

The UN Resolution on Sri Lanka: a Welcome Step

By Sheen Handoo

In his book 'Civil War', Eric Castren contends that, "the cause of outbreak of a civil war... is often the dissatisfaction of a large part of the population and the refusal of those in power to surrender their privileges and authority."ⁱ

Sri Lanka has been ravaged by a long running civil war which has scarred the country in a very brutal way. The political isolation of the Tamils started from 1948 after Ceylon gained full independence; Tamil workers, who were transported to Ceylon to work in plantations in the 19th and 20th Century, were disenfranchised and many were denied citizenship. From then onwards the tirade against them never stopped, from introduction of legislations of nationalist nature to further isolation of Tamils and their culture; the ethnic tensions had *made the Country a pile of explosives ready for ignition*. It was in this backdrop that the LTTE was born. The particularism with which LTTE started its Sisyphean task had everybody guessing whether it would careen the fate of the Tamils towards corrective justice. However, with time not much was achieved save the obdurate conscience of the Government of Sri Lanka and the never-ending violence by the LTTE. What started as a battle for civil rights, ironically, degenerated into a humanitarian disaster with both sides saber rattling and showing their might as being right. The Eelam Wars I-IV that ensued after LTTE declared war against the majority Sinhalese and their political dominance in the Island nation turned Sri Lanka into a virtual battleground. At the tail end of the war, there were reports of wide spread violation of humanitarian law and human rights by both parties. Though the LTTE announced in Feb, 1988 that it would abide by the Geneva Conventions and their additional Protocols,ⁱⁱ the international community didn't really expect much from the LTTE because of it being the "armed opposition group" in the civil war and also because of its past record; but what shocked the world

was the carnage by the Sri Lankan Army (SLA), an army of a sovereign, democratic nation.

From the very start of the war, the Sri Lankan government tried to negotiate peace with the rebels, and though constrained by political fragmentation and intra-elite rivalry, successive Sri Lankan government coalitions sought to depoliticise Tamil nationalism and bring Tamil areas and organisations into 'normal' politics within the unitary state rather than offering substantive forms of power sharing.ⁱⁱⁱ In fact, many a times agreement was reached only to be broken by one of the parties. Left with no other option, the SLA started the military offensive against LTTE in 2008 and intensified with time, uprooting the LTTE from the northern areas of Jaffna, Kilinochchi, capturing their Naval Base in Vidattativu, and forcing them into Vanni, the North-Eastern tip of Sri Lanka where they were eventually crushed. The collateral damage caused by the offensive was massive. Pursuant to the huge outcry by the world community, a Panel of Experts was appointed by the Secretary – General of the United Nations, to look into the allegations of the widespread violations of human rights and humanitarian law. The Report released in April 2011, by the Panel, found the killings of up to 40,000 civilians in the final days of the war amounting to credible allegations that war crimes were committed. The panel concluded, "most civilian casualties in the final phases of the war were caused by government shelling". It alleged Sri Lankan troops shelled civilians in a no-fire zone^{iv} and targeted hospitals^v; they also shelled food distribution centers^{vi}. To mitigate the situation, the Sri Lankan government appointed the Lessons Learnt and Reconciliation Commission. The Commission came out with its report in November 2011, and cleared the Army of almost all the charges, except for a few cases *here and there*. The Commission was paying lip service to what the government officials 'held to be true'. The Report constitutes a serious test for the Sri Lankan government. ^{vii}

Coming to the legality and the nature of the offensive, the nature of the conflict was non-international and was to come under the purview of Common Article 3 of the Geneva Conventions of 1949 and the Additional Protocol II to the Convention.

