Responsibility of States to Protect Human Rights of Civilians in Internal War Situations: A Legal Analysis From a Human Security Perspective

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Main objective of this research paper is to examine and evaluate the applicable legal standards governing the responsibility of states to protect their own people affected by the ravages of internal wars from a human security perspective. It will further discuss the responsibility of state to investigate the violations of human rights committed in such war situations and the need to prosecute the alleged offenders to provide redress to the victims of such violations. The violations of human rights will be broadly defined in this research to include both human rights and violations of humanitarian law in the context of non-international armed conflict situations. This paper will draw special attention to the international community's queries pertains to the alleged violations of human rights and humanitarian law principles against the protection of civilians during the civil war in Sri Lanka.

Keywords: *state responsibility, humanitarian law, human security*

I. Introduction

States are duty bound to ensure human security of all and in particular those who come within the jurisdiction of the respective states. It is increasingly evident that human security should receive high priority in the affairs of a state as the concept of State sovereignty is no more perceived as absolute. Sovereign states are responsible to protect the wellbeing and security of human beings than the protection of physical resources or the promotion of political structures. Recent discourses on human security bring out the challenges faced in the protection and promotion of human rights and security of people in war situations. In non-international (internal) armed conflict situations states should take all the necessary steps to protect civilians from the adverse effects of war. When sovereign authorities do not provide necessary protection and assistance to affected communities international community increasingly makes interventions to remedy such situations.

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Main objective of this research paper is to examine and evaluate the applicable legal standards governing the responsibility of states to protect their own people affected by the ravages of internal wars from a human security perspective. It will further discuss the responsibility of state to investigate the violations of human rights committed in such war situations and the need to prosecute the alleged offenders to provide redress to the victims of such violations. The violations of human rights will be broadly defined in this research to include both human rights and violations of humanitarian law in the context of non-international armed conflict situations. This paper will draw special attention to the international community's queries pertains to the alleged violations of human rights and humanitarian law principles against the protection of civilians during the civil war in Sri Lanka.

II. State Sovereignty versus Responsibility of State

The concept of state sovereignty denotes the competence, independence and legal equality of states and recognizes the legal identity of a state in international law. In its strict sense, a sovereign state has the full authority to deal with matters within its territorial boundaries without interference from other sovereign states. Accordingly, states should respect the sovereignty of other states and should not intervene in the internal affairs of other sovereign states. The principle of sovereign equality of states is stipulated in Article 2(1) of the UN Charter and the norm of non-intervention is enshrined in Article 2(7) of the same. However, sovereignty of states is no more perceived as an absolute concept.

At present, sovereignty is no more considered an absolute right in the contemporary world but incorporates obligations or responsibilities as well. It has been subjected to many changes, challenges and constraints. Due to this transformation and increased state practice, international community expects certain behaviour from each and every state. States are duty bound to ensure human security of all and in particular those who come within the jurisdiction of the respective states. Accordingly, state authorities are responsible for the safety and wellbeing of the citizens and take appropriate steps to protect and promote their rights and

needs. States have allowed for international scrutiny of their actions as well as omissions by ratifying a plethora of international treaties. Being members of the UN and other international and regional organizations states are further responsible to the international community. In situations of violations of and/or threats to human security, when sovereign authorities are unwilling or do not have the capacity to provide necessary protection and assistance to affected communities or they themselves are the perpetrators, international community increasingly makes interventions to remedy the situations effectively. The legitimacy of such interventions has become controversial and caused further problems. Therefore, it is of utmost importance to maintain a careful balance between the primary responsibility of states and the residual responsibility of the international community in such situations. A well established legal regime is a timely need in order to regulate international interventions in situations of violations of or threats to Human Security.

At present, millions of people worldwide are severely affected by human-made as well as natural catastrophes. Wars amongst nations, civil wars, political upheavals, terrorism, unbalanced power sharing, scarcity of resources, poverty, famine, global warming, epidemic health hazards etc., threaten as well as have an overwhelming impact on human security. The claim of exclusive and absolute right arising out of the concept of state sovereignty poses the question of responsibility and liability attaching to the claimed absolute right. Right without responsibility is problematic – whether it relates to exclusive right of an individual, institution or a state. It is all the more problematic if the so called exclusive right is the very cause for human catastrophe. In this context, the transitional role of sovereign states from an absolute right to a responsibility should be well defined in the light of international legal parameters. The concept of state is a political construct; it is invested with state sovereignty in order to ensure that the independence and autonomy of the state, viz., the people of the country, is preserved sacrosanct in order to ensure the broad concept of wellbeing of the people[1]. However, if the human security of the very people is under

[1] Shahrbanou Tadjbakhsh, Human Security: Concepts and Implications with an Application to Post-Intervention Challenges in Afghanistan, Les Etudes du CERI - n° 117-118 - September 2005, pp.4-9.

threat by the state instrumentalities, it becomes a puzzle as to whether the concept of state sovereignty be given a sacrosanct place in the affairs of international relations and bi-lateral relations. In such a situation is it within the call of duty of the international community to turn a blind eye to a situation where human security of people comes under severe strain due to various factors which may include the conduct or absence of conduct of the instrumentalities of state in a country? Should a responsibility be cast on the international community to ensure that the human security of the people in any country should be their concern as well?

