

Sunday, November 01, 2009

The Letter of the Law

Last week the rumour mills went into over-drive with speculation that the Chief of Defense Staff, General Sarath Fonseka, would be throwing his hat into his ring at the presidential election. People were analyzing the speech he made at a Buddhist temple in the USA and snippets of the speech were being emailed around. The Leader of the Opposition went on TV saying that the government was running scared of Sarath Fonseka and Sarath N.Silva. Ranil Wickremesinghe was thereby accepting publicly the fact that while the government was scared of two men who had never been in politics in their lives, the government was not in the least scared of Wickremesinghe who had done nothing but politics all his life, and was leading the main opposition party. It is rarely that a politician passes such a telling indictment upon himself.

Wickremesinghe is obviously waiting for a third contender who will be able to split the vote of the Rajapaksa camp thus giving him a chance at the polls. But who will be the third candidate? If he comes forward, Sarath N.Silva will be only an 'also ran' and will not be able to make any impact on the electorate which is why the entire focus was on a war hero. But then the war hero everybody is talking about is still a serving officer in the armed forces. If he is to contest an election, he will have to resign from the armed forces first. The provisions of the Chief of Defence Staff Act No: 35 of 2009 became fully operational by the Gazette notification 1609/21 issued by the president on July 10, 2009. According to article 3(3) of the Chief of Defence Staff Act, the CDS may at any time resign from his position by letter addressed to the president. However, according to article 3(4) the resignation of the CDS will not take effect until the president accepts the resignation in writing. The question is, what if the president does not accept the resignation, or sends the letter accepting the resignation only after nomination day? The rule that binds all armed forces personnel is that you can join voluntarily, but cannot leave as and when you want. According to the CDS Act, the president has the discretion to accept the resignation of the CDS or not.

Past experience has shown that when it comes to power play, the Rajapaksa regime has a tendency to quote the law. When Janaka Perera contested the North Central Provincial Council election, the powers that be, became suddenly very bureaucratic and quoting the election laws, tried to give Perera only the security that every other PC candidate was entitled to and nothing else! Perera had to go to court to obtain extra security. In this case, too when the law clearly states that the CDS cannot resign unless that resignation is accepted by the president, it is extremely unlikely that the powers that be will not use the law to pre-empt a challenge. Serving military officers cannot contest elections. Hence all this speculation is uncalled for. We have to wait for Nov. 15 until the announcement of an election is made at the SLFP convention. Then we have to wait and see who will be legally in a position to hand in nominations before the end of the deadline.

US report on SL

The US State Department put out their Report to Congress on Incidents during the Recent Conflict in Sri Lanka, just days after the European Commission released their final report on the GSP+ investigation against Sri Lanka. Both reports deal with much the same subject matter, but there are important differences in the approach taken by the Americans. In the past, the Americans were not really professional in their approach to Sri Lanka. The irresponsible statement made by Secretary of State Hillary Clinton about the IMF loan and her remarks in the UN Security Council about rape being used as a weapon of war in SL, were cases in point. This approach gave many Lankans the sinking feeling that the State Department report to Congress was going to be a continuation of the same and would therefore be substantially the same as the two reports of the European Commission put out during the last couple of months.

But this report has however been prepared with much greater professional care than the European Commission's reports on Sri Lanka. The Americans have not tried to draw conclusions from unconfirmed allegations; what they have done in this report is to confront Sri Lanka with these allegations in order to elicit a response - which is quite in order. Unlike the Europeans, the Americans have not reached legal conclusions on the incidents described in their report. They do not even claim that these incidents actually occurred. However the US report is a useful document in that we now know the kind of information the western embassies and international agencies had been receiving in the last few months of the conflict. The US report has quoted Common article 3 of the Geneva conventions that guarantee the protection of all those who do not directly take part in hostilities. In relation to this the US report makes the following points.

- * The state has an inherent right to defend itself.
- * While civilians and civilian objects such as hospitals and schools are generally immune from direct attack, they lose this immunity if they take direct part in hostilities.
- * The civilian population must not be used to shield military objectives or operations from attack.
- * All parties must take all practicable precautions to minimize incidental death and injury to civilians.
- * Whether a certain act is a crime against humanity will depend on the purpose and intent of the act and whether civilians were taking part in hostilities and whether civilian locations were being used by the enemy for military operations.
- * The law recognizes that while schools are presumed to be civilian objects, they are not immune from direct attack if they are being used by the enemy for military action and if their destruction might accordingly offer a definite military advantage.
- * The principle of proportionality requires that there should not be collateral civilian casualties disproportionate to the expected military advantage.
- * Some level of collateral damage to civilians – however regrettable - may be incurred lawfully if consistent with proportionality considerations.

Pragmatism at last

Thus one sees that the Americans have taken a very practical view of war and they are aware of the consequences of giving terrorists the impression that they will be immune to attack if they use civilians as a shield. The US state department never took such matters into consideration when they were out preaching human rights in the past and this report is, in that sense, a watershed. This may be an indication that the state department and the defense department have at last started working together with regard to countries like Sri Lanka instead of working at cross purposes as was the practice in the past. The US report has categorized the wrongdoings that SL government and the LTTE are alleged to have committed under five headings. The first being child recruitment. The allegations in this section are entirely against the LTTE and can be eliminated from what the government has to answer for. Unlike the EC reports, the US has not tried to foist the blame for the underage recruits in the Karuna Group on the SL government.

