go along. I'll start with B. Muralidar Reddy.

Now, Mr. Reddy was part of a group of "embedded" reporters, in the sense that their visit was facilitated through the Defense Ministry and the Sri Lanka army. A critic might see a problem with this. Mr. Reddy, however, prefaces his report with the following remark, which I think is important not only with regard to assessing his credibility, but to certain inferences I want to draw from his statements later:

> There were no conditions spelled out on the coverage from the war zone. We were allowed unfettered and unhindered movement up to 400 meters from the zone, where pitched battles were fought between the military and the remaining cadre and leaders of the LTTE….Most important was the fact that we had interference-free access to the internet, including *Tamilnet*, the website perceived to be pro-LTTE and based somewhere in Europe. Within the constraints of internet time available, and not-unexpected problems of connectivity and speed in a war zone, there was just enough time to read and absorb the reports on the websites before sending news dispatches to our headquarters. No questions were asked.[23]

He then says, "Here is an account of what I saw and heard and otherwise sensed in the last 70 hours of Eelam War IV,"[24] and proceeds to give his narrative. I quote at length.

> Information gathered by this correspondent from a group of the last batch of 80,000 civilians to flee the LTTE-occupied zone reveals that the Tigers made a determination on May 10 that they had lost the war and that no purpose would be achieved by holding on to the civilians. However, it is not clear on what note they wanted to end the war.
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> On May 11, the Tigers seemed to have deserted their sentry-points, dismantled their defense-lines, and destroyed everything they could. The exodus of the last batch of civilians started on May 12/13 and perhaps by the night of May 15 there were no civilians left in the 1.5 square-kilometer area the Tigers were boxed into.
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> The accounts of the last hours provided by the civilians by and large tallied with the evidence that has surfaced so far. The detention of Sea Tiger chief Soosai's family by the Navy on May 15/16 and the discovery of Prabakaran's aged parents in a camp by the military on May 27 provided the ultimate proof that the Tigers had decided to spare the life of the civilians.
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> The May 15 decision of the International Committee of the Red Cross (ICRC)—the only outfit present inside the war zone until four days before the war ended—to suspend humanitarian operations inside Tiger-held territory proved beyond doubt that the overwhelming majority of civilians were out of the battle-zone and that the military and the Tigers were engaged in a no-holds-barred fight. The beaming faces of the commanders and troops spoke volumes about the fate that awaited the Tigers.[25]

A number of important points can be highlighted from the above passages, read with Mr. Reddy's prefatory remarks. For instance, it is clear that he had an opportunity to speak with and interact with the civilians who were just coming out of the battle-zone. It is also clear, from the prefatory note, that he had access to the internet, and therefore would have been generally aware of the increasing clamor being made internationally, particularly by *Tamilnet* and other LTTE-friendly sources, that Government troops were massacring civilians. It is reasonable to presume, therefore, that as an experienced journalist he would have been on the look-out for any statements by the civilians that might corroborate that such massacres were in fact being carried out. Meanwhile, since he had the opportunity to actually interact with the civilians, it is also reasonable to presume that he would have also taken the opportunity to ask them directly what they knew of any such massacres.

To my knowledge, there is not the slightest indication in the article (or in any of his other articles), that he heard the civilians say Government troops were carrying out massacres, or that he felt or "sensed" the need to ask the civilians directly about such matters. [26] In my view, one can draw only one reasonable inference from this: namely, that his on-the-spot observation and "sense" was that no such massacres were in fact going on. It is also important to note that we are talking here about a situation where the civilians had *just* come out of the battle-zone—they wouldn't have had time to reflect on or even digest the events they had experienced, or, more important, to be "coached" by anyone as to what they ought to say to reporters. Such spontaneous and unvarnished testimony is generally considered the best and most credible form of eye-witness testimony, and is recognized as such, for instance in courts of law. The fact that there is no record anywhere in Mr. Reddy's reports that people coming out of the battle-zone ever said massacres of civilians were going on is therefore doubly significant.

Second, I want to focus on Mr. Reddy's observation, "The accounts of the last hours provided by the civilians by and large tallied with the evidence that had surfaced so far…that the Tigers had decided to spare the life of the civilians." What does this mean? It means, in my view, that it was Mr. Reddy's assessment, based on his first-hand observations, that the threat to the civilians in this situation came, or had come, primarily from the Tigers: his comment, to repeat, is that it was the Tigers who had decided to spare the lives of the civilians, meaning that it was the Tigers who had held the power of life and death over them in the first place. The inference one can naturally draw from this is that his observation and "sense" must have been that once the civilians were free from the grasp of the Tigers—i.e. once they had crossed over to Government lines—they were *safe*. Is that a picture consistent with that of a Government indiscriminately attacking and killing civilians?

I could go on, but I'll turn to the second set of quotes, which are from Mr. Reddy's report for the period covering May 13-16, that is, still a few days *prior* to the very final hours of the war. (The passages I quoted earlier were for the period covering May 16-19.) In any event, here's part of what Mr. Reddy says:

> It was pitiable to see terror-stricken and emaciated mothers clutching on to their babies and running towards military check-points. In a brief interaction before boarding government buses that took them to the Omanthai checkpoint, a group of newly arrived civilians inside the NSZ narrated the travails they had endured in the past two months.
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> "My 45-day child was born inside a bunker. After he came out of my womb, these are his first glimpses of the big bad world," said a mother who had covered the naked body of her child with a white towel to protect him from the blistering sun.

> "My son-in-law managed to buy a tin of Lactogen for a price of Sri Lanka Rs. 3,000 as my two-year-old grandchild had to go without milk for nearly two months. We have been living in the bunkers for weeks with shells and gunfire exploding all around us. Late last night we decided to crawl our way out without being detected by the Tigers," a man who was successful in coming out with his entire family said.[27]

I wish to highlight only two points from the above passages. First, as with the previous passages, it is clear that Mr. Reddy had an opportunity to speak and interact with the civilians. And again, there is not the slightest indication that he heard any of these civilians ever saying anything like, "They (government soldiers) are murdering us in there!" There is also not the slightest indication that Mr. Reddy felt the need to ask them whether such murders were going on—all of which lead to the natural inferences mentioned earlier.

There is, however, an additional point which emerges from these passages. Mr. Reddy's impression appears to have been that the civilians were *glad* to cross over to government lines. He says, for instance, that he saw mothers "clutching their babies and running towards military check-points." He also cites the statement of the man who says, "Last night we decided to crawl our way out without being detected by the Tigers." So, clearly these people were running *towards* the Sri Lanka army—presumably, expecting to find safety there. Would they have been running towards the army if they felt—either from what they had heard from other civilians, or from personal experience—that the army had been massacring civilians over the past days if not weeks? It doesn't make sense.

Once again, I could go on, but I'll turn to the final set of quotes, which are from a Western reporter, one David Gray, of *Reuters*. These quotes, meanwhile, are from a "Photographer's Blog," and therefore of a more personal and informal nature than Mr. Reddy's submissions. But such informal submissions are also important because sometimes they offer surprising insights into situations. Here, then, is part of Mr. Gray's narrative of what he saw when he was taken on a tour of the battle-zone in April 2009.