III. Responsibility of states to protect human security of people within their jurisdiction

'Human security' has become a popular notion/concept in the contemporary world. However, the exact meaning of this very word is somewhat complex. Therefore, it is wished to examine various definitions of human security used by different actors in the present day world. It is obvious that the term 'human security' is defined variously according to the issue to be analysed[2]. Broader definitions in usage mean it as the combination of threats associated with war, genocide, and the displacement of populations. According to the narrower definitions human security means the freedom from violence and from the fear of violence and is concerned with the security of individuals[3]. Although it is widely

[2] Human security was first mentioned in United Nations (UN) Secretary-General Boutros-Boutros Ghali's *Agenda for Peace* (1992). In that report he urged 'an integrated approach to human security' that would deal with the fundamental political, economic and social causes of conflict. But it was in the Pakistani economist Mahbub Ul-Haq's Human Development Report (HDR) (UN Development Program (UNDP), 1994) that human security came to prominence. Subsequently, it was endorsed by then UN Secretary-General Kofi Annan in a number of UN reports and declarations (the 1999 Millennium Declaration; High-level Panel on Threats, Challenges and Change (2004); *In Larger Freedom: Towards Development, Security and Human Rights for All* (2005)).

[3] Stephen James, Human Security: Key Drivers, Antecedents and Conceptualization, *Centre for Dialogue and Institute for Human Security, La Trobe University,* A background paper for the Institute for Human Security Workshop, 8 June 2010, La Trobe University, Australia.

agreed that the individual should be the focus of security there prevails doubts about from which threats should the individual be protected and which security issues should be addressed as human security issues[4].

This paper wishes to examine three important institutional definitions of human security in brief, namely, the definitions of the United Nations Development Programme (UNDP), the Centre for Human Security (CHS), and the International Commission on Intervention and State Sovereignty (ICISS).The United Nations Development Programme has defined the concept in its 1994 *Human Development Report* (HDR). In the 1994 *Human Development Report* (HDR), Human Security was broadly defined as "freedom from fear and freedom from want" and characterized as "safety from chronic threats such as hunger, disease, and repression as well as protection from sudden and harmful disruptions in the patterns of daily life – whether in homes, in jobs or in communities". Accordingly, the concept covers everything that constitutes freedom from want and freedom from fear. The Report outlined the four basic characteristics of Human Security as being universal, interdependent in its components, people-centered, and best ensured through prevention[5]. This broad definition led to a wide discourse on the issues related the concept in academic and policy circles.

The Commission on Human Security has defined the concept in its *Human Security Now* report of 2003 as, to protect the vital core of all human lives in ways that enhance human freedoms and human fulfilment. Human security means protecting fundamental freedoms—freedoms that are the essence of life. It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people's strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity[6]. The CHS combines the freedom from fear and want and emphasizes that human security is 'people-centred'. As it can be observed that the approach of the CHS to human security is not limited only to address the violation of the rights of civilian in

[4] Ibid.

[5] Ibid.

[6] Human Security Now, Final Report, http://isp.unu.edu/research/human-security/files/chs-security-may03.pdf, accessed on 20.10.2012.

conflict situations or other conflict related predicaments experienced by the people involved. As we find that during any type of armed conflict, whether it is an international or non-international armed conflict situation, civilians and non- combatants (*hors de combat*)and the civilian object are highly affected. Importantly, the CHS has connected the very notion of human security with the norms of Responsibility to Protect (R2P)[7].

The International Commission on International Interventions and State Sovereignty (ICISS) has defined human security very broadly. According to that definition, human security requires attention to the security of 'ordinary people' in their everyday lives. The commission has criticized states that invest heavily in the military sector while letting their citizens suffer the 'chronic insecurities of hunger, disease, inadequate shelter, crime, unemployment, social conflict and environmental hazard'[8].

Thus, some preferred a narrow definition surrounded of "freedom from fear" that concentrates on physical violence and threats. Others extended fear" debate to "freedom from want" and "freedom to live in dignity". However, both the approaches are people-centred and are complementary rather than contradictory[9]. This research paper will limit the scope of human security to the responsibility owed by states to protect human rights of civilians in war situations. The war situations also can be categorised variously. International Humanitarian Law categorises armed conflicts as international and non-international (internal). This article specifically examines the responsibility of states to protect human rights of civilians in internal armed conflict situations from a human security perspective. Therefore, violations of human rights of people will be explained as the main reason of human insecurity. If the broad definition is used it will lead to impracticality rather than a testable yardstick. Human right is defined broadly in this article to rights of

[7] The ICISS, which developed the R2P principle, defined human security broadly as 'the security of people—their physical safety, their economic and social well-being, respect for their dignity and worth
as human beings, and the protection of their human rights and fundamental freedoms.'

[8] See http://www.unitar.org/ny/sites/unitar.org.ny/files/69974_eng_175_lpi.pdf, accessed on 23.10.2012.

[9] Stephen James, Human Security: Key Drivers, Antecedents and Conceptualization, *Centre for Dialogue and Institute for Human Security, op. cit.*

people in times of peace as well as war.