Besides the US report deals with only the last few months of the conflict, thus rendering superfluous any mention of the Karuna Group. Next comes some allegations that the government killed captives or those trying to surrender. This refers to the Channel 4 video and the suspicion that the LTTE police chief Nadesan and Pulidevan were killed when they tried to surrender. The Chanel 4 video has already been exhaustively examined by the government; after this comes less than a dozen cases of disappearances, which also can be commented on by the government.

The real substance of the US report lies in two areas - harm caused to civilians in the hostilities between the LTTE and the government forces and the question of food and medical supplies to civilians in the conflict zone. Section VI of the US report deals with the targeting of civilians by both the government forces as well as the LTTE. This section lists 217 incidents, 45 of which were by the LTTE. Hence the total number of incidents targeting civilians and civilian targets attributed to the government is 172. Of this, no less than 40 have been strikes on hospitals or medical facilities. If one takes the figures given at face value, it would appear that the government had adopted a unique way of fighting - they seem to have ignored the LTTE and fired only on hospitals so that the unscathed LTTEers, looking back and seeing their hospitals destroyed, would flee in the face of enemy fire for fear of getting injured; because without hospitals, the injured would suffer a painful death. The LTTEer would not mind a quick death on the battle field, but the military was refusing to fire on them and were only targeting medical facilities, so they all fled for fear of injury - which is probably why at the end of the conflict we have over 10,000 unscathed LTTEers who surrendered and no hospitals in the Vanni!

The macabre humour apart, the Americans would have suspected that at least some of these stories were being planted on them and other western embassies and agencies by the LTTE. If the LTTE tells a western embassy that the military was firing upon their positions, the only response they would have got was the suggestion that they should start negotiations with the government. But attacks on civilian targets and especially hospitals, is sure to elicit a response more favourable to them and the pressure would be piled on the government. Indeed it was because of these very reports that the British and French foreign ministers mounted a rescue operation to stop the hostilities. For the LTTE, the civilians were their guarantee of safety and protection; so its natural that they would want to talk of civilian casualties.

Hospital journalism

One of the main conduits used by the LTTE to get their information across to the western embassies and agencies were hospital employees as is obvious from the sheer number of reports involving hospitals. Hospital sources, because they were not combatants and had regular jobs, may have been looked upon by western embassies as relatively reliable sources of information. There are a few entries in the US report that reveal that hospital staff were reporting not only on attacks on hospitals but on civilian casualties elsewhere as well. One thing that can be noted is that no western sources have received any information on the number of LTTE killed. If the hospital and other sources were really independent, they would have been saying that there were so many civilians and so many LTTE cadres killed or injured according to what they saw – these after all were supposed to be eyewitness reports. However, no witness ever seems to have witnessed an LTTEer getting killed or injured even when they were living cheek by jowl with one another; and that makes much of this information suspect. The US report has 45 incidents relating to LTTE atrocities against Tamil civilians, but it appears that these were not the usual 'hospital sources' who reported on civilian casualties caused by the government. It appears from the US report that western embassies and various international organizations had been passive recipients of whatever information was volunteered, and nobody seems to have bothered to ask their sources and witnesses searching questions about the conditions around them. As a result of this, much valuable information has been lost. Whether the available snippets can be inquired into at all without further input from the sources concerned is questionable.

Of course it has to be said that the Americans have been very careful about believing everything they hear. The incidents surrounding the Puthukudirippu hospital bares this out. The state department report began its long list of outrages against civilians with an entry on January 2, to the effect that that the Puthukudirippu hospital was shelled, killing an unspecified number of civilians. Thereafter the same hospital was shelled on January 12, when the patients had to flee to seek shelter from the shelling. The hospital was shelled again the next day on Jan. 13. Despite this, the Americans had used satellite imagery on the Puthukudirippu hospital on January 28, and they report that there was no visible damage to the hospital and that it appeared to be functioning.

The saga of the Puthukudirippu hospital finally comes to an end seven direct attacks later, on March 12 this year. Satellite imagery taken by the Americans on March 16 is said to have shown heavy damage to the hospital on this date. The Sri Lankan military had claimed that the hospital was used both as a command centre and a weapons firing site and that the hospital had earlier been evacuated by the ICRC. So this is an easily verifiable fact – the date the ICRC evacuated the hospital. That the Puthukudirippu hospital complex was used by the LTTE to fire on the government forces was confirmed by sources quoted in the US report itself on January 27, February 1 and February 16.