> After what seemed like hours, but was actually only one, we arrived at the destroyed town of Putumatalan. Here, we got into jeeps. The troops that were escorting us got noticeably nervous. They held their guns at the ready now, looking more alert and more intently into the coconut groves as we passed. We must be close now, I thought.
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> After about 20 minutes driving down a dirt road, we turned a bend. Suddenly, there were thousands of exhausted and weary looking civilians. They were being given small amounts of food and drink by the soldiers, but only enough to last them a day or so. This was when our escorts really started to hurry us. It seemed they didn't want us to talk or view the civilians for too long, and after just 5 minutes, we were told to get back in the jeeps. Frantic calls were made on radios, and we were told we were now headed to the front.
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> In just 10 minutes, we arrived at a place where just days earlier the Sri Lanka government soldiers had pushed their way through the LTTE defenses, leading to a mass exodus of civilians. Smoke billowed less than a mile away, where, we were told, troops were continuing to fight.[28]

What can one learn from the above observations? I want to focus on only one point, related to what Mr. Gray says about his encounter with the civilians. He says that he was being driven along a

dirt road when the jeep rounded a bend and suddenly in front of him he saw thousands of civilians. From the context, it is clear that this was an area where his escort suspected there were Tiger fighters hiding in the surrounding coconut groves. So, the encounter with the civilians was clearly not a "set up" or a pre-planned "photo-op": the escort simply did not know the civilians were around the bend. In any event, what is the first thing that Mr. Gray noticed when he saw the civilians? He says that he saw the civilians "being given small amounts of food and drink by the soldiers." In other words, he saw the soldiers *feeding* the civilians.

Now, a critic or a cynic might point out that according to Mr. Gray's narrative the soldiers were giving only "small amounts" of food and drink. But obviously, soldiers on the battlefield cannot be expected to carry the massive amounts of food necessary to feed thousands of civilians (most probably they were sharing their own rations with those civilians). But the inescapable fact, if we go by Mr. Gray's observation, is that he saw the soldiers *feeding* the civilians.

Recall that the general accusation being made against the Government is that it had ordered indiscriminate attacks. If these soldiers that Mr. Gray saw were either intending on or in the *habit* of attacking civilians indiscriminately, or were part of an army that had been tasked or allowed to carry out such attacks, which entails a certain callousness and utter disregard for the wellbeing of civilians generally on the part of that army, as well as the Government that was ultimately in control of that army, why would these soldiers be feeding civilians? Is that the sort of behavior one would expect from soldiers tasked with mistreating—i.e. leveling indiscriminate attacks—against civilians? So, these are some of the questions that emerge when one considers eye-witness testimony coming from the battle-field.

I have considered here only three sets of quotes: as I indicated earlier, there are innumerable others. The point I want to make is simply this: the overall impression one gets from these quotes (and others), and especially the closer the testimony is in time and space to the battle-zone, is that the army was taking as much care as was reasonably possible to protect the civilians, that the civilians themselves were aware of this, and took every opportunity they could to escape to government lines. This impression is entirely consistent with the picture painted by the numbers, and in fact corroborates the inference that the army was not targeting civilians deliberately or indiscriminately, as claimed by the critics.

Summary

In this section I have considered numbers, plus testimony of outsiders, to see whether a prima facie case for war crimes can be made against the Government. I have tried to show, at least as far as the Secretary General's allegations are concerned, that it is difficult to make such a case under either of these categories, and harder when they are taken in combination. Recall that the POE report sets out three main "charges" against the Government: indiscriminate shelling of civilians, shelling of hospitals, and depriving the civilians of food and medicine. Let's just go through these quickly. On the first charge, indiscriminate shelling of civilians, I think the numbers, plus the eye-witness testimony coming from the battle-zone, are sufficient to counter it.

On the second charge, shelling of hospitals, if the Government did in fact target hospitals, there is no doubt the Government committed a war crime. The Government, however, denies that it ever targeted hospitals deliberately. Even if one dismissed the Government's denials out of hand (saying such denials are self-serving), it seems to me that to really evaluate the second charge one has to

consider a number of matters. First, the hospitals that were allegedly attacked were in the battle-zone, an area from which civilians had been generally evacuated by the Government, or reciprocally, if civilians were present, they were being forcibly kept there by the LTTE. So, the *buildings* may at one time have been hospitals, but it is unclear, going on the POE's allegations, if they were *functioning* as hospitals at the time of the alleged attacks. It is important to note that the POE itself explicitly admits that the LTTE was known to store military equipment and also to fire from hospitals.

In light of the above, one has to also consider whether the army knew there were civilians still in the hospitals that were allegedly attacked, roughly how many, and what measures if any were taken to protect those civilians while neutralizing combatants, if any, holed up in those hospitals. One would also have to keep in mind the exceptions mentioned in the ICRC study with respect to "civilian casualties incidental to the conduct of military operations," and other such matters. The POE does none of these things. Finally, as a general matter, one has to keep in mind the overall picture painted by the numbers, plus the testimony coming from the battlefield. I think the overall impression one gets from the numbers as well as the outside testimony is that the Government was taking as much care as possible to spare the civilians, and that the latter knew this. But in that case, why would the Government go out of its way to deliberately attack *functioning* hospitals, the most vulnerable of civilian targets? It doesn't make sense. Due to these reasons, I feel that the POE does not establish a prima facie case with respect to the second charge either.

That leaves charge number three: the denial of food and medicine to the civilians, which I haven't addressed so far. The Secretary General's experts say that the Government denied food and medicine to the civilians, or rather, that the Government "deprived" the civilians of food and medicine. The ICRC, however, which was present in the conflict-zone throughout the final phase of the war, and in fact participated in and helped coordinate the Government's food and medicine convoys to the battle-zone, did not complain at the time. Government records, meanwhile, show that it transported 534,227 metric tons of food and medicine to the conflict-zone[29]: the ICRC has never disputed those quantities.

It should be further noted that the Government continued its food-and-medicine convoys right up to the very end of the war, and this in face of the fact—apparently well-known to the ICRC and others—that the LTTE was pilfering much of the food and medicine once it got to the distribution points.[30] It seems to me, therefore, that one can perhaps argue over whether the *quantities* of food and medicine sent were adequate or inadequate, but it is very difficult to say that there was a systematic attempt to "deprive" the civilians of food and medicine. Hence, on this charge also it is very difficult to come to a clear-cut determination that a "war crime" was committed.

It should also be noted that with respect to food convoys, the POE attempts a rather blatant obfuscation. On page 20 of the report (para 78) it says, of UN and WFP[31] food convoys, "The first convoy entered the Vanni on 3 October 2008. In total 11 convoys went into the Vanni over the period of 5 months, delivering a total of 7,435 metric tons of food, which was not enough to maintain the civilian population."[32] But these, to repeat, were UN/WFP convoys. But there is not a single mention of the ICRC and the Government food convoys that went parallel to the UN/WFP convoys, and in fact continued long after the latter stopped. Thus, the POE comes to the conclusion that the civilians were deprived of food and medicine purely on the basis of the food and medicine transported by the UN, and entirely ignores the food and medicine transported by the Government and the ICRC. It is on this type of "evidence" that the POE wants the world to decide on important questions such as whether Sri Lanka committed war crimes.

So, where does all this leave one? It leaves one with only one conclusion: The Secretary General has not made a prima facie case for war crimes, or rather, he simply has no *case*. And yet he persists in his dogged quest for "accountability," most importantly, *without* giving Sri Lanka any opportunity to respond. Why? What gives him the right or the authority to do this—or rather, *does* he have a right or authority to do this? These questions naturally lead one to query his culpability under the law, to which I turn next.