IV. Protecting Human Rights of Civilians in War situations

Any society crippled by the ravages of armed conflicts face the challenge of ensuring accountability for international humanitarian law (IHL) and human rights law (HRL) violations committed during the armed conflict. Making the perpetrators accountable for IHL and HRL violations is vital for many reasons: to ensure such blatant violations are not repeated, to prevent collective retribution, as a record for posterity, for punishment as well as to deter future criminals etc. However, States which are transforming from war to peace find challenges that pertain to striking a careful balance between making the alleged offenders accountable for IHL and HRL violations and fostering reconciliation to war affected societies. This is the real human security expected by the vulnerable communities affected by war from the state authorities. Nevertheless, in reality, having a compromise between these two conflicting interests is not easy. Sovereign authorities of such a country have to address many issues to reconcile the matter effectively. In the aftermath of the civil war situation that has lasted for nearly thirty years, Sri Lanka now has to deal with the challenges of ensuring accountability for IHL and HRL violations committed during the armed conflict in Sri Lanka and to find a plausible conciliation by harmonising the above mentioned conflicting interests.

V. International Humanitarian Law and Human Rights Law Violations against civilian population

In times of any armed conflict, whether international or internal in nature, blatant violations of IHL and HRL are highly prevalent. International humanitarian law (IHL) is defined as the body of law which seeks, for humanitarian reasons, to limit the effects of armed conflict. In a wider sense, IHL includes all the legal provisions whether in the form of treaty law, or customary international law ensuring respect for the individual and his or her well-being in times of war, and thus comprises of

the law of war and human rights.[10] Technically, the relevant provisions of IHL are applied to situations of international and non-international armed conflicts once an armed conflict is begun. IHL applies equally to all sides regardless of who started the fighting, but internal tensions or disturbances cannot be covered.

The applicability of IHL provisions depend on the nature of the armed conflict concerned. The traditional classification of armed conflicts divides conflicts around the world into two categories; international armed conflict situations and non- international armed conflict situations. Prof. T. Meron describes this categorization as

> "....a crazy quilt of norms that would be applicable in the same conflict, depending on whether it is characterized as international or non international....".[11]

Nevertheless, unlike the treaty law provisions of IHL, most of the customary principles of IHL are applicable to both types of war situations.[12]

VI. International armed conflict situations

International armed conflict (IAC) is a conflict between two or more sovereign States and by far the most regulated type of conflict under IHL. Plenty of international conventions include provisions to cover international armed conflict situations, i.e., Hague Conventions of 1899 and 1907and the annexed Hague Regulations, Four Geneva Conventions of 1949 (with the exception of Article 3 common to the Conventions), and First Additional Protocol to the Geneva Conventions of 1977. In addition, the recently codified Customary IHL principles also cover such war situations and domestic courts, international courts and other international *ad hoc* tribunals have developed case law jurisprudence to address numerous issues pertain to IACs. In fact, this

[10] Chandrahasan, N. (1999). Introduction to International Humanitarian Law, Unpublished Hand Book for Undergraduates, Colombo, p.2.

[11] Meron, T. (2000). The Humanization of Humanitarian Law. The American Journal of International Law, 94(2) p. 242.

[12] The ICRC Customary Humanitarian Law Study codifies the widespread Customary IHL Rules in one single document.

legal framework is assumed as comparatively adequate to deal with present day inter-State armed conflicts. IHL Conventions distinguish between mere violations and blatant violations of IHL. For example, four Geneva Conventions (GCs) include special provisions to designate more serious violations of IHL as 'grave breaches'.[13] If these designated provisions are violated by the warring parties in the context of IACs it is considered a serious violation and a criminal offence.[14] In the case of grave breaches, the obligation of the State Parties are to enact legislation providing for effective penal sanctions, to search for persons alleged to have committed or have ordered such grave breaches to be committed , and to bring such persons before its own courts.[15] The Grave breaches included in the above mentioned provisions consist of the following actions when committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[16] In addition to the above provisions included in the four GCs, Article 11 of the first Additional Protocol of 1977 stipulates a supplementary list of serious violations for making the perpetrators accountable if committed in IAC situations against 'protected persons'.[17] Article 85 of the same Protocol also adds a supplementary

[13] Although these grave breaches provisions are located in different places of the said Conventions, the wordings are relatively the same.

[14] Articles 49 and 50 of the First Convention, Articles 50 and 51 of the Second Convention, Articles 29 and 30 of the Third Convention and the Article 146 and 147 of the Fourth Convention are termed as grave breaches of IHL if committed in international warfare.

[15] See Articles 49 of the First Convention, Articles 50 Second Convention, Articles 129 of the Third Convention and the Article 146 of the Fourth Convention.

[16] See Articles 50 of the First Convention, Articles 51 of the Second Convention, Articles 130
of the Third Convention and the Article 147 of the Fourth Convention.

