

# **The Application of Humanitarian Law and Ways Forward**

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## **Introduction**

I have been involved in many armed conflict situations, which is to be expected since I specialize in humanitarian law, also referred to as the laws and customs of war. The conflict in Sri Lanka is however, extremely unique. This is primarily because in contrast to other conflicts that people addressed in terms of humanitarian law, the conflict in Sri Lanka has been addressed most exclusively in terms of human rights law. It is a little bit as if you are given an exam in French when your class was in German. I think it is essential that if we are ever going to find a way out of the war or any way move forward in regards to the Tamil question, we must take the “human rights” framework back and substitute the “humanitarian law” one.

Right now the Government of Sri Lanka is heavily aided and abetted by certain governments who have very-very strong political interests, unfortunately, in the Tamil areas.<sup>1</sup> They join the government of Sri Lanka in framing the discussion their way. They will never willingly change the discussion to where it really belongs – on the application of humanitarian law norms to the conflict. I fear that we may have nothing short of the annihilation of the Tamil people unless we begin to talk about the war as a war and with the rules of war as the frame. This is not to say there are no human right problems in Sri Lanka. Of course there are. However these affect mainly the Sinhala people, and primarily occur in the Sinhala areas. They are unrelated to the armed conflict. But the Tamil question in Sri Lanka, outside of the human rights issue of self-determination, is explicitly related to humanitarian law. The “human rights” violations committed against the Tamil people, occurring almost exclusively in the context of the war, are almost all violations of humanitarian law and should be treated as such.

## **How do we know it is a war?**

I have been stunned and amazed when I ask people “what is a war?” They do not know what to say. There has been a war in Sri Lanka for 25 years and when I ask people who have been working on the situation in Sri Lanka “what is war?” they do not know what to answer. Obviously one cannot very succinctly, clearly, rationally, intelligently address the application or misapplication of humanitarian law unless one can clearly set out what a war is. Failure to do that makes one vulnerable to the purposeful confusion of terrorism and war that is so damaging to the Tamil people as a whole and has impeded the peace process in Sri Lanka. It is very difficult to counter the “terrorism” label without knowing what a war is. At the same time, not knowing how to describe terrorism makes it still harder to get the discussion of the war in Sri Lanka in the proper legal frame. The situation is either war or terrorism -- it is legally impossible to be both. Sadly, what has happened, is that the leading “outside interest” ( the United States) and the Government of Sri Lanka have framed the war in Sri Lanka exclusively in terms of “terrorism and counter-terrorism”, with some concession to human

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<sup>1</sup> I have written many NGO statement and articles about the keen interest of the United States in the Tamil areas of Sri Lanka for military outposts, as well as in strategic minerals and possible natural gas and petroleum reserves. Interest has spiked considerably due to the inadequacies of Diego Garcia.

rights problems. This has been tragic, and has been a lead factor, in my view, of the continuation of the conflict and the failure to find a solution to the Tamil/Sinhala question.

So let us describe war. First of all, a war involves a series of military operations. That sounds a little bit “in a circle”, but it important to contrast police action with police as opposed to war with soldiers. War involves military operations not police actions. Military operations are operations that use military force between armies and groups in military uniform using the instrumentalities and *matériel* of war. Police actions involve stun guns and batons. Military operations involve multi-barrel rocket launchers, grenades, cannons. Police actions involve police vehicles. Military operations utilize its tanks, jeeps, helicopter gunships, fighter planes. Police actions address civil unrest, or criminal actions such as terrorism. Is Osama Bin Laden out there, somewhere, marching around in uniform with tanks and airplanes? It sounds a bit obvious to say, but terrorists are not in uniform. Terrorists do not want you to know who they are or where they are. They are not engaged in an armed conflict using the *matériel* of war precisely because they cannot. At the same time, those seeking the arrest of terrorists do not use the instrumentalities of war, but rely on police operations similar to those undertaken to address organized crime.

What is occurring in Sri Lanka is not a police reaction to civilian unrest or to terrorism but rather a war between two armies. The Liberation Tigers of Tamil Eelam (LTTE) and the government forces are in military uniforms, engaging in sustained and concerted military operations and using the typical weaponry and tactics of armed conflicts. This does not mean to say that there are no acts of terrorism in armed conflicts. Under the rules of war, terrorism is defined as acts calculated to instill terror in the civilian population and directly targeting the civilian population. However, the occurrence of terrorist military operations in a war does not change the war to terrorism/counter-terrorism, but are, of course, chargeable as acts that violate the rules of war.