Part 2: Secretary General's Culpability

To assess the Secretary General's culpability, it is first necessary to consider his own stated reasons (or those given by his experts) for his actions; second, any other reasons that can be inferred from his statements or those of his experts; and finally, any reasons *other* than those that can be inferred from his or his experts' statements that can nevertheless be helpful in explaining his actions. In this section, I consider each of these matters. My argument, in brief, is as follows. The Secretary General's stated reasons for his actions is a purported agreement he reached with the Sri Lankan President during a visit to the island in late May 2009, just after the war. On close examination, however, this agreement does not empower or authorize the Secretary General to pursue the types of actions he has pursued, namely, to place himself in the position of being a sort of "monitor" of the accountability process in Sri Lanka. This therefore deprives the Secretary General of the primary legal basis for his actions.

His only other option, if he wants to legally justify his actions, is to resort to Article 99 of the UN Charter, which grants the Secretary General a certain amount of discretion to bring various matters to the attention of the Security Council. In my view (and I will explain the reasons later), the Secretary General can't resort to the above option, either, in this instance, which means that he has absolutely no legal basis for his actions. One could stop there. The fact, however, that he has continued his actions despite having no legal basis for them raises the prospect, in certain very interesting ways, that he has also violated Article 100 and Article 2(7) of the UN Charter. Article 100 prescribes that the Secretary General and the UN staff will not allow themselves to be influenced in their duties by any "external authority to the Organization," and Article 2(7), one of the most important Articles in the entire Charter, prohibits the UN from interfering in the internal affairs of nations. Again, I will explain all this in greater detail later, but first, let's turn to the Secretary General's own stated reasons for his actions.

a) The Secretary General's stated reasons

The legal basis explicitly given by the Secretary General (or his experts) for his actions is a purported agreement between him and the Sri Lankan President reached during a visit to the island just after the war. This is indicated in the terms of reference of both of the Secretary General's reports. I shall quote the relevant portions. Incidentally, these portions are important for another reason also: they confirm that the two reports were commissioned purely on the initiative of the Secretary General, and not, for instance, at the request of the General Assembly, the Security Council, or any such official organ.

The relevant portion of the first report's terms of reference read as follows:

> In a Joint Statement of the Secretary General and the President of Sri Lanka issued at the conclusion of the Secretary General's visit to the country on 23 May 2009, the Secretary

> General underlined the importance of an accountability process to address violations of international humanitarian and human rights law committed during military operations between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE). The President of Sri Lanka undertook to take measures to address these grievances. At this time and against this back ground,
>
> 1) The Secretary General has decided to establish a panel of experts to advise him on the implementation of the said commitment to the final stages of the war.
>
> 2) The purpose of the panel shall be to advise the Secretary General on the modality, applicable standards and comparative experience relevant to the fulfillment of the joint commitment to an accountability process, having regard to the nature and scope of alleged violations.[33]

The terms of reference of the second report state:

> The Secretary General's Internal Review Panel (the Panel) was set up pursuant to Article 4B of the report of the Secretary General's Panel of Experts on Accountability in Sri Lanka.[34]

The above passages establish beyond any doubt that the reports were commissioned entirely on the Secretary General's initiative, and that the legal basis for the POE report (itself the anchor for the second report) is the purported agreement with the President. This purported agreement, therefore, is a very important document.

Before turning to the aforementioned document, it is necessary to highlight two further points: first, if one goes back to the lead paragraph of the terms or reference of the first report, it seems that the Secretary General's understanding was that the Government was admitting or accepting that violations of humanitarian law were, in fact, committed during the last stages of the war. The relevant sentence says, "The Secretary General underlined the importance of an accountability process to address violations of international humanitarian and human rights law *committed* during military operations between the Government of Sri Lanka and the LTTE" (emphasis added). The word "committed" is not qualified in any way, for instance as "allegedly committed," or "may have been committed," or some such phrase.

Second, if one goes to subsection 2 of the terms of reference of the same report, it indicates that the Secretary General's understanding was that there was a *joint commitment* to accountability. A "joint commitment" obviously entails that the Secretary General would be in a position to monitor the accountability process, to give assistance to it, and so on. What one has to look for when examining the agreement, then, is whether it actually bears out the above two interpretations on the Secretary General's part.

So, let's look at the agreement itself. I quote at length. (The document consists of 12 paragraphs, and I quote the last seven.) I have numbered the paragraphs, to help with the subsequent analysis.

> 1. President Rajapaksa and Secretary-General Ban Ki-moon discussed a series of areas in which the United Nations will assist the ongoing efforts of the Government of Sri Lanka in addressing future challenges and opportunities.

2. With regard to IDPs [Internally Displaced Persons], the United Nations will continue to provide humanitarian assistance to the IDPs now in Vavuniya and Jaffna. The Government will continue to provide access to humanitarian agencies. The Government will expedite the necessary basic and civil infrastructure as well as means of livelihood necessary for the IDPs to resume their normal lives at the earliest. The Secretary-General welcomed the announcement by the Government expressing its intention to dismantle the welfare villages at the earliest, as outlined in the Plan to resettle the bulk of IDPs and call for its early implementation.

3. The Government seeks the cooperation of the international community in mine clearing, which is an essential prerequisite to expediting the early return of IDPs.

4. The Secretary-General called for donor assistance towards the Common Humanitarian Action Plan (CHAP) jointly launched by the Government of Sri Lanka and the United Nations, which supports the relief, shelter and humanitarian needs of those in IDP sites.

5. President Rajapaksa and the Secretary-General recognized the large number of former child soldiers forcibly recruited by the LTTE as an important issue in the post-conflict context. President Rajapaksa reiterated his firm policy of zero tolerance in relation to child recruitment. In cooperation with the United Nations Children's Fund (UNICEF), child-friendly procedures have been established for their "release and surrender" and rehabilitation in Protective Accommodation Centres. The objective of the rehabilitation process presently underway is to reintegrate former child soldiers into society as productive citizens. The Secretary-General expressed satisfaction on the progress already made by the Government in cooperation with UNICEF and encouraged Sri Lanka to adopt similar policies and procedures relating to former child soldiers in the north.

6. President Rajapaksa informed the Secretary-General regarding ongoing initiatives relating to rehabilitation and reintegration of ex-combatants. In addition to the ongoing work by the Office of the Commissioner General for Rehabilitation, a National Framework for the Integration of Ex-combatants into Civilian Life is under preparation, with the assistance of the United Nations and other international organizations.

7. Sri Lanka reiterated its strongest commitment to the promotion and protection of human rights, in keeping with international human rights standards and Sri Lanka's international obligations. The Secretary-General underlined the importance of an accountability process for addressing violations of international humanitarian and human rights law. The Government will take measures to address those grievances.[35]

Now, where in these passages is there any indication that the Government is, one, accepting or admitting that violations of humanitarian law were in fact *committed*, and two, that it was undertaking a "joint commitment" to an accountability process? Mention of "accountability" is tucked away at the very end of the document (paragraph 7), and that only in two sentences. I will turn to those two sentences in a moment, but first let's look at the paragraphs as a whole, to see if it is possible in some way or another to extract the meanings that the Secretary General seems to think are contained in the document. For instance, since there is mention of UN "assistance" in some of these passages, is it possible to interpret this to cover assistance to an accountability process?