Article 3 is applicable in cases of armed conflict not of international character occurring in the territory of one of the contracting parties to the 1949 Conventions,^{viii} and has no antecedents in earlier Geneva Conventions and was clearly viewed in 1949 as marking a "new step" in the development of humanitarian law^{ix}. Hence, it applies to a situation where the conflict is within the State, between the Government and the rebel forces or between the rebel forces themselves. Protocol II that is supplementary to this article has expanded this provision. Article 3 offers an international minimum protection to persons taking no active part in hostilities, including members of armed forces.^x In general, Common Article 3 of the Geneva Conventions, 1949^{xi}, is implemented by setting standards in military manuals, by offering training to armed forces of humanitarian laws, enacting national legislations and by fixing accountability on individuals who are responsible for violating common article 3.^{xii} Having stated that, failure to enact the necessary legislation cannot affect the international obligations of these countries to implement the Geneva Conventions; but invoking a certain norm as customary rather than conventional in such situations may be crucial for ensuring protection of the individuals concerned.^{xiii}

In view of the fact that Sri Lanka has signed but not yet ratified the Geneva Conventions, and not even signed their additional protocols, it is logical to inquire into, whether the SLA is bound by the provisions of the Geneva Conventions and their Additional protocols. As mentioned above, the invoking of the customary status of the Geneva Conventions would be of help in situations like these. As has been rightly held by authors and jurists alike, the rules governing internal armed conflict bind both the State party as well as the armed opposition group, for their binding character does not come from the signature or ratification of the instruments but from their customary international law status.^{xiv} Though the majority view supports the customary status of the Convention and its Additional Protocols, yet there still seems to exist an anomaly among the jurists. With the aim of seeking to regulate internal armed conflicts, much has been thrown into the cauldron of custom with relatively little analysis of state practice and *opinio juris*^{xv}. However, the difference in the accent of the interpretation of the provisions of Geneva

Conventions and their Additional Protocols has been seen quite frequently nowadays with ICJ torch bearing the shift in the interpretation and narrowing down the gap between bidirectional views, as witnessed in the Nicaragua Judgment and the North Sea Continental Shelf Case. The ICJ has declared the principles laid down in common Article 3 to be a constituent part of customary international law.^{xvi} Similar statements have been made by the International Criminal Tribunal of the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone.^{xvii} Though the same may not hold true for the Additional Protocol II, not all of its provisions have customary status^{xviii}, however, in the Tadic case, the Appeals Chamber of the ICTY has stated that only 'the core' of Additional Protocol II is part of the customary international law^{xix}. Nevertheless, consensus that the Geneva Conventions are declaratory of customary international law would strengthen the moral claim of the international community for their observance because it would emphasize their humanitarian underpinnings and deep roots in tradition and community values.^{xx} Hence, the State Party (Sri Lanka in this case) as well as the armed opposition group (the LTTE in this case), are bound by the laws of war, irrespective of the fact whether or not they have ratified the Conventions and/or their Additional protocols.

Accountability is paramount.

The wave of accountability is gathering strength. At no point in the last fifty years has so much attention been focused on human wrongs; by global media, by NGOs, and by the organs of national and international law.^{xxi}

Keeping up with the trend, the UNOHCHR successfully adopted resolution A/HRC/19/L.2, whereby it called for the Sri Lankan government to adequately address serious allegations of violations of international law; implement the constructive recommendations made in the report of the Lessons Learnt and Reconciliation Commission and to take all necessary additional steps to fulfill its relevant legal obligations and commitment to initiate credible and independent actions to ensure justice, equity, accountability and reconciliation for all Sri Lankans; and to present, as expeditiously as possible, a comprehensive action plan detailing the steps that the Government has taken

and will take to implement the recommendations made in the Commission's report, and also to address alleged violations of international law.

