

## Chapter - VII

### **Laws of War and the Right to Freedom from Torture**

The Geneva Convention (I) provides for the amelioration of the condition of the wounded, the sick and shipwrecked members of Armed Forces or those engaged in conflict while at sea owing to the civil ethnic conflict that raged in Sri Lanka for over two decades. It is pertinent to briefly scrutinize provisions of the laws of war which internationally govern conduct during armed strife. According to Article 2 the terms of Geneva Convention (II) should apply to cases of armed conflict even if the war is not recognized by one of them. The need to examine the conflict and the conditions regarding torture, then, is imperative because armed conflict has marked conditions in the Island from the mid seventies, and more so from the eighties<sup>1</sup>.

The provisions of the Convention apply to occupied parts of territory and persons therein. The moot question in the conflict in Sri Lanka is whether the belligerent group was a "power". At one time Indian authorities who intervened as peace keepers gave them a status almost on par with the Sri Lankan Government. Indian mediation was between two parties, and hence provisions of the Convention would apply to the parties locked in conflict.<sup>2</sup>

Groups, not participants in the hostilities even from the Armed Forces but have abandoned arms and are ill, or been disabled while in detention should be, according to provisions of the Convention, treated humanely, in all circumstances indiscriminate of their race, religion or other distinguishing criteria. No evidence is forthcoming, whether this provision was honoured in practice. Even those in remand in prisons, had been massacred, and not once. So, better humane treatment outside was unimaginable. Among militants in combat, more so than among regular forces, in Sri Lanka, contrary to provisions of the Convention Governing Laws of War, some taken captive in conflict have been arbitrarily executed. Later on, at times the services of the

International Committee of the Red Cross was used by both the militants and the State to transfer back the captives or to surrender the bodies of personnel who died in fighting. This measure mitigated somewhat violations of the provisions needed to be observed under the laws of war.

According to Article 12 of the Geneva Convention (II) it is required that the parties to the conflict in Sri Lanka should ensure healthy humane treatment of the sick and wounded in a skirmish<sup>3</sup>. Those in an incapacitated or sick state have to be tended without discrimination while in the custody of one party or the other. Violence used against such captives and, worse, subjecting them to cruelty, torture or degrading treatment or even to biological experiments is expressly prohibited. Neither should such helpless captives be neglected or exposed to infection. Due respect should be paid to their sex when female captives are in custody. Only a few cases of disregard of these provisions came to light in Sri Lanka but the belief is that the violation of these stipulations were manifold<sup>4</sup>. The Geneva Convention (I) provides for the amelioration of the conditions of the wounded and sick in armed combat in the field. This was often ignored in the Sri Lankan conflict. In regard to the repression of abuses and infractions such as commission of torture, Article 50 enjoins States to enact legislation needed to impose penal sanctions on persons committing grave breaches of provisions governing conduct during conflict. Article 50 clarifies that grave breaches denote torture, willful killing, subjecting one to inhuman treatment, which include biological experiments, which cause much suffering or serious injury to the health or body of a captive from the other party in the conflict<sup>5</sup>.

Even in a state of conflict, legal sanctions are against the practice of torture, and infliction of cruel suffering by any of the conflicting parties. The Geneva Convention deals with the treatment of prisoners of war more specifically in Article 13<sup>6</sup>. Humane treatment of prisoners is essential. They are entitled to protection from torture,

violence or intimidation and should not be exposed to insult or public curiosity. Unfortunately, these useful provisions to safeguard prisoners of war or conflict have not been observed sometimes in Sri Lanka. On 28 September, 2002, a prisoner of the conflict complained of having been tortured and subjected to intimidation and threats from those in State service who had him in custody.

In pursuance of the Geneva Convention (II) on the Treatment Of Prisoners of War, in the section on penal and disciplinary sanctions, Article 87 generally forbids the infliction of any form of torture or cruelty. Safeguards are prescribed to ensure that neither torture nor cruel penalties could be imposed on a prisoner of war, but owing to the secrecy that shrouded the actions of the conflicting parties in Sri Lanka, it has been difficult to unravel cases of inhuman treatment of prisoners of conflict. Still, in human rights violation cases, both brutal and repulsive torture had been found committed occasionally on prisoners by the State Security Forces and the militant groups alike. In terms of Article 129<sup>7</sup>, the Geneva Convention, on which the laws of war and the International Laws governing armed conflict are based. States are required to impose effective penal sanctions on those committing or ordering certain grave breaches of expected conduct. The transgressions comprise deliberate killings, torture or inhuman treatment and biological trials that cause serious consequences.