[17] Protected persons under IHL are persons who are not participating in armed conflicts and no more participating in armed conflicts. These new set of serious crimes in-

list to the list of grave breaches.[18] Most of these provisions now have acquired the status of customary IHL principles and thus can be applied to non-international armed conflicts as well. The former President of the International Criminal Tribunal for former Yugoslavia (ICTY), Antonio Cassese, has stated in the *Prosecutor v. Tadic* case as follows:

> "…..There has been a convergence of the two bodies on international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts…"[19]

VII. Non-international armed conflict situations

The protracted armed conflict in Sri Lanka between the armed forces of the State and the dissident armed group called the LTTE (Liberation Tigers of Tamil Ealam) cannot be recognized as an IAC due to the fact that it was not between two sovereign States. Therefore, the Sri Lankan situation should be examined with much care to identify its legal nature using the prescribed yards stick in IHL. The Sri Lankan war is widely recognized as a civil war or a non-international armed conflict situation (NIAC). Fighting between the armed forces of a state and dissident or rebel armed groups within the same State is acknowledged as a NIAC.[20] The law applicable in such conflicts has long been considered as a purely domestic matter for States to deal with. However, the scope and number of IHL treaty rules governing NIACs are far less extensive than

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clude the crimes committed against physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty.

[18] "..when committed wilfully, causing death or serious injury to body or health; making the civilian population or individual civilians the object of attack; launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life...".

[19] See the judgment of Prosecutor v. Dusco Tadic of the ICTY, Case No IT- 94- 1, ICTY.

[20] See Article1 of the Additional Protocol II of 1977 relating to Non international armed conflicts.

those applicable to IACs. Although the Hague Conventions of 1899 and 1907 do not include provisions relating to NIACs over time most of these provisions have derived the form of customary international law (CIL). In the four Geneva Conventions, only one provision is allocated to regulate NIACs, which is Common Article 3, called a 'treaty in miniature'. Common Article 3 of GCs, Additional Protocol II of 1977 (AP II), certain number of other treaties, CIL and judicial decisions provide the legal frame work to regulate NIACs. Two key treaty provisions set thresholds for identifying the law applicable to NIACs; namely, Common Article 3 and the Article 1 of AP II. The ICTY has affirmed that a NIAC exists when there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[21] However, CA 3 does not give a definition of NIAC. In its commentary on the article, the ICRC states that:

> "Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities -- conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front."

Common Article 3 stipulates that in the case of an 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:

> "....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

[21] In the view of the ICTY, for there to be a non-international armed conflict: non-state armed groups must carry out protracted hostilities; and these groups must be organized. See the judgment of Prosecutor v. Dusco Tadic of the ICTY *op.cit.*

> whatsoever with respect to the above-mentioned persons: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular, humiliating and degrading treatment;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; 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. The wounded, sick and shipwrecked shall be collected and cared for....".

However, control of a portion of the territory by a non-state armed group is not required for the application of common Article 3, but would certainly be strong evidence of its application. Article 1 of the Protocol II defines an internal armed conflict as

> "...an armed conflict, which is taken 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 and to implement this Protocol."

This provision partly fills the gap by defining a NIAC. Nevertheless, situations of internal disturbances and tension such as riots, isolated and sporadic acts of violence and other acts of a similar nature are not considered armed conflicts. In its commentary on Article 1 of AP II, the ICRC states that:

> "The Protocol only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as common Article 3, which applies in all situations of non-international armed conflict."

Certain criteria are required for the application of 1977 AP II: namely, a confrontation between the armed forces of the government and opposing "dissident" armed forces, the dissident armed forces are under a responsible command, and they control a part of the territory

as to enable them to "carry out sustained and concerted military operations" and to implement the Protocol. As a consequence of these criterions, the Commentary has stated that common Article 3 and 1977 Additional Protocol II have different, but overlapping, application.[22] As discussed above, due to extensive State practice tied with the intention of being strictly bound by such practices (*opinio juris sive necessitatis*) many rules applicable in IACs have become applicable in NIACs as CIL. Accordingly, the determination of the violations of IHL involves a careful examination of both the Conventional provisions and CIL principles. When probing the allegations of IHL violations leveled against Sri Lanka, the above discussed relevant legal standards should be examined with due care.

VIII. Violations of International Humanitarian Law and Human Rights Law

Violations of international human rights law (IHRL/HRL) could be highly prevalent in times of war. IHRL is a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behaviour or benefits from governments. Human rights are inherent entitlements which belong to every person as a consequence of being a human. Human rights law principles can be found in numerous treaties (hard law)[23] and non-treaty based instruments such as declarations and guidelines (soft law). IHL and IHRL are both concerned with ensuring respect for individuals and their well being. However, there are debates over the relationship between IHL and IHRL focusing on the question of whether IHRL continues to apply during armed conflict and if so, and how these two bodies of law can complement each other.[24] This is a crucial issue because a

[22] For an example, in a conflict where the level of strife is low, and which does not contain the characteristic features required by the Protocol, only common Article 3 will apply as it was the first separate treaty setting down standards for the protection of persons and basic rules on methods of warfare applicable to both states and non-state armed groups involved in internal armed conflict.

[23] International Covenant of Civil and Political Rights of 1966, International Covenant of Economic, Social and Cultural Rights of 1966,

[24] Noam Lubell, Challenges in applying human rights law to armed conflict, Interna-

popular view exists that IHRL can be applied only in times of peace. Therefore, the viability of this view should be discussed by focusing on established authorities on the issue.