The first paragraph clearly raises the issue of UN "assistance": it says that the President and the Secretary General "discussed a series of areas in which the United Nations will assist the ongoing efforts of the Government of Sri Lanka." But is this assistance the UN is to give, and which the Government is putting itself under obligation of accepting, supposed to cover the matters mentioned in all of the remaining passages, or just a few? In my view, it covers only paragraphs 2, 3 and 4, and not paragraphs 5, 6 and 7. The former three clearly involve "assistance" in one way or another. For instance, in paragraph 2 the UN pledges to assist the IDP's in Vavuniya and Jaffna, and the Government agrees to allow access to these areas. In paragraph 3, the Government "seeks the cooperation of the international community in mine clearing." Paragraph 4, meanwhile, contains a reference to the Secretary General calling for "donor assistance."

Next come paragraphs 5, 6 and 7, where it is not clear that any assistance is being offered or requested. For instance, paragraph 5 deals with LTTE child-soldiers, and the progress the Government had made up to that point in rehabilitating and re-integrating these child-soldiers back into society. The Secretary General says he's happy with the progress so far, and to carry on. Paragraph 6 deals with initiatives that the Government had taken to rehabilitate adult ex-combatants. There is a reference to "assistance," but that is to a program to which UN assistance had already been given, and the Government is simply expressing its appreciation.

So, it is in this context that one has to approach paragraph 7, which contains the two sentences: "The Secretary General underlined the importance of an accountability process for addressing violations of international humanitarian law and international human rights law. The Government will take measures to address those grievances." The Secretary General's contention, to repeat, is that these two sentences establish, one, that the Government is agreeing or admitting that violations of humanitarian law were in fact committed, and two, that there is a joint commitment to an accountability process, which in turn empowers or authorizes the Secretary General to monitor and provide assistance to that process as he sees fit. Is there any indication in those two sentences that the Government is agreeing to any of these things?

In my view, there is no such indication. If, for instance, the first sentence said something like, "The Secretary General expressed his concern over violations of international humanitarian law committed during the last phases of the war,[36] and underlined the importance of an accountability process to address those matters," and the second sentence said something like, "The Government undertakes to take measures to address those concerns," there may some basis to contend that the Government is admitting that the violations indicated by the Secretary General did in fact occur, and that it will look into them. But as the sentences stand, I cannot see how any reasonable person can interpret that the Government is admitting that violations in fact occurred. In my view, those two sentences as they stand indicate only that the Government is saying it will look into any allegations of violations if such are made, and pursue further those allegations that are found to have *merit* and substance.

There is no question that in the last sentence the Government is making a commitment, i.e., to take measures to address any "grievances" with respect to violations of humanitarian law. But the "grievances" refer to *allegations*, not to acts the Government has admitted it committed. Now, someone can say, "What good is a commitment (even if it is to investigate allegations) if there is no enforcement mechanism, i.e. monitoring, to make sure the Government actually follows through on its promises?" But even in that case, since the agreement is with the UN *organization*, and not with the Secretary General *personally*, it would be the UN in its collective capacity—i.e. the General

Assembly or the Security Council—that would be entitled to monitor, and not the Secretary General personally. Of course, the Secretary General would be entitled to inform the General Assembly or the Security Council that, in his view, progress with regard to accountability was slow, or some such thing, but it would be up to the General Assembly or the Security Council to decide what to do about it.

In sum, then, at least as far as I can see, the purported agreement with the President nowhere contains any of the elements that the Secretary General contends. Even the two sentences which refer to an accountability process, when looked at closely, don't contain any admission by the Government that violations in fact occurred, or any agreement that the Government is placing itself in a position of being monitored by the Secretary General personally. This means that the Secretary General can't really use this document as a legal basis for his actions: at any rate, it is a most insubstantial and flimsy *pretext* for a legal basis.

b) Article 99

I shall now turn to Article 99 of the UN Charter, because, other than an independent compact or contract such as, say, the joint-statement with the President (which as we have seen is insufficient as a legal basis in this instance) the only other way the Secretary General can try to justify the types of actions he has taken—i.e. commissioning reports and inquiries against a country purely on his initiative—is by recourse to Article 99. As I indicated at the very start, in my view recourse to Article 99 is unavailable to the Secretary in this instance. I want to discuss why this is so, and draw out the necessary implications.

Incidentally, there are indications that the Secretary General's legal experts also at one time contemplated recourse to Article 99, and rejected it (perhaps for the same reasons I also think that Article is not an option in this instance). In any event, the fact that his legal advisors contemplated a resort to Article 99, and appear to have rejected it, is highly significant, and I'll briefly turn to this matter later in this section. But first, here's Article 99:

> The Secretary General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."[37]

To fully appreciate Article 99, one has to read it in conjunction with Articles 97 and 98, both of which control the functions of the Secretary General. Article 97 establishes the Office of the Secretary General, as follows: "The Secretary General shall be the chief administrative officer of the organization."[38] Article 98, meanwhile, sets out or defines the Secretary General's functions, as follows: "The Secretary General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs."[39]

Of the two, Article 98 is the more important for my purposes. To repeat, it defines the basic parameters of the Secretary General's duties: he is to act as the chief administrative officer in the meetings of the General Assembly, the Security Council, and the Trusteeship Council, and also to perform any other functions "entrusted to him by these organs." So, under normal circumstances, if the Secretary General wants to perform functions *other* than being the chief administrative officer, they have to be ones entrusted to him by the General Assembly, Security Council or the Trusteeship Council. Article 99, then, provides an extension to this: it allows the Secretary General to bring

issues of his choosing to the attention of the Security Council. So, can he justify his reports and inquiries on Sri Lanka by invoking the aforesaid discretion, that is, by saying that he is engaging in these inquiries with an eye to eventually bringing the matters in question before the Security Council?

In my view, recourse to Article 99 is unavailable to the Secretary General in this instance, and the reason is obvious from just one glance at the Article itself. The Article certainly gives the Secretary General discretion to bring various issues before the Security Council, but there is a caveat involved: those issues the Secretary General wants to bring before the Security Council have to be ones that in his opinion pose a threat to the "maintenance of international peace and security." In other words, if he wants to bring "accountability issues" in Sri Lanka before the Security Council, he is going to have to be of the opinion that such issues, in some way or another, pose a threat to the maintenance of international peace and security. Can such an "opinion" possibly be justified? I don't think so: no one, not even Sri Lanka's harshest critics, would go so far as to contend that "accountability issues" in Sri Lanka rise to the level of being a threat to international peace and security.

A supporter of the Secretary General might say something like this: "Article 99 gives the Secretary General sole discretion to decide whether or not a situation he wants to take before the Security Council is a threat to international peace and security, and he doesn't have to justify his choice in any way." But that is problematic. It is true that the Secretary General has been given discretion, but no discretion is ever absolute or untrammeled. It is a settled principle of Administrative Law, for instance, that an official who has been given discretion must nevertheless exercise that discretion in a reasonable way.[40] True, the Secretary General is not subject to the Administrative Law of individual nations, but it cannot be that he is immune from principles of administrative conduct generally accepted in much of the world. If nothing else, he has to justify his actions in the court of public opinion. So, asserting a claim to absolute discretion is simply out of the question: at the very least, the Secretary General is going to have to come up with an argument, albeit even a farfetched one, that "accountability issues" in Sri Lanka pose a threat to international peace and security.