Since 1949 when the Convention came into force, the International Committee of the Red Cross Society has provided humanitarian assistance towards returning of bodies of the dead in civil wars or conflicts and in the exchange of prisoners of war between the conflicting parties. In Sri Lanka the adoption of this practice has somewhat alleviated the maltreatment of prisoners. According to Parts I and II, of the Geneva Convention (IV) which deals with the protection of civilians in times of war, no physical or moral coercion can be used against protected persons so as to obtain information from third parties<sup>8</sup>. Any party engaged in strife is forbidden from inflicting physical

pain or the extermination of protected persons. Similarly no torture, corporal punishment, mutilation, medical and scientific experiments or any other brutal action can be applied by civilian or military agents on protected captives. Nor can the property of a protected person be pillaged. Unfortunately, in Sri Lanka the parties battling one another have committed some of the above wrongs. Among regulations to be followed in the treatment of "internees" there is a special prohibition of torture as a disciplinary sanction. Again, in terms of the Geneva Convention no other activities or experiments which can be perilous to the physique or health of any one taken into custody<sup>9</sup> can be done.

Furthermore, the Statute of the International Tribunal (Security Council Resolution 827 (1993), May 25, 1993, titled "Grave breaches of the Geneva Conventions of 1949" enunciated in Article 2 that in dealing with the serious breaches of the Geneva Convention of 1949, the International Tribunal can prosecute persons committing or ordering to killings, torture or inhuman treatment or scientific harmful experiments on one in custody<sup>10</sup>. In terms of International law responsibility for the commission of torture by State Officers has to be borne on the State itself. Among the principles of international laws recognized by the Charter and the Nuremberg judgements crimes against humanity became punishable. Torture, killing and other inhuman acts committed against civilians and the persecution of people on political, racial or religious grounds cannot but be some of the crimes calling for strict penalties.

It is accepted that conflicts between parties are normally highly ordered arrangements. Antagonists are expected and usually comply with commonly accepted expectations about the correct way to fight. The right way to fight may at times be agreed upon, but in some conflicts antagonists can hold different views of the objectives of the conflict. Hence there can prevail varying sides of fairplay, and this appears to be so in the conflict in Sri Lanka. The rules of conflict are tried under strain and stress when one party as in Sri Lanka cannot use

air power in combat, which government Air Force does, hurting free civilians and property and thus torturing them.

As a rule, combatants have welcomed desired limitations and prohibitions on use of torture, harmful scientific tests and cold blooded defenceless killings of captives as mutually good. At best of times too there had been not even an unorganized legal system to govern the conflict in Sri Lanka. Even if certain practices in war appeared desirable, there was no way or mechanism to enforce them. Respect and recognition of laws of conflict arose only from a continuous process of reciprocating and retaliating. In the international political system there is an International Court of Justice (ICJ) at the Hague<sup>11</sup>. Its competence to adjudicate in each case of torture or degrading treatment or infringement of human rights depends on the prior agreement of parties concerned. If a State party does not agree to submit a particular dispute or type of contention to the ICJ it simply cannot act, and there is no executive with the ability to enforce decisions.

Most of the laws of armed conflict developed from practices gradually recognized as customary law<sup>12</sup>. The law of war which forbids torture and similar cruelties are found not only in treaties but in customs and practices of States which later obtained universal recognition, and from general principles of justice as applied by jurists and practiced in military tribunals. The law is continually adapted to suit the demands of a changing world. Treaties, or formal written agreements between States or parties bind only States or parties, that have ratified it. In Sri Lanka the parties in conflict never signed any treaty, but even after a Memorandum of Understanding was signed along with a truce, there still are problems of interpretation and application.

Custom has the advantage of applying to everyone while treaties like contracts apply only to States or groups that became parties to them. But customary law has the disadvantage of usually

being hard to identify. Apart from this, in a conflict as in Sri Lanka, if one of the belligerents fails to conform to it, the custom may become inapplicable or be regarded as suspended. This presents a major problem and it is not easy to acquaint one whether certain actions can be taken because custom may not always be binding or valid at a time<sup>13</sup>. Most laws dealing with behaviour in the course of conflict were initially codified at conference in the Hague and the laws related to the armed conflict are referred to as "Hague Laws<sup>14</sup>". Similarly, the International Committee of the Red Cross(ICRC) was set up in Geneva in 1964. The ICRC mostly from Geneva meetings offered to reinforce and widen humanitarian features in the laws of war, particularly safeguarding prisoners of war and non combatants. Hence the rules codified by the ICRC are referred to as "Geneva Laws<sup>15</sup>". From 1977 onwards the International Committee of the Red Cross has endeavoured to merge the two streams of Hague Laws and Geneva Laws into one comprehensive code of law, to be designated "Humanitarian Law" embodying sections of contemporary International Law relating to the protection of human rights. Both try to prevent Governments abusing power against citizens. The human rights protectors believe in absolute prohibitions. The laws of war on the contrary deal with the level of violence reasonably permissible and proportional in the context<sup>16</sup>.

In discussions, the aspect that the General Assembly resolutions of the United Nations do not bind member States but some Resolutions do become part of International Law, is taken into account. Similarly non-governmental organizations pass resolutions that are supposed to express International Law but they become law only after acceptance by the international community. This point of view is also considered in the course of this scrutiny especially during the armed conflict in the Island. But for a law to be effectively applied the international political system has no central enforcement agency.