Absolute prohibitions

As far as harm to civilians in the course of a conflict is concerned, Article 13(3) of Additional Protocol II of the Geneva Conventions which covers internal conflicts stipulates that civilians shall enjoy protection only so long as they do not take direct part in hostilities. It is however in the Rome Statute of the International Criminal Court that war crimes and crimes against humanity

are most comprehensively analyzed. According to Article 8 of the Rome Statute, Intentionally directing attacks on the civilian population not taking direct part in hostilities is wrong. (But by implication, attacking civilians involved in terrorist activity is not wrong). Intentionally directing attacks against buildings dedicated to religion, hospitals and places where the sick and wounded are collected is wrong only if terrorist have not been using those facilities to direct military attacks on the adversary.

International law is not as half as dumb as many people think. Any civilian facility including hospitals is open to attack if terrorist use them to launch attacks. If hospitals and other facilities were given unconditional immunity, hospitals will become the favourite hang outs for terrorists and the end of western civilization will start from hospitals! Article 31(1) of the Rome Statute emphasizes that a person shall not be criminally responsible if the person acts reasonably to defend himself in a manner proportionate to the degree of danger. The only limitation on this right to self defence is the proportionality of the response. The Rome Statute stipulates that if the conduct which is alleged to constitute a crime, has been caused by duress resulting from a threat of imminent death, there is nothing wrong if this person acts reasonably to avoid the threat, provided the person does not intend to cause a greater harm than the one sought to be avoided. The questions raised even in the US report with regard to attacks on civilian targets relate more to the proportionality question than anything else.

There are also some acts that are absolutely prohibited under the Rome statute. Using civilians to render certain areas immune from military operations is wrong in absolute terms. (There are no exonerating circumstances for this.) The killing or wounding of combatants who have laid down their arms or surrendered is absolutely wrong as is intentionally starving civilians as a method of warfare by depriving them of food and medicine and willfully impeding relief supplies. The LTTE stands accused for the first of these and there are allegations against the government over the other two absolute prohibitions. With regard to the allegations against Sri Lanka, Article 22(2) of the Rome Statute says that the definition of a crime shall be strictly construed and in case of ambiguity, the definition shall be interpreted in favour of the person being investigated. Furthermore, Article 54(1) of the Rome Statute says that in order to establish the truth, incriminating and exonerating circumstances should be equally investigated. Article 66 of the Rome Statute declares that the onus is on the prosecutor to prove the guilt of the accused.

Article 7 of the Rome Statue defines the intentional deprivation of access to food and medicine, calculated to bring about the destruction of part of a population, a crime against humanity. This in fact is one of the categories of wrongdoings that find mention in the US report and in the view of the present writer, the most serious allegation against Sri Lanka. There are 56 separate entries in the US report detailing instances when civilians were reported to be in dire need of food, water and medical supplies. While the allegations are serious, this is also the easiest to verify because details of food supplies sent to the Vanni can be easily cross checked. What is suspicious is that while all the reports refer to civilians lacking food or medicine, there are no reports as to how the LTTE was faring even though they were living cheek by jowl with the civilians. When Prabhakaran was killed, he was looking as plump and well nourished as ever, despite having spent months on the run; and when the family members of LTTE cadres had crossed over to government held areas, the cameramen who were relaying the scenes live from the Vanni specifically said that they looked less famished and were in much better shape than

the other civilians. So the level of suffering within the LTTE held area was not uniform and there was a hierarchy of privilege which needs to be investigated.

Need for consistency

What needs to be looked into is why is it that there is not a single instance in the US report of an LTTE cadre being treated at the medical facilities within the no-fire zone. Were the LTTE cadres treated at a separate facility and were they too short of medicine? Were LTTE cadres operated on without anesthetics as the civilians were? Did the LTTE cadres have sufficient food and where did they get it from? It's the LTTE that controlled all supplies to the civilians in the NFZ and if the LTTE had enough of everything, while the civilians went without, then what is the conclusion that one is inexorably led to?

Last week in our critique of the European Commission's final report, we pointed out that the EC had mentioned a figure of more than 2,800 civilians killed and more than 7,000 injured, between January 20 and March 13, 2009, alone, and that this was one of the grounds on which Sri Lanka was to be deprived of GSP+. The EC's report however did not present any evidence other than quoting a statement of the UN Human Rights Commissioner Navi Pillay. When we examine the information on incidents collated in the US report from various sources, we find that the number of killed and injured between January 20 and March 13 according to the US report also works out to something like 2,900 killed and around 6,000 injured. This looks similar to the figures quoted in the EC report and we may well ask 'is this the information that was missing in the European Commission's report?' Generally speaking, most international agencies and western diplomatic sources share the information they get and it may be surmised that what the Americans have is roughly equivalent to what the UN may have.

Since the figures quoted in the US report and the EC report more or less tally, we may surmise that their sources were the same. But the problem is in the conclusions reached. The Americans are not drawing any legal conclusions from the information they have received nor are they even asserting that these incidents actually happened. They know that some may be true and others may be false or exaggerated. But the European Commission has accepted all of it as Gospel and is planning to deprive Sri Lanka of GSP+ benefits on the basis of this information. Before the end of this year, the nations of Europe will have to vote on the Sri Lankan issue. How are these nations going to justify accepting as truth, information that the Americans consider dubious or unconfirmed at best? This I think will be one of the issues that need to be discussed in the talks with the European Commission with regard to the extension of GSP+.