Let's suppose that he were to concoct some such argument purely to reach the threshold of reasonable administrative conduct. In that case, it only leads to a further problem, because a critic can point out, "If he is willing to "stretch" with respect to Sri Lanka, why not "stretch" with respect to other places in the world, and bring those also to the attention of the Security Council?" I want to digress a moment at this stage, and briefly mention two of my own favorites for places that I feel could use a little bit more of this sort of special attention. (These examples are not directly related to events in Sri Lanka, but they're relevant to the overall point I'm trying to make here, plus, they will be relevant to my argument in the next segment, with respect to possible violations of Article 100 and 2(7).) In any event, here are just two of my choices (the reader can substitute his or her own choices in place of mine).

The first is the situation in Honduras, where a dire human rights crisis has arisen. Honduras, it should be recalled, was the scene of the coup in 2009 that brought President Porfirio Lobo to power, a coup condemned by almost the entire civilized world, but supported and perhaps sustained by the United States. Laura Carlson, an American specialist on the subject, wrote the following in 2011:

> The crisis in human rights and governance in Honduras has become apparent to the world and is a fact of daily life within the country. In the two years since Lobo came to power in

> elections boycotted by the opposition, Honduras catapulted into the top spot in the world for per capita homicides — the United Nations Office on Drugs and Crime's (UNODC) Global Homicide Survey found an official murder rate of 82 per 100,000 inhabitants in 2010. There were 120 political assassinations in the country in 2010-2011. In the region of Bajo Aguan, where peasants are defending their land from large developers, 42 peasants have been murdered, and alongside 18 journalists, 62 members of the LGBT community, and 72 human rights activists have been killed since 2009. The Honduran Center for Women's Rights reports that femicides have more than doubled and that more than one woman a day was murdered in 2011….The disturbing suspicion that the U.S. government, the historic godfather of the region, had given its blessing to the new regime became certainty when the State Department negotiated an agreement that paved the way for coup-sponsored elections without assuring the return of the elected government.[41]

Second, I turn to the situation in the Congo, where, again, a horrendous human rights situation is unfolding, with both Rwanda and Uganda supporting various Congolese rebel factions who are massacring hundreds if not thousands of civilians. Thomas C. Mountain, a British journalist, has the following to say about the situation:

> Rwanda has a president named Paul Kagame who twenty years ago was the head of the Ugandan CIA under President Musuveni and Rwanda and Uganda remain pretty much joined at the hip. Both Musuveni and Kagame are dependent on the hundreds of millions of under the table royalties they are making off the illegal mining they "protect" in north and eastern Congo and both countries have "peacekeepers" funded by the UN in Somalia. So the UN is giving both countries lots of weapons and cash and then doesn't like it when such ends up supporting local warlords on behalf of the Musuveni/Kagame mafia? And in the meantime millions of Congolese die, millions more live in desperate conditions fleeing the fighting and millions more dollars each day are looted from the Congo, a country that meets the definition of a failed state if ever there was one.[42]

Now, I am no expert on either of the above situations, but if even half of what these two writers say is true, the above places cry out for special UN attention. I have a simple question,:When is the Secretary General going to commission Panels of Experts on "accountability," or reviews of UN "failures," in these places?

To return, I'm interested here only in the larger point: if the Secretary General is to make the argument that his discretion under Article 99 allows him to consider "accountability issues" in Sri Lanka a threat to international peace and security, and to proceed with various reports and inquiries with regard to the matter, he is going to have to explain why he hasn't used that discretion in the same manner with regard to innumerable other places in the world. And that puts him, not to mention his legal advisors, in a very difficult and uncomfortable position. The long and the short of all this, then, is that recourse to Article 99 is not open to him in this instance.

I can now turn briefly to a point I mentioned earlier, namely, that there are indications the Secretary General's legal advisors also contemplated a resort to Article 99, and rejected it. The mention of Article 99 occurs in the course of an interesting narrative of the events that preceded the Secretary General's decision to commission his reports on Sri Lanka, and appears in the second of his reports. The following is the relevant portion:

> Progress on accountability was slow, but the UN would continue to pursue the issue. In June 2009 the Policy Committee discussed the possibility of UN action to establish a mechanism for an international investigation, an option presented by OHCHR….The UN Office of Legal Affairs advised the Secretary-General that he had the authority, under Article 99 of the UN Charter, to establish Commissions of Inquiry. In July 2009, the Policy Committee held a meeting exclusively on accountability in Sri Lanka during which the Secretary-General decided to give the Government of Sri Lanka some time to meet its responsibilities on accountability, but to establish an international initiative of some sort if it did not do so. From July 2009 to the beginning of 2010 the Secretary-General and senior UN officials repeatedly urged the Government to take action to ensure accountability. In a 14 September 2009 letter to the President of Sri Lanka, the Secretary-General said he was "considering the appointment of a Commission of Experts to advise me further and to be available to you for assistance" on accountability. In March 2010, in the absence of Government initiative on the issue, the UN informed the Government and Member States of plans to establish a UN Panel of Experts on accountability in Sri Lanka.[43]

A number of interesting points emerge from this passage. First, it says that the Secretary General's legal advisors told him he had the authority under Article 99 to establish Commissions of Inquiry. But did they also tell him that his authority under the Article would cover a Commission of Inquiry on Sri Lanka in this particular instance, with respect to the issue of "accountability"? The passage is surprisingly silent on this crucial question. To pursue this a bit further, the passage indicates that soon after being informed that he had authority under Article 99 to establish Commissions of Inquiry, the Secretary General decided to give "Sri Lanka some time to meet its responsibilities." That is obviously very generous of him, but why didn't he resort to a Commission of Inquiry *after* the requisite time had passed? Instead, he chose to base his actions on the purported agreement with the President, which, as we saw, is quite insufficient for the purpose.

Surely, the Secretary General and his legal advisors were also aware of the flimsiness of the agreement with the President as a legal basis. And yet they resorted to it, despite having (according to their own testimony,) the option of a Commission of Inquiry. What does this mean? It means, in my view, that they felt, under the circumstances, that a resort to the agreement with the President, as flimsy as that was, was still better than a recourse to Article 99—which means, by extension, that they felt a recourse to Article 99 was really unavailable in this instance.

Second, consider the last sentence in the passage, "In March 2010, in the absence of Government initiative on the issue, the UN informed the Government and Member States of plans to establish a UN Panel of Experts on accountability in Sri Lanka." This is clearly an untruth if not an obfuscation. As the terms of reference of the first report made absolutely clear, the commissioning of that report, and also the designation of the "Panel of Experts," was emphatically an act of the *Secretary General*, not the *UN*, in the sense that the decision to commission the report and to appoint the experts was not a collective decision made by UN *Members*. The decision to commission the reports, to repeat, was taken by the Secretary General exercising his discretion. Certainly, Members were welcome to give their input, but the Secretary General had the final say in whether or not he would accept any such input.

The Secretary General's experts, however, know the above, and yet they designate the report a UN report. Why? Clearly, they want to convey the impression that the Secretary General's actions in this case are *UN* actions, i.e., that he is only carrying out the wishes of the Members, and not acting

on his own. But if it is so important to convey the impression that he is only carrying out the wishes of the Members, or at any rate acting in conformity with standard procedures set down in the Charter itself, why not resort to a Commission of Inquiry under Article 99, especially if he has that option open?