While reviewing the use of torture and cruel inhuman and degrading treatment notwithstanding the armed conflict, an important issue for examination is the role of the media because it can convey information in respect of infringement of human rights<sup>17</sup>. Sometimes the State, as in Sri Lanka, can have an agreement by which the media even while aware of violations of rights, practices self censorship in the selection of human rights offences to be reported as well as indicating the moral and legal significance of the incidents reported, because of the promise of journalists or the security service spokesman who conveyed information to the public. In Sri Lanka operations by the journalists was restricted, if not almost denied, and a military spokesman became conveyor of news of the conflict and the armed forces. Moreover, while excluding the press from operations, as noticed in Sri Lanka, the released news gets manipulated. Explanations are offered by spokesmen of the objectives of the encounters and what was accomplished: certain news get highlighted attention and others get deflected. As a result of this kind of participation, the deviation in the application of laws prohibiting torture and similar acts in Sri Lanka have proved to be substantial.

The humanitarian element plays a significant, but not substantial, role in Sri Lankan law of armed conflict. It is reasonable to expect officers judging their personnel being conscious and sympathetic to the stresses under which they have functioned and so to be biased in adhering or applying the law even in respect of torture. This has been extremely clear in Sri Lanka, where even "deserters" with arms too are treated leniently<sup>18</sup>. But non governmental and civil bodies have mitigated to a limited extent the indifference shown to the laws regarding human rights in the Sri Lankan conflict. Where individual members are persons of learning, and the procedures observed are fair and correct, such non-governmental bodies could sway public thinking on crimes in conflict such as mutilation or torture. Additionally, in Sri Lanka, the reason why violation of human rights including commission of torture and cruel degrading treatment occur is

that the country has been negligent in providing officers and other security personnel adequate training in the law of conflict and the need to comply with it.

Access to and understanding with the fundamental instruments of the law of conflict is indispensable to those personnel of the armed forces<sup>19</sup>. The way the law has to be implemented must be grasped by security personnel. Now in Sri Lanka little heed is paid by the armed forces to the need to desist from torture, as seen from the few human rights cases brought before court.

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- <sup>1</sup> Jagath P. Senaratne: Political Violence in Sri Lanka, 1977 – 1990, Riots, Insurrections, Counter Insurgencies, Foreign Intervention (see University Press, Amsterdam, 1997)
- <sup>2</sup> Rohan Gunaratne, Indian Intervention in Sri Lanka: The Role of India's Intelligence Agencies, (South Asian Network on Conflict Research, Colombo, 1993)
- <sup>3</sup> ed. Michael Reisman and Chris Antoniou: The Laws of War: A Comprehensive Collection of Primary Documents on International Law Governing Armed Conflict (Vintage Books, United States, July, 1994)
- <sup>4</sup> Jagath P. Senaratne; op.cit. See Introduction specially pp 15 – 16.
- <sup>5</sup> Ed. Michael Reisman and Chris Antoniou, op. cit. See Repression of Abuses and Infractions pp 176 – 177.
- <sup>6</sup> Ibid. See Geneva Convention (III) Relative to the Treatment of Prisoners of War pp 179 onwards to 193 specially: also Howard S. Levve, International Law Studies, Vol. 59 Prisoners of War etc.
- <sup>7</sup> Ed. W. Michael Reisman and Chris T. Antoniou op.cit pp 217 – 218. Also ed. J. Pietet “Commentary on the Geneva Conventions”, (International Committee of the Red Cross, 1960)
- <sup>8</sup> ibid pp 233 - 239
- <sup>9</sup> ibid Section IV “Regulations for the Treatment of Internees” pp 55 - 277
- <sup>10</sup> ibid see “Statute of The International Tribunal” (Security Council Resolution 827 (1993) in pp 393 – 405; also see eds. H.K. Thompson, Jr., and Henry Strutz; Doenitz at Nuremberg: A Reappraisal, War Crimes and the Military Professional, p 181.
- <sup>11</sup> See W. Michael Reisman and Chris T. Antoniou, op. cit – pp XIX,67, 356. Also see 1986. “Nicaragua v United States of America, ibid pp XXX, 12-23
- <sup>12</sup> Henry J. Steiner and Philip Alston: International Human Rights in Context, Second Edition. See “Laws of War and Custom International Law” for further elucidation on pp 59 - 81
- <sup>13</sup> ibid and pp 59 – 81 and W. Michael Reisman and Chris T. Antoniou, op. cit., especially Introduction XVII – XXXII.
- <sup>14</sup> See W. Michael Reisman and Chris T. Antoniou, op. cit. Introduction, p XXI
- <sup>15</sup> ibid.
- <sup>16</sup> ibid. pp XXI – XXIII for further clarification
- <sup>17</sup> ibid. see p XXVII for a discussion
- <sup>18</sup> At one time more than 20,000 deserters were there as the media reported. But secrecy shrouds security information and reliability is limited.
- <sup>19</sup> W. Michael Reisman and Chris T. Antoniou, op. cit. p XXVII