

Two eminent persons, a lawyer Mr. Gomin Dayasri, and a former Ambassador Dayan Jayatilleke, have invoked the doctrine of 'Just War' in regard to the conflict in Sri Lanka. Another lawyer, Ms. Nirmala Chandrahasan has stated that IHL (International Humanitarian Law) is applicable to 'Internal Armed Conflicts' (The Island, November 5, 2010), but has not stated explicitly whether IHL as it applies to Internal Armed Conflicts is applicable to the Sri Lankan conflict. However, the timing and content of these commentaries seem to convey a shift towards categorizing the conflict as an internal 'war' within the territory of Sri Lanka.

This shift contrasts sharply with the position taken by successive Sri Lankan Governments that the conflict was an internal 'law and order' situation amounting to an insurgency. This policy was presumably in order to avoid giving recognition to a non-state actor such as the LTTE; a policy that did not change even after recognizing the LTTE as a "party to the conflict" when the CFA was signed. The differences in the implications of categorizing the conflict as an internal Armed Conflict or an Insurgency are significant. While the former is governed by codified stipulations, the latter has no defined guidelines for member states to follow. Consequently, since there are no specific guidelines, the measures adopted by a sovereign government such as Sri Lanka to meet the challenges of an insurgency could be judged by IHL and/or the much broader International Human Rights Laws (IHRL). The scope of International Human Rights Laws are extensive in comparison with IHL, and thus, categorizing the conflict as an insurgency would make Sri Lanka vulnerable to charges that could very well be avoided by categorizing it legitimately as an 'internal Armed Conflict'. These issues were addressed by me in an article titled "Humanitarian Law in the context of Armed Conflict" (The Island, March 13, 2008).

Invoking the doctrine of 'Just War' only justifies the grounds for INITIATING war (*jus ad bellum*). However, what matters are the methods adopted DURING the war (*jus in bello*). It is the 'methods' adopted during the war that makes States vulnerable to charges of war crimes or crimes against humanity. In order to prevent such charges being arbitrarily brought against States, the 'methods' that could be adopted during internal Armed Conflicts were first embodied in common Article 3 in all 4 of the Geneva Conventions. However, recognizing the inadequacy of the provisions in one article (Article 3) to codify internal Armed Conflicts categorized as 'Non-International Armed Conflicts', prompted its provisions to be expanded in scope and content to the current form in Additional Protocol II of 1977.

The recommendation to the Lessons Learnt and Reconciliation Commission (LLRC) during my presentation was that the Sri Lankan conflict should be categorized as an internal Armed Conflict. Such a categorization would warrant the measures adopted by the Government to be judged by the provisions of Additional Protocol II of 1977 rather than to be judged by Human Rights Laws by categorizing it as an Insurgency.

Sections of my presentation relevant to this issue are extracted and given below:

"A clear definition of what constitutes an armed conflict was established during the case of the

Prosecutor v. Dusko Tadic, when the Appeals Court of the International Tribunal for the Protection of Persons responsible for serious violations of International Humanitarian Law committed in the former Yugoslavia since 1991 (hereinafter "International Tribunal 1995") stated: "...we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between government authorities and organized groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring State or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there".

"A further justification for categorizing the Sri Lankan conflict as an internal Armed Conflict is contained in Additional Protocol II of 1977. Part 1 Article 1 is titled "Material field of application". In it article 1.1 states that this Protocol "shall apply to all armed conflicts ...that take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations...".

"According to the ICRC the term "Armed Conflict" is defined in International Humanitarian Law as "First, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against insurgents, instead of mere police force. Second, non-governmental groups involved in the conflict must be considered as "parties to the conflict" meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations"(ICRC, Opinion Paper, March 2008).

It is evident from the three references cited above that sufficient grounds exist for the Sri Lankan conflict to be categorized as an 'Internal Armed Conflict'. This categorization would entitle the actions of the Government and the LTTE to be guided by the provisions of Additional Protocol II of 1977

Article 3 paragraph 2 of this Protocol states: "Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State".

"Thus Article 3.2 gave license for the Government of Sri Lanka to adopt "legitimate means" to restore the territorial integrity of the Sri Lanka, meaning the acceptance of the concept of proportionality in restoring the territorial integrity of the state as the objective. The objective thus becomes military. This requires the Sri Lankan armed forces to adopt strategies that balance military gains in proportion to civilian casualties in the pursuit of its objective. However, from the time the LTTE deployed civilians as a human shield the objective of re-establishing the writ of the state which was military became secondary to the larger humanitarian issue of the safety of

the trapped civilians. Since the issue of balancing the protection of civilians against military or humanitarian objectives is a constant in any armed conflict, any civilians that may have come in harms way should be considered in terms of INTENT OF PURPOSE and not as DELIBERATE DISREGARD for their SAFETY".

Some of the acts prohibited under this Article 4 paragraph 2 are:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishment; (c) taking of hostages; (d) acts of terrorism; etc. etc. Thus it is the LTTE that is guilty of having violated most of the acts prohibited under Article 4.2.

"The issue of war crimes is not addressed by any of the Geneva Conventions or Protocols to the degree addressed by the Rome Statute of the International Criminal Court of 1998. Article 8 of this Statute addresses war crimes. While Article 8 paragraphs 2 (c) and (e) set out details of what constitutes war crimes, paragraphs 1 and 3 set out the context in

which they should be assessed. Paragraph 1 states: "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes" and paragraph 3 states: "Nothing in paragraphs 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity or territorial integrity of the State, by all legitimate means". Therefore, categorizing the conflict as an armed conflict would not impose any liabilities because of the nonexistence of "a plan or policy" and whatever isolated incidents that may have occurred were in the defense of "the unity or territorial integrity of the State".

"The position adopted by successive Sri Lankan Governments causes the strategies adopted by the security forces to be judged by IHRL. Since IHRL is vast in scope and even though a certain degree of derogation is permitted during law and order disturbances, its very nature made Sri Lanka's Government vulnerable to charges of Human Rights violations concerning civilians affected by conflict. Thus under IHRL the focus shifted to the safety of civilians at the expense of military necessity; a fact that was exploited by the LTTE to the fullest. Under these circumstances, designating the conflict as a law and order situation restricted and limited the actions of the Government while it gave the LTTE far greater latitude with more options to operate than if the conflict had been designated an armed conflict".

CONCLUSION

The conflict that occurred in Sri Lanka could be categorized as internal Armed Conflict or as an Insurgency. Successive Governments opted to categorize it as an Insurgency in order not to legitimize the LTTE. However, such a step would not legitimize the LTTE as according to the ICRC definitions, it would remain a non-state actor. However, with the LTTE having all the makings of a regular military establishment in the form of a separate Army, Navy (Sea Tigers) and Air capabilities as well as Suicide Squads, each with its own command and control structures with distinct uniforms and ranks, it is incongruous not to recognize the conflict as being an Armed Conflict. The facts presented above demonstrate that there are decided

advantages by categorizing the conflict as an Internal Armed Conflict. Since such a categorization would entitle the Government to invoke the provisions of Additional Protocol II of 1977 that is applicable to Non-International Armed Conflicts, its provisions would validate the measures adopted by the Government both during as well as after the conflict.

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