The International Court of Justice (ICJ) has discussed the relationship between IHL and IHRL in a number of cases. However, the ICJ contradicts itself over the issue in different occasions. For example, in the *Legality of the Threat or Use of Nuclear Weapons, Advisory opinion*,[25] the Court examined the applicability of HRL in times of armed conflict, and emphasized that "*in such situations even though human rights law does not disappear, it nevertheless is in effect displaced by international humanitarian law*".[26] Nevertheless, after a few years the same Court once again revisited its own judgment and approached the issue related to the applicability of HRL in war situations quite differently. In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, the ICJ has thus decided that HRL is not entirely displaced and can at times be directly applied in situations of armed conflict.[27] The court elucidated in this case that the protection of human rights conventions does not cease in case of armed conflict, but will be continued subject to certain derogations. The ICJ referred to Article 4 of the International Covenant of Civil and Political Rights (ICCPR).[28] This Article permits derogations from the obligations resulting from the Covenant in time of public emergency which threatens the life of a nation and the existence of which is officially proclaimed. However, Article 4(2) states seven fundamental rights which

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tional Review of Red Cross, 860, p737.

[25] Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, 8 July 1996, ICJ Reports 1996. The General Assembly of the United Nations requested advisory opinion of the ICJ on the legality of the threat or use of nuclear weapons.

[26] Legality of the Threat or Use of Nuclear Weapons, para. 25.

[27] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, ICJ Reports 2004.

[28] Noam Lubell, op. cit. p737. Article 4 stipulates that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

cannot be subjected to any derogation under any situation.[29] The continued applicability of HRL in war situations was thus highlighted by the ICJ in 2004. The Court stated that there are three possible situations pertaining to the relationship between two bodies of law.

"Some rights may be exclusively matters of International Humanitarian Law; others may be exclusively matters of Human Rights Law; yet others may be matters of both these branches of International Law." [30]

The Court clarified the relationship between IHL and HRL in war situations as follows:

> "....a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' .... that they are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of International customary law."

Once again, in the case *Democratic Republican of the Congo v. Uganda'* the ICJ re-emphasized the interrelationship between HRL and IHL.[31] In this case the ICJ affirmed the previous decision relating to the construction of a wall in the occupied Palestine Territory and held that Uganda is internationally responsible for violations of IHL and IHRL committed by the Ugandan Military forces in the territory of the DRC and for failing to comply with its obligations as an occupying power in Ituri in respect of violations of IHL and IHRL in the occupied terri-

[29] namely, the right to life, the prohibition of torture or inhuman treatment, the prohibition of slavery and servitudes, the prohibition of imprisonment for debt, the prohibition of retroactivity of the criminal law, the right to recognition as a person before the law, the right to freedom of thought, conscience and religion.

[30] ICJ, Advisory Opinion, para.106. It was decided by the ICJ in this Case that Israel's action in illegally constructing this wall has legal consequences not only for Israel itself, but also for other States and for the United Nations and determined that Israel has a legal obligation to bring the illegal situation to an end by ceasing forthwith the construction of the wall in the Occupied Palestinian Territory.

[31] Democratic Republican of the Congo v. Uganda, Judgment of 19 December 2005, ICJ Reports, 2005, para.216-219. In this case, concerning armed activity on the territory of the Congo, the ICJ ruled that Uganda has violated the principles of non-intervention under Art 2(4) of the UN Charter and further violated IHL and HRL when it launched military operations in the DRC between 1998 and 2003.

tory. Accordingly, the Court accepted the significance of preserving and promoting the human rights of people in situations of armed conflict. Along with the above discussion, it is clear that the difference between the application of IHL and HRL principles in war situations has become very much amalgamated now, and thus, some rights violations in armed conflict can be considered as matters under both legal regimes. However, as Lubell expresses, when we actually come to apply HRL in practice to situations of armed conflict, certain difficulties do appear. Therefore, he states that:

> "...the road of joint applicability has a number of obstacles along the way that will need to be addressed if we are to have a smooth ride. The focus of the arguments is now shifting from the question of how Human Rights Law applies during armed conflict to that of the practical problems encountered in its application."[32]

The International Conference held in Teheran in 1968 on Human Rights passed an important Resolution entitled 'Human rights in armed conflict.' This was based on the fundamental precept that 'peace is the underlying condition for the full observance of human rights and war is their negation'. The Resolution 2444 (XXIII) adopted by the UN General Assembly on the same year was also on 'respect for human rights in armed conflict'. These emerging trends and authorities reveal that even in times of armed conflicts it is crucial to respect and promote human rights of people. If any violations are committed the offenders should be held accountable.

International law recognizes certain norms as inviolable under any circumstances. These norms are known as *jus cogens* (peremptory norms), which are undisputed and has long been accepted by the international community as a whole. It is widely accepted that the entire world has an obligation (*erga omnes*)[33] to protect and promote these norms. Examples of *jus cogens* norms coupled with *erga omnes* include piracy, genocide, slavery, and racial discrimination..[34] The ICTY has also recognized the concept of *erga omnes*, noting that the prohibition

[32] Noam Lubell, op. cit. p739.

