Geneva Conventions Act 2006 and the armed conflict in Sri Lanka

By Shan

The parliament of Sri Lanka has finally enacted the Geneva Conventions Act of 2006. Sri Lanka became a state party to the Geneva Conventions (GC) in 1959 by way ratification. The Geneva Conventions Act of 2006 has a few deficiencies which will be addresed later on in this article.

The importance of the GC Act 2006 to Sri Lanka in general and the armed conflict in particular is a matter worth examining closely in the context of the ongoing peace talks and the pronouncement made by the Chief Negotiator of the LTTE on international humanitarian law in Geneva, especially in regard to the protection of civilians. Many studies have been undertaken by various writers on the conflict in Sri Lanka, atrocities committed, treatment of civilians, impact on the economy, negotiations of the CFA and the protection of prisoners, but no substantial effort has been made to analyze the conduct of hostilities in the context of international humanitarian law. This article intends to provide an insight into international humanitarian laws governing armed conflicts, minimum standards to be maintained and consequences when failed to adhere to law particularly in internal armed conflicts.

The new world order is yet a nascent system grappling with war and violence, proliferating terrorism and traumatic infliction of crimes on innocent civilians. History bears witness to massacres without mercy and mass suffering consequent on lawless attacks on the wounded and dying soldiers and victimization of women and children during armed conflicts. When nations attack nations on ethnic, tribal or religious groups, they indulge in "cleansing operations" on an international scale. The two world wars resulted in unleashing numberless weapon of savage cruelty. The Second World War resulted in death of 60 million people out of which two third were civilians and from 1949 to 1995 armed conflicts have brought nearly 24 millions deaths, 80% of the victims were civilians. The impact of armed conflicts on human race is of such a magnitude that it demanded timely action by governments, organization and individuals. There was a compelling need to limit superfluous suffering that war can cause. This called for an effective legal and institutional response to the humanitarian challenges faced during armed conflicts which saw the birth of Geneva Conventions of 1949 and other humanitarian law treaties.

In the modern world there are various legal tools available to govern armed conflicts. Some of them are treaty laws while others are customary laws. Both laws together make the International Humanitarian law (IHL) also called "Law of Armed Conflict" and previously known as Law of War. The IHL aims at mitigating the effects of war, first in that it limits the choice of means and methods of conducting military operations, and secondly in that it obliges the warring parties to spare persons who do not or no longer participate in hostile actions. While some of these laws apply in international armed conflicts, others apply to non-international armed conflicts. The four Geneva conventions of 1949 were represents one of the most important treaty laws of modern international law.

Four GC of 1949:

While the Geneva based laws first appeared more than a century ago, the Second World War exposed the shortcoming of them and the world realized the need to strengthen the existing laws. It was in 1949 community of countries agreed on four conventions and now popularly known as Geneva Conventions of 1949.

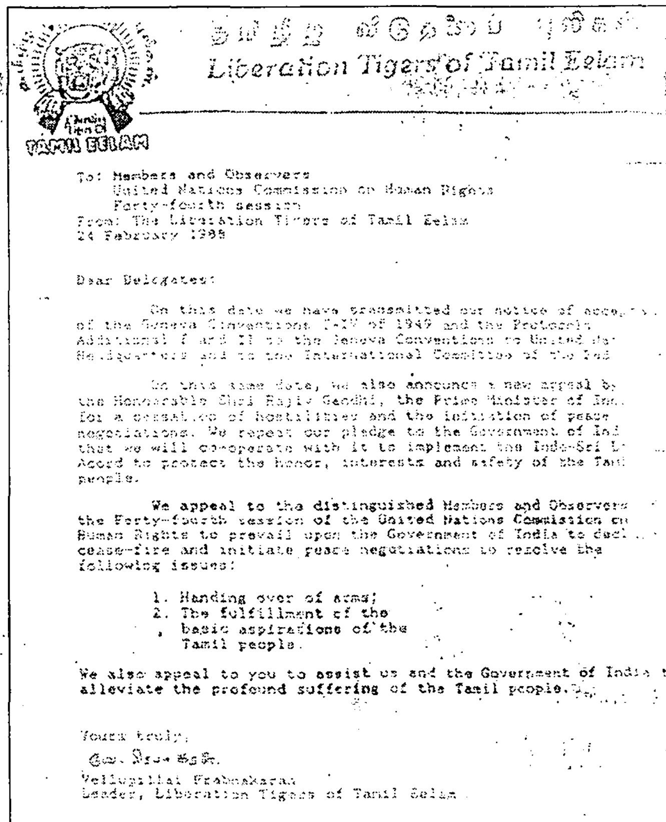
The GC today are the most accepted international law by countries around the world and as of today 189 countries have signed and ratified them. The conventions deal with different subjects; first GC- for the amelioration of the condition of the wounded and sick in armed forces in the field; Second GC for the amelioration of the condition of wounded, sick and shipwrecked members of the armed forces at sea; Third GC relative to the treatment of prisoners of war while fourth GC relative to the protection of civilian persons in time of war.