Many conflicts in the past have had the same trajectory as that of the Sri Lankan civil war, but the response to such conflicts has been varied. Codification of the Rome Statute, the ICTY, ICTR, The Special Court for Sierra Leone, The Extraordinary Chambers of Cambodia, Kosovo Regulation 64 Panels, East Timor Special Panels for Serious Crimes, the Bosnian War Crimes Chamber, The Special Tribunal for Lebanon, to name a few, are perhaps most interesting for what they herald. These tribunals herald a transformation in individual accountability for violations of International humanitarian law.^{xxii} The Sri Lankan case might not hold the interest of many countries because of its insignificance in world politics, but it undoubtedly plays an important part in establishing international rule of law and strengthening the principles of international criminal law and individual accountability.

ⁱ Eric Castren, 'Civil War' Pg. 21, Helsinki: Suomalainen Tiedeakatemia, 1966.

ⁱⁱ Commission on Human Rights Report of Special Rapporteur on extrajudicial, summary or arbitrary executions: Visit to Sri Lanka UN Doc E/CN.4/1998/68/Add.2

ⁱⁱⁱ Kristian Stokke, 'Building the Tamil Eelam State: Emerging State Institutions and Forms of Governance in LTTE-Controlled Areas in Sri Lanka', Third World Quarterly, Vol. 27, No. 6 (2006), pp. 1026

^{iv} http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf , pp. 27, 28

^v *ibid* , pp 23, 25, 26 (PTK hospital was attacked regularly, killing already injured civilians every time it was struck. Also, the Putumattalan, Mullivaikkal hospitals were also attacked)

^{vi} *ibid*, pp. 24

^{vii} David Miliband and Bernard Kouchner, 'The Silence of Sri Lanka', The International Herald Tribune, Op-Ed, June 21, 2011

viii M. Gandhi, 'Common Article 3 of Geneva Conventions, 1949 in the Era of International Criminal Tribunals', *ISIL Yearbook of International Humanitarian & Refugee Law* (2001)

ix Theodor Meron, 'The Geneva Conventions as Customary Law',

The American Journal of International Law, Vol. 81, No. 2 (Apr., 1987), pp. 356, 357

x *Ibid* at iv

xi Common Article 3 of the Geneva Conventions states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

Person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

^{xii} M. Gandhi, 'Common Article 3 of Geneva Conventions, 1949 in the Era of International Criminal Tribunals', *ISIL Yearbook of International Humanitarian & Refugee Law* (2001)

^{xiii} Theodor Meron, 'The Geneva Conventions as Customary Law', *The American Journal of International Law*, Vol. 81, No. 2 (Apr., 1987), pp. 348, 349

^{xiv} Sandesh Sivakumaran, 'Binding Armed Opposition groups', *The International and Comparative Law Quarterly*, Vol. 55, No. 2 (Apr., 2006), pp 372 ; Judge Morelli has emphasized that "the power to make reservations affects only the contractual obligation flowing from the convention," adding that "[i]t goes without saying that a reservation has nothing to do with the customary rule as such. If that rule exists, it exists also for the State which formulated the reservation, in the same way as it exists for those States which have not ratified." *North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.)*, 1969 ICJ REP. 3, 198 (Judgment of Feb. 20), Morelli, J., dissenting.

^{xv} *Ibid.* Reference may also made to the Nicaragua Judgement here, wherein it was stated by the ICJ , ' there is no doubt that, in the event of international armed conflict, [the rules of Common Article 3] also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which , in the court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity"'

^{xvi} Stefan Oeter, 'Civil War, Humanitarian Law and the United Nations', *Max Planck Yearbook of United Nations Law*, Vol 1, 1997, pp. 203.

^{xvii} Sandesh Sivakumaran, 'Binding Armed Opposition groups', *The International and Comparative Law Quarterly*, Vol. 55, No. 2 (Apr., 2006), pp 372

^{xviii} *Ibid.*

^{xix} *Prosecutor v Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 Oct 1995) para 98.*

^{xx} Ibid at xiii, pp. 350.

^{xxi} 'Developments in the Law: International Criminal Law', Harvard Law Review, Vol 114, No. 7 (May 2001), pp. 1957

^{xxii} Ibid, pp. 1958.