### **Who are parties to armed conflicts?**

It takes two parties to have a war. There could be more parties to an armed conflict, but there has to be at least a side A and a side B, in uniform ,using the instrumentalities of war, and engaging in military operations. Who are the parties to an armed conflict? Many wars involve country A versus country B; this is a classic international armed conflict. Some wars involve two parties in the same State. One of this kind of war is a civil war, and is governed by civil war rules. But there is also a kind of international armed conflict involving a State and a group in that country that has the right to self-determination. This type of conflict is governed by international humanitarian law rules.

### **The right to self-determination**

I have addressed the right to self-determination for many groups because many wars occur in the context of the realization of the right to self-determination, such as those in Timor-Leste, Namibia, South Africa, Acheh and Kashmir. The Tamil people have made the claim that they have the right to self-determination. When you look at the international law on the subject, it is a viable claim. If there is a viable claim, the international community must support the side in an armed conflict with the right to self-determination. This is because the right to self-determination is a *jus cogens* norm. That is why the international community was obligated to support Namibia. Obviously if one is going to assert that the armed conflict in Sri Lanka is a war governed by the international war rules because of the right to self determination,

reference must be made to the law of self determination. Whether or not one initially agrees with the Tamil assertion, the claim is made and it merits careful consideration.

A legal showing of a claim to self-determination requires that the group in question has an identifiable territory that the group has historically occupied. How long it has to have occupied the land is not certain. For example, the Kosovars entered Kosovo from Albania only a few centuries ago, displacing the Serbs who resided there, but are considered to have the right to self-determination in Kosovo by many States. In any case, the rule requires a historic relationship to that land, with historic governance in it. The people making the claim must have a distinct culture, a distinct language, or other ethnic characteristics that distinguish them from others. Sometimes religion is an issue, sometimes not. The international community has of late added a few other requirements: (1) the people in question must actually seek to restore their historic State -- third parties, however well-intended, cannot defend the right for a group that does not seek it; (2) the group must have leadership; and (3) the group must, along with their leadership, have the capacity for self-governance. This is rather a paternalistic rule, but is nevertheless operative in the current international arena and resulted in the “non-self-governing list” in the Trusteeship Council for States not viewed as presently capable of self-governance. This rule was in play for many years with Timor Leste, and to a certain extent in Namibia, where, for example, the international community decided on its own voting criteria in order for SWAPO to assume control of the government. It is clear to me that the Tamil people in Sri Lanka meet all aspects of the test for self-determination.

Since the advent of and the advancement of human rights norms, there is also a right to self-determination that I refer to as “back-door” self -determination. Under this theory, when a people has been marginalized, oppressed, or victimized by other group[s] in power in a territory, and they have had no discernable or sustaining success in realizing their human rights, they may seek freedom through the operation of the right to self-determination and the right to resist “oppression and tyranny” (from the Universal Declaration of Human Rights). In other words, when the people have tried peaceful means to get their rights, but this has failed, they may resist with the use of force. There is no clear understanding what steps are prerequisite to resist with the use of force, and there has been a certain amount of political use of this: those groups that a particular State favors can obtain the right practically instantaneously, while other groups are labeled “terrorist” even though they only resort to force after 40 or 50 years of serious oppression. In regards to the Tamil question, the issue is whether the Tamil people tried hard enough or long enough to realize their rights using peaceful means. Again, this is a paternalistic test but nonetheless is there. In my opinion, events since decolonization clearly show that the Tamils fought very hard against Sinhala-dominance and oppression for many years, and it was only after a third, and very traumatizing massacre of Tamils at the hands of Sinhala mobs, that the Tamils seriously adopted the “last resort” remedy of armed resistance.

### **Civil war**

However, if members of the international community are not willing to accept the right to self-determination claim (most are not for political not legal reasons), they cannot deny that the war is a war. So then the only other choice for the type of war is a civil war. If this war is viewed as a civil war, it is not one in which the opposition groups seeks to overthrow the seated government, but is instead one in which the opposition groups seeks severance or a form of autonomy from the dominant power.

In a civil war the international community is required to be neutral because a civil war is viewed as an internal affair of the State and States are prohibited from intervention in the internal affairs of another State. Efforts to seek compliance with humanitarian law norms, however, are not viewed as intervening in a civil war.<sup>2</sup> In a claim that a war is a civil war, there has to be a showing that a military force occupies sufficient territory so as to be able to engage in sustained military operations, has a responsible chain of command, and is able to implement humanitarian law obligations. These criteria are easily met in the conflict in Sri Lanka, as the government itself concedes Tamil-controlled areas, concedes that the LTTE have an identifiable chain of command, and has engaged in exchanges of bodies and POWs.