Subsequent to these conventions, Additional Protocol 1 and 2 were adopted in 1977 to further strengthen the GC. Additional Protocol 1 speaks about international armed conflicts while additional Protocol 2 deals with non-international armed conflicts. Sri Lanka is yet to ratify the Additional Protocols.

International armed conflicts

The international humanitarian law recognizes two different categories of armed conflicts. Firstly, wars between two or more states are considered to be international armed conflict, and secondly warlike clashes occurring on the territory of a single state are considered non international (or internal) armed conflicts. The situation in which people rises against colonial domination in the exercise of its right of self – determination is an exception and they are now considered to be international armed conflicts. It is worth mentioning that there was only one reference in IHL on right to self-determination. That was when people rise against colonial domination. It is interesting to note that, international law does not recognize right to self-determination in a non-colonial context. This particular point is a matter of interest in Sri Lanka as LTTE claims of right to self-determination of Tamil people.

When examining the law of armed conflict applicable in either situation, one is immediately stuck by the immense difference in their numbers. The Geneva Conventions and their Additional Protocols contain 20 provisions on internal armed conflicts against 500 on international wars. The explanation for this startling difference is to be found in the phrase "state sovereignty"


தமிழீழ விடுதலைப் புலிகள்

Liberation Tigers of Tamil Eelam

TAMIL EELAM

To: Members and Observers
United Nations Commission on Human Rights
Forty-fourth session
From: The Liberation Tigers of Tamil Eelam
24 February 1988

Dear Delegates:

On this date we have transmitted our notice of accession of the Geneva Conventions I-IV of 1949 and the Protocols Additional I and II to the Geneva Conventions to United Nations Headquarters and to the International Committee of the Red [illegible]

On this same date, we also announce a new appeal by the Honorable Shri Rajiv Gandhi, the Prime Minister of India for a cessation of hostilities and the initiation of peace negotiations. We repeat our pledge to the Government of India that we will co-operate with it to implement the Indo-Sri Lanka Accord to protect the honor, interests and safety of the Tamil people.

We appeal to the distinguished Members and Observers the Forty-fourth session of the United Nations Commission on Human Rights to prevail upon the Government of India to decl[illegible] a cease-fire and initiate peace negotiations to resolve the following issues:

1. Handing over of arms;
2. The fulfillment of the basic aspirations of the Tamil people.

We also appeal to you to assist us and the Government of India to alleviate the profound suffering of the Tamil people.

Yours truly,

[illegible]

Velluppillai Prabhakaran
Leader, Liberation Tigers of Tamil Eelam

Non-international armed conflict.

Non-international armed conflicts are conflicts that take place within the territory of a State that is between the Government on the one hand and armed insurgent groups on the other hand. The members of such groups - whether described as insurgents, rebels, revolutionaries, secessionists, freedom fighters, terrorists, or by similar names - are fighting to take over the reins of power, or to obtain greater autonomy within the State, or in order to secede and create their own State. Any international interest in events taking place inside a State soon encounters a major obstacle, which is the attitude of governments that internal problems are to be excluded from outside interference.

First of all, States have certainly realized that unbridled violence and murderous weapons cause just as much injury and destruction in civil war as in conflicts between States. The horrible example of the Spanish Civil War gave the impetus for the first special provision relating to non-international armed conflicts to be incorporated into international humanitarian law: common Article 3 of the 1949 Geneva Conventions. It is worth mentioning that only a year after the proclamation by the United Nations of the Universal Declaration of Human Rights of 1948, rules of humanitarian law for internal conflicts within States was adopted. That this protection was further extended, thirty years later, in Protocol II is largely thanks to the 1966 International Covenant on Civil and Political Rights.

Of course, States retain the right to use force within their territory in order to restore law and order. International law contains no limitation of sovereign rights in internal conflicts corresponding to the UN Charter's prohibition of recourse to force in international disputes; it merely sets limits to the manner in which law and order may be established. This means that the right of governments to choose methods and means is no longer unlimited.This is the background in which the international norms relating to armed conflict have emerged in the international society. In non-international armed conflict, common articles 3 of the four GC is absolutely binding on all parties to the conflict and represent the minimum standards to follow. A breach of common article 3 constitutes a violation of IHL.