[33] In international law it is used as a legal term describing obligations owed by States towards the community of states as a whole.

[34] The ICJ recognized the right to self determination as an inviolable norm in the *Case concerning East Timor*

on torture has that character, in *Prosecutor v. Anto Furundzija* Decision in 1998. These norms of inviolable character are binding on all States and cannot be modified by even an international treaty and are not subjected to any derogation. However, there is no clear agreement regarding precisely which norms are *jus cogens* or how a norm reaches the status of *jus cogens.* If any person or persons or agents of States commit a crime which violate these peremptory norms alleged perpetrators should be held responsible for such crimes.

The above discussion highlights the need to prevent the violations of human rights and humanitarian law if possible and if such violations do occur to investigate and prosecute diligently the serious violations of IHL, IHRL or *jus cogens* norms with no impunity. Otherwise, the human security of people in such societies would be at great risk.

IX. Sri Lankan Experience and the Demands of the International Community

The State armed forces of Sri Lanka could successfully defeat the armed rebellions of the Liberation Tigers of Tamil Ealam (LTTE) after a hard war. However, after the cessation of hostilities, there have been accusations levelled against the warring parties claiming that they have committed serious breaches of IHL and HRL during the thirty years civil war situation in Sri Lanka. Especially, in the recent past, several steps were taken against the country asking the responsible authorities to probe war crimes allegations. Therefore, this issue warrants a scholarly discussion. However, the scope of this paper does not allow to examine all such efforts and thus it is wished to briefly discuss the Report (Darusman Report) submitted on 31 March 2011 by the Expert Panel appointed by the United Nations Secretary General (UN SG) in 2010[35] and their observations and recommendations.

The Report of the Expert Panel appointed by the United Nations Secretary General (Darusman Report)

The Expert Panel's mandate has been limited to advise the UN SG

[35] The Secretary-General appointed as members of the Panel Marzuki Darusman. (Indonesia), Chair; Steven Ratner (United States); and Yasmin Sooka (South Africa).

regarding the modalities, applicable international standards and comparative experience relevant to an accountability process pertains to alleged violations of IHL and HRL during the final stages of the armed conflict in Sri Lanka.[36] However, the release of the Report followed varied responses and reactions locally and internationally. The Government of Sri Lanka denied the serious allegations of human rights violations and war crimes levelled at her. Many Western Counties and Organizations have insisted that the Government of Sri Lanka should cooperate with the UN Panel. However, many Sri Lankans saw this as an unfair intervention by the international community over a domestic matter that falls under the purview of 'State sovereignty' of Sri Lanka.

A summary of the observations and recommendations made by the Panel would be of significance for this paper in concluding its analysis. In its legal assessment, the Panel has noted that both IHL and IHRL principles are applied to the recently ended internal armed conflict situation of the country.

> *".....The Panel analyzed information from a variety of sources in order to characterize the extent of the allegations, assess which of the allegations are credible, based on the information at hand, and appraise them legally..... In its legal assessment, the Panel proceeded from the long-settled premise of international law that during an armed conflict such as that in Sri Lanka, both international humanitarian law and international human rights law are applicable. The Panel applied the rules of international humanitarian and human rights law to the credible allegations involving both of the primary actors in the war, ... "*[37].

However, the different military objectives of the involved parties to war[38] or the asymmetrical nature of the tactics employed had not been taken into consideration in preparing the Report. Nevertheless, the Panel Report has seriously considered the obligations of Sri Lanka to investigate alleged breaches of the said instruments and prosecute those responsible. The Report refers to CIL applicable to the armed conflict

[36] See, the Report of the Secretary-General's Panel of Experts on accountability in Sri Lanka, 31 March 2011, p.i.

[37] Ibid.

[38] Combating terrorism, in the case of the Government, and fighting for a separate homeland, in the case of the LTTE.

and related obligations. In addition, the Panel has drawn heavily on the international standards expressed in various United Nations documents and views of treaty bodies. The Report concludes by emphasising the need to achieve accountability for crimes under international law by paying due regards to the rights, truth, justice and to make reparations through institutional guarantees of non-recurrence.

The Panel has also drawn on the diverse practical approaches, which have been developed in numerous other countries that have faced with similar challenges for ensuring accountability.[39] The Report gives emphasis to the accountability issue as follows:

> *"Accountability for serious violations of international humanitarian or human rights law is not a matter of choice or policy; it is a duty under domestic and international law. These credibly alleged violations demand a serious investigation and the prosecution of those responsible. If proven, those most responsible, including Sri Lanka Army commanders and senior Government officials, as well as military and civilian LTTE leaders, would bear criminal liability for international crimes."*[40]

The Report of the Expert Panel includes many recommendations related to investigations and to advance accountability in Sri Lanka as essential which require complementary action by the Government of Sri Lanka. For example,

> "In light of the allegations found credible by the Panel, the Government of Sri Lanka, in compliance with its international obligations and with a view to initiating an effective domestic accountability process, should immediately commence genuine investigations into these and other alleged violations of international humanitarian and human rights law committed by both sides involved in the armed conflict."[41]

The Government of Sri Lanka was reluctant to accept the Report and

[39] The above section of the research paper summarizes the contents of the Report of the Secretary-General's Panel of Experts on accountability in Sri Lanka.