### **Compliance with Geneva law and The Hague Law**

The provisions of humanitarian law relating to the protection of victims of armed conflict are known as Geneva law, because the Geneva Conventions and Optional Protocols are the basic documents. However, almost no monitoring occurs in relation to military operations law, known as The Hague law for the treaties that resulted from international conferences in The Hague, except when civilians have been clearly targeted. As with Geneva law, it is important to know the basics of The Hague law when monitoring an armed conflict situation. In this regard, most countries have an operations manual for combatants. I usually refer to the Canadian manual, but there are many other that are quite good. When there are allegations by one party or other to an armed conflict, these should be reviewed by referring to the rules as set out in the manuals: one should not merely accept an allegation made by a warring party. I encourage NGO involved in monitoring the armed conflict in Sri Lanka to monitor military operations, as in my view, pressure for compliance can lead to better compliance, which itself can contribute to establishing conditions in which the road out of the war can be created. This is especially important in the Sri Lankan conflict because the Government of Sri Lanka constantly attacks military operations of the LTTE as terrorism or otherwise illegal, thus attempting to buttress its “counter-terrorism” argument. One example is when the LTTE attacked a military base several years ago and destroyed a number of military planes and civilian aircraft on the ground. This is perfectly legal in armed conflict. The United States did the same in the Iraq war in attacking Baghdad airport, and while I accuse the US forces of violating humanitarian law in the most egregious fashion in Iraq, the attacks against Baghdad airport were legal. I have found that in war situations it is always useful to defend or condemn events using the actual rules: we never help situations by being hazy on the rules. If someone makes an accusation, then ask that they supply the rule.

I will not address the rules of basic rules of weaponry because for the most part the weapons used in the conflict in Sri Lanka have been legal. However, I am disturbed by news that the government is seeking arms that are illegal or can only be used legally in rare circumstances. Cluster bombs fall into this category. I have been told that the government forces seek uranium depleted weapons but I tend to not believe that because they would not be particularly useful against LTTE military *materiel*.

Protection of POWs and civilians, as well as sick and wounded combatants are part of Geneva law. The ICRC has published many books, pamphlets and “cheat sheets” on these rules, so I will not discuss them in detail here. Also, any mention of the armed conflict by NGOs or other international monitors usually addresses Geneva law.

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<sup>2</sup> Humanitarian law requires that all States ensure compliance with humanitarian law norms, regardless of what type of war, or their own geo-political interests. The more a State is involvement with a State at war, the stronger the duty to act on violations and to seek to end future ones.

I note that compliance with humanitarian law norms relating to POWs receives almost no attention in review of the Sri Lankan conflict. Of late I have not heard of anyone going to Sri Lanka to monitor the POW camps of the Sri Lankan government.<sup>3</sup> The ICRC has issued a few statements about LTTE-held POWs, but other groups have not. This is highly unusual, because usually the situation of POWs is a very important component of review of an armed conflict. This was the case, for example, in regards to the war in El Salvador. I spent many years on this issue, and it was a feature of the many resolutions of UN bodies on that war. In contrast to the situation in Sri Lanka, the El Salvador situation was consistently reviewed as a humanitarian law issue by NGOs, representatives of people from that country and others -- ultimately leading to strong UN action. The United States, heavily involved in that armed conflict, was forced to retreat

Under Geneva law, sick and injured combatants are entitled to humanitarian aid. The Geneva Conventions provide that no one may be penalized for providing medical care or sending medicine to any combatant, even the enemy ones. However, because of the “terrorism” label and treatment of the armed conflict as “terrorism/counter-terrorism,” anyone seeking to provide such aid is at severe risk of accusation of materially supporting a terrorist organization. This is but one example of how badly the discussion has been removed from the reality of war.

Civilians may not be the target of military operations. Civilians are entitled to unfettered humanitarian relief such as food, medicine, shelter. When you look at the degree of impairment by the government authorities of provision of humanitarian aid to Tamils, coupled with the blockage of post-Tsunami aid, a case for genocide against the Tamils can be argued. Blocking food and medicines to civilians in an armed conflict situation is itself part of the crime of “extermination” under the Statute and Elements of the International Criminal Court.