This point, plus the one previously discussed, indicate that the Secretary General's legal advisors also recognized that though as a general matter he had the authority to resort to Article 99, in this particular instance, he didn't have that option open. (In my view, they probably told him that if he wanted to pursue an "accountability" agenda in Sri Lanka, he had to find some other way to justify it, which he promptly did.) In any event, the point is that for whatever reason, a recourse to Article 99 was never made, and the Secretary General chose to base his actions purely on the agreement with the President.

So, what does all this mean? As we have seen, Article 99 offers the *only* way for the Secretary General to engage in activities other than those entrusted to him by the General Assembly, the Security Council, and the Trusteeship Council. For reasons discussed earlier, that option is not open to him in this instance, and in any event, he himself has chosen not to use it. As we have also seen, the agreement with the President is not an independent contract that gives the Secretary General any special powers to monitor Sri Lanka with respect to the accountability process. That means only one thing: the Secretary General has absolutely no legal basis for his actions. Technically, I suppose the "charge" would be that he is *exceeding* his powers under Article 99.

One could stop there: if the Secretary General has no legal basis for his actions, or is exceeding the powers granted to him by the Charter, he can be held accountable just on those grounds. As I said earlier, however, I believe that an argument can also be made that he is violating Articles 100 and 2(7). So, let's turn briefly to that now.

c) Violations of Articles 100 and 2(7)

I shall start with Article 100. First, here is what it says:

> 1) In the performance of their duties the Secretary General and the staff shall not seek or receive instructions from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.
>
> 2) Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary General and the staff and not to seek to influence them in the discharge of their responsibilities.[44]

My argument as to the Secretary General possibly violating the above Article, especially 100(1), is based on a process of elimination, and draws inspiration from a very famous principle in the criminal law of England, also for the most part operative in Sri Lanka.[45] The principle is called the Ellenborough Principle, and what it says is that where a strong prima facie case is made against an accused, and it is in the power of the accused to explain away certain suspicious circumstances or events that tie him to the offence, and he either refuses or fails to explain those away, an inference of guilt can be drawn against him.[46] So, here is my argument.

We have already seen that the Secretary General has absolutely no legal basis for his actions. Is there any other way he can justify, if not excuse, his actions? Can he justify his actions, for instance, on moral grounds? For instance, a reader might be inclined to say something like this: "If high Sri Lankan officials committed war crimes during the last stages of the war, they ought to be held accountable—what does it matter if, in pursuing justice, the Secretary General cuts some corners, or takes some liberties, with 'procedure'?" I am perfectly willing to agree with this sentiment: if anyone is guilty of war crimes, the interests of justice demand that they be held accountable, and they ought not to be able to get away by exploiting "procedure," technicalities, loopholes, or any other thing.

This is where the long discussion I undertook in the first section of this essay becomes relevant. As I tried to show in that section, it is not clear that the types the of war crimes the Secretary General is alleging were committed by the Sri Lankan side in the last stages of the war, or at any rate the Secretary General has not produced a prima facie case that such crimes were committed. If the Secretary General cannot make a prima facie case for war crimes, he does not have a moral right to continue making accusations of such crimes. In fact, it seems to me the reasonable and fair thing for him to do under the circumstances is to *stop* making accusations, or busy himself in collecting some evidence with which he can present a prima facie case at some future date, and make his accusations at that time.

I can think of only one other ground that might help explain—certainly not justify, but explain—the Secretary General's actions: personal sentiment or attachment to Sri Lanka. But I cannot see how Sri Lanka would evoke any special personal sentiment or attachment on the part of the Secretary General. For instance, he is not a Sri Lankan, and, as far as I know, he has no relatives or kith or kin who are Sinhalese or a Tamil, the two parties most affected by the conflict. To my knowledge, he has also not sojourned in Sri Lanka for any extended period of time. His visits to Sri Lanka have been for official purposes, certainly not long enough to induce him to grow any more fond of this country than any other country where he has probably sojourned for equal amounts of time, including, perhaps, Honduras and the Congo, the places I mentioned in the last segment, or any number of other places that I'm sure the reader can name.

We are thus left with a very curious situation. To begin with, the Secretary General does not have any legal basis for his actions. He also does not have a moral justification for those actions. In the meantime, as I have suggested just now, there is not even a personal ground that one can point to that at least helps explain those same actions. So, why does he continue to engage in them? In my view, there can be only one reason: he is being pressured by interested parties. And this immediately triggers Article 100.

To revert to the Ellenborough Principal, as I mentioned earlier, it says that where a strong prima facie case is made against an accused, and it is in the power of the accused to explain away certain suspicious circumstances and events that tie him to the offence, and he refuses or fails to explain those away, an inference of guilt can be drawn against him. I think it is impossible to ignore, when one takes into account all of the possible reasons that can help explain the Secretary General's actions in this case, that a strong suspicion arises that he is bowing to outside pressure. The ball is in his court: the onus is on him to explain his actions. I cannot help but feel that unless he explains himself, one has no choice but to draw an adverse inference against him with regard to the matter I have discussed. I shall leave it at that.

Finally, to turn to Article 2(7), here is what it says:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter.[47]

My argument is that, one, the Secretary General is violating the above Article by the very fact that he is continuing his actions despite having no legal basis for them, and two, that his actions can set the stage for other countries to meddle in Sri Lanka's internal affairs, which in turn would make those actions complicit in such meddling, and thus amount to a violation of the above Article.

With respect to the first, as Article 2(7) makes clear, the UN is prohibited from meddling in affairs that fall principally "within the domestic jurisdiction of members." Is this prohibition absolute? Clearly, it isn't—because if that were the case a country could close its doors to the world and carry out massacres and genocidal campaigns to its heart's content, and the world would be helpless to do anything about it. It would be absurd to suggest that the UN Charter was intended to countenance such a state of affairs.

But then how does one make sense of the prohibition in Article 2(7)? In my view, there's only one way to do this, and that is to say that if the UN were to meddle in the internal affairs of a nation, it would have to be for the most compelling of reasons, for instance, because the internal situation in question involved demonstrable violations of international law, or had the potential to flare into a larger conflagration and drag in other nations, thus causing an international crisis. In my view, "accountability" issues in Sri Lanka at present cannot be brought under either of these categories.

Of course, there is no statute of limitations on war crimes: if the Secretary General or anyone else were to uncover compelling evidence of such crimes in the future, they can always bring their charges before the Security Council or any other relevant organ of the UN, and the relevant organ can recommend appropriate action at that time. But continuing to commission report after report on Sri Lanka, with "war crimes" as the theme, is uncalled for. Sri Lanka, it should be remembered, was the scene of nearly thirty years of civil war. The most important task now is for the different ethnic groups in the country, especially the Sinhalese and the Tamils, to mend fences as best they can and get on with their lives. In my view, continuing to open old wounds is not a help but a hindrance to this process of reconciliation and mending of fences: it is an interference in the internal affairs of this country, and thus, ipso facto, a violation of Article 2(7).