[40] The Report of the Secretary-General's Panel of Experts,. p ii.

[41] Ibid. p vii.

its recommendations due to many reasons and kept hope more on its own initiative, the 'Lessons Learnt and Reconciliation Commission. The sub section below will analyse the out come of its Report submitted to the Sri Lankan parliament in December 2011.

X. The Report of the 'Lessons Learnt and Reconciliation Commission' (LLRC Report)

In May 2010, the Government of Sri Lanka appointed an eight-member 'Lessons Learnt and Reconciliation Commission' (LLRC). The mandate of the LLRC has been to report on the lessons to be learnt from the events in the period between 21st February 2002 to 19th May 2009 happened in the war-torn areas in Sri Lanka and to report whether any person, group or institution directly or indirectly bears responsibility. According to the Minister for External Affairs of Sri Lanka, the government has established the LLRC '*drawing upon the experience of South Africa in particular' with the primary focus on 'restorative justice, enabling people to pick up the pieces, to get on with their lives'*.[42] The Attorney-General of Sri Lanka has also explained the public nature of hearings of the LLRC and described the mandate of the Commission which includes *'determining responsibility regarding past events in question related to the conflict'*.[43] Minister Peiris has introduced this Commission as a, '*home grown, home spun mechanism*' which has the capacity to bring '*people together, accentuating, not the things that divide them*'[44].

The final report of the LLRC has been tabled before the parliament in mid-December 2011. The Report provides answers for many accusations levelled at Sri Lanka by various segments, both at the domestic and international spheres. It has allocated two comprehensive chapters to describe IHL and HRL principles to be applied and respected in times of war. The Commission makes the following comments on the report.:

[42] Peries, G.L. speech at the 9th IISS Asian Security Summit on 6 June 2010, www.groundviews.org/.../submissions-before-lessons-learnt-reconciliation-committee-llrc-by-chandra-jayaratne/, Accessed on 20.10.2011.

[43] Peiris, M. at the 15th session of the UN Human Rights Council on 13 September, www.colombopage.com. Accessed on 20.10.2011.

[44] Peries, G.L. speech at the 9th IISS Asian Security Summit. op cit.

> *"....The principle of distinction and proportionality should not remain theoretical and should be implemented rigorously throughout the planning and execution of military operations in order to ensure that such operations are conducted in accordance with the applicable law. These propositions applicable to both international and non international armed conflicts, give full meaning and content to the core principles of IHL...."*.[45]

In evaluating the Sri Lankan experience in the context of allegations of violations of IHL, the Commission states that it is satisfied that the military strategy that was adopted to secure the LTTE held areas was one that was carefully conceived, in which the protection of the civilian population was given the highest priority.[46]

> "Given the complexity of the situation that presented itself as described above, the Commission after most careful consideration of all aspects, is of the view that the Security Forces were confronted with an unprecedented situation when no other choice was possible and all "feasible precautions" that were practicable in the circumstances had been taken."[47]

Nevertheless, it finds the conduct of the LTTE in the No Fire Zone as violating the accepted international norms, in particular IHL principles. The difficulty of making non State actors accountable for IHL violations in the context of non international armed conflict also has been highlighted by the Commission[48]. However, the Commission recommends that action be taken to investigate the specific instances referred to in observations in paragraphs 4.359, vi (a) and (b) and any reported cases of deliberate attacks on civilians. If investigations disclose the commission of any offences, appropriate legal action should be taken to prosecute/punish the offenders.[49] In relation to recent allegations arising from the video footage such as the "Chanel 4 video", the Commission recommends that the Government of Sri Lanka should

[45] See Chapter 03, The Final report of the Lesson Learnt and Reconciliation Commission, p.115.
[46] Ibid.
[47] See Ibid, p. 120
[48] See, Ibid, p.135.
[49] See pp. 145-146.

institute an independent investigation into this issue with a view to establishing the truth or otherwise of these allegations and take action against the allegations in accordance with the laws of the land.

The Commission considered a number of key human rights issues arising out of the conflict. The LLRC has been informed during its public sittings in many occasions about the violations of fundamental rights and freedoms of people affected by the conflict.[50] The Commission has also heard a substantial number of allegations of abductions and disappearances by the LTTE. The Commission believes that its recommendations on these human rights issues are critically relevant to the process of reconciliation, and recommends that the Government is therefore duty bound to direct the law enforcement authorities to take immediate steps to ensure that these allegations are properly investigated into and perpetrators brought to justice. [51]

The Commission emphasises that consensual approaches advancing national interest, national reconciliation, justice and equality for all citizens is vital. It is of the hope that the observations and recommendations of the Commission would provide indicators to areas such as governance, devolution, human rights, international humanitarian law, socio economic development, livelihood issues, issues affecting hearts and minds, leadership issues etc. It accepts that the report may not provide an exhaustive agenda to address all the troubled of post conflict Sri Lanka, the recommendations could constitute a framework for action by all stakeholders, in particular the Government, political parties and community leaders. This framework would go a long way in constructing a platform for consolidating post conflict peace and security in Sri Lanka. The Commission therefore urges that effect be given to its recommendations and encourages the promotion of public awareness of the contents and implementation of these measures. The report states that,

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[50] These include abductions, enforced or involuntary disappearances, arbitrary detention, conscription of underage children, extrajudicial, summary or arbitrary executions, violation of the freedom of expression, movement, association, freedom of religion and the independence of the media etc. Representations were also made on issues pertaining to the rights of IDPs, and other vulnerable groups such as women, children and disabled. See, Chapter 05 of the final report of the LLRC, p. 154.