Providers of humanitarian relief may not be targeted, they may not have their work impaired, and they may not have their assets seized – all of which has occurred in Sri Lanka. The provision or intended provision of humanitarian relief may not be criminalized. If a government does not itself provide full humanitarian relief to its civilians or civilians in occupied territories, then it absolutely must allow others to do so. In the Sri Lanka conflict there has been woeful disregard for this rule, with the government going so far as to prevent the international community from assisting Tamils. For example, the government of Sri Lanka did not allow the Secretary General of the United Nations of President Clinton to assess the tsunami damage in the Tamil areas. It recently prevented John Holmes, the UN head of humanitarian relief efforts from visiting the Tamil-controlled areas to assess both post-Tsunami needs as well as those of victims of the armed conflict. While the government does not dare keep the ICRC out, ICRC has a rule of confidentiality and only rarely speaks out about violations.

### **Difficult issues**

It might be useful to discuss two issues that the government of Sri Lanka and others have used to demonize the LTTE, and by extension the Tamil people and to keep the label “terrorism” in the headlines: these are child soldiers and suicide operations. The minimum age for

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<sup>3</sup> I recall a statement I made at the UN Commission Human Rights in relation to the war in El Salvador, after I had made a visit to that country and had asked the President for permission to visit the POW camps. The President replied “we do not have any.” I noted that this was either an admission that the government forces were especially inept as after what was then more than 5 years of conflict they had failed to capture a single opposition soldier or an admission that they summarily executed captured combatants. Evidence from many visits to jails at that time, revealed there were no POWs in those facilities. Several years later, I was finally allowed to visit POWs, and helped arrange medical care for a number of them, including care in other countries.

combatants under the Geneva Conventions and customary humanitarian law is 15. This is the age that the International Criminal Court uses. An attempt was made by certain elements of the international community to change the minimum age to 18 by addressing it in an Optional Protocol to the Convention on the Rights of the child. No one wanted this to succeed more than I did – in fact, I would like 21 to be the minimum age. But the Optional Protocol is too flawed a document on this point to generate a new standard.<sup>4</sup> In brief, it is simply too poorly written with too many “outs” for any judge to uphold. Further, a sizable number of States have ratified with reservations or statements indicated that they will use age 16 or 17, rather than 18. However, both the Karuna group and the LTTE have been accused of using soldiers between the ages of 15 and 18. Besides acting to demonize the LTTE and to a certain extent the Karuna group, it has taken attention away from the far more serious situation of children in this war and allows the government of Sri Lanka far too much latitude. In my view, people seriously wanting to get the parties back to the peace table will need to stop using the child soldier issue to demonize the parties to the conflict as this has become a barrier. It clearly is not helping to keep child victims of armed conflict alive, fed, and tended to. Even the representative of the Special Advisor on Children in Armed Conflict ignored the other 5 main issues for the Special Advisor on Children in Armed Conflict during his mission last year and in his report. This is not helpful, and may have actually prolonged the war. It certainly buttressed the terrorism and counter-terrorism rhetoric of the government of Sri Lanka.

The second issue is “suicide bombing.” This is also raised to demonize the LTTE in a way that also demonizes combatants in other armed conflicts. Unfortunately, there is no international humanitarian law rule against suicide bombing. The only provisions relate to who is targeted by a military action. If civilians are targeted, then this is a violation of humanitarian law whether as a result of a suicide bomb, a multi-barreled rocket launcher shot from 1 mile away, or by any other military weapon. In World War II there were many suicide operations, not just the kamakazis, but also operations such as the first round of D- Day. The relevant issue in military law is to evaluate the military gain compared with loss of life. The “human wave” tactic (a whole line of children in the front in the Iran-Iraq war) was to me an improper use of military personnel for the potential gain of a few inches in the sand, doubly in violation because most of the children were under 15. In contrast, the almost certain loss of one person for a huge military gain weighs in favor of the operation. The United States had many suicide missions in the Korean War, in which many soldiers died to gain a foot or two. (Pork Chop Hill comes to mind). In any case, these two issues have been used by some almost exclusively to demonize the LTTE and the Tamil people.

## **Conclusion**

To conclude, in my view this war will not move to the negotiating table until it is discussed as a war by all parties, including all elements of the international community, and until the rules of war are on the table. In the meantime, the Tamil people are a grave risk of genocide and the government of Sri Lanka is trying to keep the eyes of the world away from Sri Lanka, especially the Tamil areas. Instead of seeking to improve the situation of humanitarian law at home, the government is going abroad and attacking those expressing concerns about the crisis, especially those who seek aid for Tamil civilians.

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<sup>4</sup> In this regard, please see the written statement I prepared and submitted for my NGO on this matter, A/HRC/6/NGO/9, itself an abbreviated version of a legal opinion letter that I transmitted to members of the Security Council Working group on children in armed conflict. I note that certain NGOs were pleased to get the instrument adopted, but many persons in these NGOs are not jurists, and, perhaps, do not understand its legal flaws.