The article 3, presents a list of rules, which, as stated by the International Court of Justice in its judgment of 27 June 1986 in the dispute between Nicaragua and the United States are an expression of fundamental considerations of humanity. Article 3, therefore, is binding not only because it is part of international treaty law but also as an expression of (unwritten) general principles of law. It is absolutely binding international law: jus cogens.

Article 3 common to all four Geneva Convention state "in case of a non international armed conflict all parties shall be bound to apply as minimum the following:

Person taking no active part in hostilities including members of armed forces, who have laid down their arms and those placed hors de combat, shall in all circumstances be treated humanly without any discrimination.

The following acts committed against such persons constitute a serious crime. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) Taking of hostages; (iv) The passing out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

The wounded and sick shall be collected and cared for.

Additional Protocol II to the Geneva Conventions of 12 August 1949, adopted on 8 June 1977. This short text, composed of 28 articles, extends humanitarian protection in civil wars by elaborating the concise rules of common Article 3. However, Article 3 remains applicable in its entirety for the parties to the Geneva Conventions and, in particular, is binding on States that have not ratified Protocol II.

Customary law

Alongside the written international treaty law, the unwritten rules of customary law take on special significance for limiting force in internal conflicts. As already pointed out, the entire content of common Article 3 is now to be regarded as part of customary law. In addition, certain rules of customary law can be identified for areas not covered by Article 3 and only partly covered explicitly by Protocol II. The law of non-international armed conflicts, lastly, has an interesting peculiarity. If it is to fulfill its purpose, this law must be accepted and observed both sides, i.e., the government and the insurgents. International law, however, is binding only on entities that are subject to it, i.e., chiefly States. Insurgents, therefore, generally have the legal status of subjects with rights and obligations under international law only if they have been recognized as such, something that has not occurred for many years. Yet there is no doubt in either theory or practice that insurgents are bound by international humanitarian law. The position was further confirmed by the ruling of International Court of Justice "the contras rebels" in Nicaragua are bound by common article 3. This has made it possible to avoid the issue (politically always explosive) of the possible recognition of insurgents: Consequently, common Article 3 states explicitly that its application shall not affect the legal status of the parties to that conflict.Article 3 defines the scope of its own application only indirectly. It was left to State practice and legal literature to lay down directly applicable criteria for the recognition of "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties".

The paramount question here is what level of violence the conflict must reach before what began as an internal State problem to be treated as an issue under international law. Under these circumstances, the armed conflict in Sri Lanka falls under this category will be a contested issue. Nonetheless, the implementation of the 1949 Geneva Convention by the Parliament of Sri Lanka should provide for the violations of common Article 3 for numerous reasons.

Combatants

The status of combatants is often misused in Sri Lanka. The law of armed conflict is based on two notions: they are "combatants and protected person". All the provisions in GC and Additional Protocols hinge on these two key concepts. It must be clearly understood, however, they are not necessarily opposites or mutually exclusive. A combatant can easily become a protected person (when he is wounded and surrenders, or taken prisoner of war) without loosing combatant status. The status of combatants was further defined in article 43, paragraph 2 of Protocol 1. "Members of armed forces of a party to the conflict... are combatants. This leaves no rooms for misunderstanding: whoever is a solider in the armed forces of a state is a combatant except medical personnel and chaplains. This has raised an interesting question whether fighters of LTTE can be called combatants? Certainly not, status of combatants ever exists in non-international armed conflicts. Therefore, recognition of LTTE fighters as combatants in true legalistic point is illegal and over recognition of the legal status. IHL only offers status of combatants to members of armed forces of states and not organizations.

Conditions for application of common Article 3

In evaluating the deliberations of the Diplomatic Conference of 1949, the Commentary on the Geneva Conventions edited by Pictet made a number of significant statements. According to these, Article 3 is applicable when government and insurgents oppose each other in collective hostilities and using the force of arms. As a rule, the government employs the armed forces in such circumstances because the ordinary police forces no longer control the situationThe insurgents carry on their struggle against the established power by conducting their own military operations, which presuppose a certain degree of organization. It is only when those engaged in the fighting are organized and are led by persons responsible for their operations that it can be realistically expected that obligations of international law will be respected and implemented. Protocol II has added, by way of clarification, that "internal disturbances and tensions", "riots", "isolated and sporadic acts of violence" and "other acts of a similar nature" on their own do not constitute armed conflicts and are therefore not subject to international humanitarian law

.Article 3 constitutes a very flexible instrument, probably the best possible international answer to internal conflicts, which are always extremely volatile politically.

The vaguely defined conditions for its application mean that in any specific case respect for Article 3 can be demanded, without the actual situation having to be clarified from the legal