[51] Ibid, p. 163.

"In evaluating the Sri Lanka experience in the context of allegations of violations of International Humanitarian Law (IHL), the Commission is satisfied that the military strategy that was adopted to secure the LTTE held areas was one that was carefully conceived, in which the protection of the civilian population was given the highest priority. The Commission also notes in this regard that the movement of the Security Forces in conducting their operations was deliberately slow during the final stages of the conflict, thereby evidencing a carefully worked out strategy of avoiding civilian casualties or minimizing them.."[52]

XI. The report discusses about the final days of the civil war of Sri Lanka and states as follows:

"On consideration of all facts and circumstances before it, the Commission concludes that the Security Forces had not deliberately targeted the civilians in the NFZs, although civilian casualties had in fact occurred in the cause of crossfire. Further, the LTTE targeting and killing of civilians who attempted to flee the conflict into safe areas, the threat posed by landmines and resultant death and injuries to civilians, and the perils inherent in crossing the Nanthi Kadal Lagoon, had all collectively contributed to civilian casualties. It would also be reasonable to conclude that there appears to have been a bona fide expectation that and attack on LTTE gun positions would make a relevant and proportional contribution to the objective of the military attack involved."[53]

The report further highlights,

"Having reached the above conclusions, it is also incumbent on the Commission to consider the question, while there was no deliberate targeting of civilians by the Security Forces, whether the action of the Security Forces of returning fire into the NFZs was excessive in the context of the Principal of Proportionality. Given the complexity of the situation that presented itself as described

[52] See, Chapter 04 of the Report of the LLRC.

[53] Ibid.

> above, the Commission after most careful consideration of all aspects, is of the view that the Security Forces were confronted with an unprecedented situation when no other choice was possible and all "feasible precautions" that were practicable in the circumstances had been taken."[54]

As examined above, the final report of the LLRC includes noteworthy observations about the IHL and IHRL violations committed during the civil war situation in Sri Lanka. It contains strong recommendations and viable measures to heal the wounds of war.[55] The following recommendations of the LLRC Report *inter alia* are very vital in relation to ensure human security of war affected people in Sri Lanka.; obligation to educate the members of the armed forces in the relevant aspects of Human Rights and International Humanitarian Law, measures taken to safeguard civilians and to avoid civilian casualties during military operations, establishment of No Fire Zones and the LTTE strategy of using human shields, supply of humanitarian relief including food and medicine to civilians in conflict areas, conduct of the Security Forces during the movement of civilians and combatants to cleared area, alleged disappearances, allegations concerning abductions, treatment of detainees; and, conscription of children by the LTTE and other armed groups. Also, issues relating to land matters, especially in relation to settling the returnees and resettlement of the IDPs, restitution/ compensatory relief, post conflict issues that affect vulnerable groups and the citizens at large and policies and measures that will promote reconciliation through healing, amity and unity.[56] However, it is too early to predict on the actual impact of these recommendations of the LLRC. If sincere and genuine steps are taken to implement these recommendations, such actions will be of significance to ensure human security of people in the Sri Lankan society ravaged by war.

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54 Ibid.

55 In formulating its recommendations, the Commission has closely examined some specific incidents that took place during the armed conflict after the Mavil Aru incident in the context of the International Humanitarian Law and the Human Rights Law.

56 Preamble, The final report of the Lessoned Learn and Reconciliation Commission, 201.1

X. Conclusion

As discussed in this research paper, discharging the primary responsibility of national authorities to protect human security of people in war situations is very important to avoid any external interventions to the sovereign affairs of a country. The Government of Sri Lanka has taken positive steps to address some of the human security issues emerged during the thirty years civil war situation in the country. However, the Government of Sri Lanka should take diligent and impartial steps further to probe serious allegations of war crimes and blatant violations of human rights. By doing so, unnecessary international interventions and undue threats to the sovereignty of the State can be avoided. We should prove that the country acts as a responsible State and attend to the protection and promotion of rights and security of people in Sri Lanka. If evidence related of serious IHL and HRL violations is available the alleged perpetrators should be prosecuted before domestic courts. However, it is stressed that the entire accountability process should be well extended beyond mere prosecution but be combined with suitable restorative justice approaches too. Sri Lanka should come up with her own model to address human security of people in her own country. The nature of the alleged violations, actual damages occurred and our cultural practices should also be taken into consideration. Practicable modalities should be initiated without delay in order to eliminate mistrust amongst communities and to foster long lasting peace and reconciliation in Sri Lanka.

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