To turn to the second matter, my argument is as follows. The Secretary General's continuing to commission report after report against Sri Lanka, with "war crimes" as the theme, tends to create an impression in the minds of persons in the outside world, especially persons who may not have extensive or detailed knowledge of the specific issues or events in question, that the Government may in fact have some deep, dark secret it is hiding about the war. In other words, it prejudices or poisons the minds of persons in the outside world against Sri Lanka. But what if, like the famous "weapons of mass destruction" in Iraq, there is no deep, dark secret about the war?

If Iraq proved anything, it is that in an atmosphere of prejudice and suspicion, it is often possible to get persons in the outside world to approve, endorse, or otherwise go along with various measures against a country that it is difficult if not impractical to pursue if no such prejudice existed, and where, in a manner of speaking, "cooler heads" could prevail. I feel that if sufficient prejudice is

generated against Sri Lanka in the international community, it may be possible to get the international community to approve various measures against this country also, measures they would be reluctant to approve or endorse in a less charged atmosphere.

I feel that the danger in this situation is that if an initial measure such as a resolution to authorize war crimes investigations is passed, it can be exploited, used as a platform or springboard from which to launch various destabilization schemes against this country. For instance, it would be possible to insert or infiltrate *agents provocateurs* into this country in the guise of war crimes investigators, or, in general, to focus so much international attention on the issue of "war crimes" in Sri Lanka so as to disorient the Government, and thereby create space for domestic agitators to maneuver, and affect, say, a "color revolution."

I am not saying that any particular country is plotting such things at *present*, but reason, common sense and the experience of other nations especially in recent years indicate that such things are *possible*. The Secretary General cannot be so naïve that he doesn't also recognize this possibility. If a person who can reasonably be expected to recognize that his actions might lead to harm, does not stop those actions but continues them, he or she is at some level responsible for that harm were it to occur later on. My point is this: if the Secretary General's focus on "accountability" is exploited by a third party to subvert or destabilize this country, by facilitating such subversion, the Secretary General also becomes party to the "crime." Hence, his actions become a violation of Article 2(7).

Summary

I have in this section looked at the Secretary General's culpability from three angles. I showed that his own stated legal basis for his actions is insufficient and flimsy at best. I then showed that there is simply no way he can resort to Article 99 to justify his actions, either. That leaves him with absolutely no legal basis for his actions. I also showed that he may be violating Articles 100 and 2(7). With regard to the former, I indicated that the onus is on him to explain away certain suspicions that arise as to his conduct, and that if he fails to do this, an inference of guilt can be drawn against him. With respect to Article 2(7), I showed that his actions are, one, an ex facie violation of the Article, and two, that those actions can also constitute a violation of the Article if they facilitate or aid the efforts of third parties to subvert or destabilize Sri Lanka. Such then is the Secretary General's culpability. Is there a remedy?

Part 3: The Remedy

I start with a simple premise: nothing makes officials quake in their boots more than the imminent prospect of being hauled up before a court of law. So, my recommendation is this: Sri Lanka should go before the International Court of Justice and ask for an Advisory Opinion on whether the Secretary General has acted within the law with respect to his "accountability" quest in Sri Lanka. The ICJ statute, enacted along with the UN Charter, and in fact an integral part of the latter, says, "The court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."[48] Sri Lanka is perfectly within its rights to take the aforementioned matter before the court.

What are the advantages and disadvantages if Sri Lanka were to go before the ICJ? That is the crucial question. It seems to me that from the Government's point of view, the biggest disadvantage, and perhaps danger, is that the court might say the Secretary General's actions are

legal, in which case he would be in a far more solid position than he is in now to continue his actions. In my view, however, he will continue his actions to their logical end—i.e. to compel an official investigation into the last stages of the war—regardless of whether he had the ICJ's affirmation or approval. So, as far as the Government is concerned, it really wouldn't make any difference whether or not he had the added help of an ICJ ruling to give the imprimatur of a legal basis to his actions.

On the other hand, what are the advantages of filing the case? What would happen, for instance, if the court were to rule *against* the Secretary General? Clearly, he will have to stop his accountability quest: it is one thing to act without explicit ICJ *approval*, but quite another to act if there was explicit *disapproval*. He simply cannot continue a course of action if there is an ICJ ruling that says that his actions are a violation of the law? The advantage to the Government, therefore, in taking the matter before the ICJ is that if the court rules against the Secretary General, his accountability "quest" will be well and truly finished. Sri Lankans, meanwhile, can finally put the war behind them, and get on with their lives.

There is another advantage, related to the above, that I want to mention. Let's suppose, for a moment, that the case is filed, and the Secretary General is called before the ICJ. Can we imagine something of how the case will proceed? The court will no doubt ask him, among other things, "Why do you say that the Sri Lanka Government committed war crimes?" To this, he will answer with something like, "Well, there are allegations." The court will then ask him, "What allegations, and how did you come upon them?" The Secretary General will then have to produce not just his "reports," but the evidence his experts relied on to come to the conclusions they did in those reports. And at that point, I suspect, the Secretary General (and his legal advisors) will start to sweat.

Why?—because some people say that the Secretary General's experts, when generating their reports, used highly questionable methods to gather evidence. Here, for example, is one such claim, this one concerning the first report:

> Those willing to petition the UN for an international war crimes inquiry targeting Sri Lanka had the choice of over two dozen sample letters prepared by the anti-Sri Lanka Lobby, to be sent online to UNSG Ban Ki Moon's Panel of Experts….The POE in its March 2011 report on accountability in Sri Lanka revealed the receipt of over 4,000 submissions from some 2,300 senders. However, the POE has denied access to material in its possession for a period of 20 years.[49]

I did not mention these claims before in my arguments in this paper because I wanted to take the Secretary General's own allegations at their strongest. I did not want to challenge his allegations at their *root*: I wanted to show that even if one took the allegations as they stood, he had not established a prima facie case with respect to them. But if the court is to assess whether or not the Secretary General acted within the law in pursuing accountability in Sri Lanka, and if the Secretary General is saying that he undertook his accountability quest because of allegations of war crimes, the veracity of those allegations become a crucial issue: as I mentioned earlier, the court will have to consider how he came upon his allegations in the first place.

The problem so far has been that no one can *prove* definitively that questionable methods of evidence-gathering were used: the POE has ensured that all their material is sealed for twenty years.

But if the ICJ wants to see the record, the Secretary General can't go before the court and say that the record is sealed for twenty years. The court will be compelled to ask the Secretary General to unseal the record, even partially, so that at least the court can take a look at what's in it. And what if it turns out that the rumors as to the questionable methods of evidence-gathering are true? What would that do to the Secretary General's credibility, the credibility of his "experts", and generally, the credibility of all the rest of the critics who have been screaming for "accountability" in Sri Lanka? It will truly be the end of the road for all of them.

In my view, therefore, the advantages of filing this case far outweigh the disadvantages, and therefore the Government should go ahead and file it. From the point of view of a general reader, it would be a marvelous civics lesson to the world. It will be a chance to put to the court certain very important questions of law, not just on the scope and limits of the Secretary General's powers, but also certain broader issues, touching on the position of the Charter with respect to interference in the internal affairs of nations, on humanitarian law, and so on, all relevant issues on which clarity and substantive commentary is so desperately needed, especially today. From the narrower perspective of the Government, I am sure it will be a marvelous opportunity to seize the initiative in the "accountability" imbroglio. Thus far, the Government has allowed the Secretary General and the critics to set the pace and the tone of the debate, and no doubt has been suffering for it: a good attack, it is often said, is the best defense.

Conclusion

I have in this paper argued that the Secretary General does not have a prima facie case for war crimes against Sri Lanka. I have also argued that the Secretary General's reasons as to a legal basis for pursuing "accountability" don't stand up to scrutiny, and that, technically, he is in violation of Article 99 of the Charter. I have argued further that his accountability quest, in certain ways, may also violate Articles 100 and 2(7) of the Charter.

The Secretary General, like any human being, is free to entertain whatever opinion or sentiment he wants about Sri Lanka or Sri Lankans, but if he wants to accuse Sri Lanka of "war crimes," one of the most serious and odious of charges that can be made against anyone, he needs to bring his evidence forward, and make his accusations in a forum and a venue where Sri Lanka can respond. More than anything, he ought not to be allowed to compel international action against Sri Lanka by working behind the scenes, and on the basis of *accusations* alone.

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References

[1] *Report of the Secretary General's Internal Review Panel on United Nations Action in Sri Lanka,* November 2012, para 76

[2] *Indirect* submissions include "leaking," unofficial e-mail submissions to members, posting on the UN website, and so on.

[3] Richard Falk, "Why international law matters," www.juragentium.org, 2005

[4]*Report of the Secretary General's Panel of Experts report on Accountability in Sri Lanka, March 2011*, p. ii-iii (Executive Summary)

[5]Ibid, p. 40, para 137

[6] It goes without saying that if a smaller number of civilians were killed, that doesn't mean indiscriminate attacks did not take place. Clearly, that would depend on the specific evidence available as to such attacks, if any. My point here, however, is that from a general point of view, if large numbers of civilians were in fact not killed, it is less *probable* that there were indiscriminate attacks. Equally important, a lesser number of civilian casualties is consistent with alternative scenarios, for instance, where an army is fighting combatants operating from within a civilian population, and where civilians killed, if any, are the possible result of "collateral damage," or damage *incidental* to the conduct of military operations.

[7] *Department of Census and Statistics, Sri Lanka, Enumeration of Vital Events 2011, (Northern Province)*, p.19

[8]Ibid. p. 20

[9] Ibid p. 20

[10] See, for instance, Michael Roberts, "The civilian death toll in early 2009: a flawed estimate," *The Island*, November 23, 2011

[11] *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka, March 2011*, p. 40, para. 134

[12] *High Resolution Satellite Imagery and the Conflict in Sri Lanka*, American Association for the Advancement of Science, August 2009, www.shr.aaas.org/geotech/

[13] The study found evidence of three gravesites with 1,346 *individual* graves between them, as of May 10, 2009, and that was at the height of the fighting. If "tens of thousands" were being killed, why just 1,346 individual graves?

[14] *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, p.ii

[15] Ibid, p.19

[16] Ibid, p.iii

[17] Ibid, p.iii

[18] These three categories pertain to events that allegedly occurred during the fighting itself, particularly the last phases, which is the focus in this paper. The other two categories deal with

post-conflict issues, and fall more within the purview of human rights law, a vast subject which it would take an entirely separate paper to address properly.

[19] Ibid, p. ii

[20] Ibid, p. ii

[21] Ibid, p. ii-iii

[22] At any rate, as I indicated earlier, it is a picture less consistent with indiscriminate attacks, but consistent with alternative scenarios, for instance where the civilian casualties are *incidental* to military operations.

[23] B. Muralidar Reddy, "An eye-witness account of the last 70 hours of Eelam War IV," *Frontline*, Volume 26-Issue 12: June 6-19, 2009

[24] Ibid

[25] Ibid

[26] A critic might suggest that the question is not whether the government was "massacring" civilians, but whether civilians were being killed in indiscriminate attacks. Indiscriminate killing is not the same as intentional targeting of civilians under international law. I am aware of the technical definition of "indiscriminate" attacks, but I'm talking here about matters as seen from the perspective of the civilians. I'm using the term "massacre" to mean systematic indiscriminate attacks, and not deliberate targeting of civilians in massacres such as, say, Mai Lai in Vietnam, and other such incidents. For the purposes of the analysis here, I consider that from the standpoint of civilians, an "indiscriminate" attack is a "massacre." The relevant question is whether, going on the statements of the civilians, as recorded by persons closest to the battlefield, it is possible to conclude or infer that "massacres"—or anything resembling "indiscriminate" attacks—were taking place, which in turn would be helpful in evaluating the picture painted by the numbers.

[27] B. Muralidar Reddy, "A first-hand account of the war and the civilians' plight as Eelam War almost comes to a close," *Frontline*, Volume 26, Issue 11, May 23-June 5, 2009

[28] David Gray, "A Day at the Front Line in Sri Lanka (Photographer's Blog)", www.blogs.reuters.com, April 27, 2009

[29] "Distribution of food and essential items to Jaffna and Vanni districts from August 2006 to September 2009 (Including food items sent to Mullaitivu district by sea from February 2009 to May 2009)", *Commission of Inquiry on Lessons Learnt and Reconciliation* (LLRC), November 2011, Vol. 2 (Annexes), Annex 4.12 (p. 101)

[30] Ibid, p. 100

[31] World Food Program

[32] Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka, March 2011, p. 22, para 78

[33] *Report of the Secretary General's Panel of Experts in Accountability in Sri Lanka, March 2011*, p. 2

[34] *Report of the Secretary General's Internal Review Panel on United Nations Action in Sri Lanka, November 2012*, p. 36

[35] Joint Statement by UN Secretary General, Government of Sri Lanka, 26 May 2009, www.un.org

[36] Recall that the terms of reference of the first report said explicitly, "The Secretary General underlined the importance of an accountability process to address violations of international humanitarian and human rights law committed during military operations between the Government of Sri Lanka and the LTTE."

[37] UN Charter, Article 99

[38] Ibid, Article 97

[39] Ibid, Article 98

[40] The classic case on this is, *Associated Provincial Picture Houses v. Wednesbury Corporotation* (1948), where Lord Green opined, "It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to statutory discretion often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used as a general description of the things that must be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in the law. He must call his attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matters he has to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting "unreasonably." (at p. 229)

[41] Laura Carlson, "Honduras and the Obama Administration," *Counterpunch*, March 20, 2012

[42] Thomas C. Mountain, "Carnage in the Congo," *Counterpunch*, December 24, 2012

[43] Ibid, p. 15, para 38

[44] UN Charter, Article 100

[45] The focus of this paper is obviously international law, not criminal law, but I don't see why one cannot use principles of law from other fields to elucidate discussions of international law, or any other field of intellectual endeavor, as long as the principles in question recommend themselves generally, on account of their intrinsic reasonableness and probity.

[46] "No person accused of a crime in bound to offer any explanation of his conduct or of circumstances of suspicion which attaches to him; nevertheless, if he refuses to do so where a strong prima facie case has been made out, where it is in his power to offer evidence, if such exists, in explanation of such suspicious circumstances, which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so, only from the conviction that the evidence so suppressed or not adduced, would operate adversely to his interest." *Rex v. Cochrain*, (1814, Gurney's Report, at 479.)

[47] UN Charter, Article 2(7)

[48] Statute of the International Court of Justice, Article 65(1)

[49] Shamindra Ferdinando, "How Moon panel gathered "war crimes" info revealed," *The Island*, April 20, 2012