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Legal Opinion concerning the Law Applicable to Military Operations in the Final Stages of the Armed Conflict between the Government of Sri Lanka and the LTTE that ended on 19 May 2009 following intense combat in the Vanni Area of Northern Sri Lanka by Sir Geoffrey Nice, QC and Rodney Dixon, QC

LEGAL OPINION

Introduction

1. We have been asked to provide a legal opinion concerning the law applicable to military operations in the final stages of the armed conflict between the Government of Sri Lanka and the LTTE that ended on 19 May 2009 following intense combat in the Vanni area of Northern Sri Lanka.

2. Our Opinion reflects known factual circumstances of the final months of the conflict and does not address other hypothetical conduct by either side of the conflict.

3. Various reports produced to date have blamed the Government of Sri Lanka for its armed forces unlawfully attacking civilians in the final stages of the conflict. However none of these reports has considered properly, or at all, the complex legal standards applicable to military operations at the stage in a conflict that had been reached in this conflict in early 2009.1

4. As a minimum, principles of distinction and legitimate targeting, military necessity and proportionality have to be addressed before judgment about the rights and wrongs of a military attack can be made. The law in this field is not at all settled in many respects and may be regarded as generally undefined. It requires very careful consideration to be given to the circumstances of any conflict before judgments about legality or illegality of military actions in the conflict are made publicly. The relevant law, it can be argued, should not be discussed in a casual way – in the press, on television, in international organisations etc – if its possible application to parties in armed conflict is going to lead to lasting condemnation of one side and exoneration of the other. Such "discussion may reflect instinctive reactions to the horrifying consequences of battle quite without recognition of the inevitability of grave loss of civilian life being caused where a losing party takes desperate measures to avoid defeat and surrender at a time when defeat and surrender is unavoidable.

5. As far as is known, no report to date has sought to provide a thorough analysis of the application of the law, as presently defined and understood, to the specific factual circumstances of the latter stages of the Sri Lanka - LTTE conflict. Nor has any report – so far as is known – proposed alternatives to the military approach taken by the Government of Sri Lanka and backed up such proposed alternatives by expert military opinion.

6. This Opinion seeks to be a milestone in the process of rigorously defining the law and takes a first step – no more – in applying the law to the known facts, particularly those facts that are widely accepted as having been accurately reported. Our opinion would, of course, be subject to adjustment if further investigation reveals other significant occurrences that should be taken into account.

7. If the approach taken in this Opinion is followed, well-reasoned and dispassionate findings can be reached in the best interests of all concerned, particularly the victims and citizens of Sri Lanka. Only in this way can we at least approach the truth – elusive though that may always be – of the closing phase of this long and bloody conflict.

8. The Opinion sets out the applicable legal framework within which to assess the conduct of the parties in the final months of the conflict. Our conclusion is that, subject to the full factual circumstances being established, the applicable legal standards did allow Sri Lanka Government forces to attack the LTTE and its military locations. But that is not the end of the problem, indeed it is barely the beginning. Any attack, aimed as it was at defeating and finally destroying the LTTE, would only have been lawful if civilian casualties were not excessive and disproportionate in the circumstances. To meet this test the Government forces would need to have assessed – as accurately as possible – the number of civilians at risk, a task made extraordinarily difficult where the LTTE were deliberately and unlawfully protected by civilian 'human shields' in embedded positions. In the cascade of difficulties facing the Government in its attempt to end a civil war, assessments had to be made from a distance about whether the human shields were (i). voluntarily involving themselves in the hostilities and thus

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to be treated as legitimate targets under International Humanitarian Law (IHL), or (ii) were 'hostages' who had been forced to act as shields and / or perform military tasks.

9. Merely to identify the problem is to articulate its scale. But it was not a problem that the legitimate government of the country could overlook / postpone indefinitely / ask others to solve for it. The Sri Lankan Government had a responsibility to recover its proper lawful authority but it had to comply with relevant international law.

10. There is no hard and fast rule on the precise limits of acceptable civilian casualties under IHL, and each situation must be assessed on its merits. As explained below, the peculiar circumstances of the final months of the conflict – which are largely not contested – were ones in which the Government's forces should, in accordance with the rules of IHL, be afforded a margin of latitude commensurate with the military exigencies that they encountered and taking into account the widespread unlawful use of civilians by the LTTE.

11. The problem the Government faced was not one that, at the time, could be solved 'on paper' by lawyers any more than it could now be established by lawyers alone .- in this Opinion or elsewhere - that what was done was lawful or unlawful. As revealed in the analysis of law and practice that follows, this is an area of law heavily dependent for its impact on the lawfulness of what a government does through its military on what senior service officers judged at the time to be lawful. And those officers will often have made judgments in the heat of battle with necessarily incomplete information and intelligence. Post facto assessment of legality in these circumstances requires best analysis by independent top-level military personnel of the justifications made by Sri Lanka's high command and sometimes by its field commanders. In any judicial examination of the lawfulness of what was done by the Government forces, it should be borne in mind that anyone prosecuting a case against the Government for attacks against the LTTE would call (a) military expert(s) to assist the court. And the Government would be in a position to call experts in its defence. The public discussion – that in some quarters has been condemning of the Government – has failed to reflect this proper practice by seeking independent military analysis of what was done. Instead it has generated an emotional response by presenting emotionally charged visual imagery and a simple explanation of the law (at best), all coupled to statistical information that is usually or always highly controversial.

Outline of key factual circumstances

12. The overall factual circumstances of the final months of the conflict are distinctive and possibly unique. No other known conflict has mirrored the characteristics of this decisive stage of the conflict in Sri Lanka when the LTTE was on the verge of being conquered after over 30 years of war but sought, in a compacted period of time and territory, to take every possible step to avoid being completely overwhelmed.

13. It is not disputed that the LTTE in the final stages of the conflict exerted considerable control over large sections of the civilian population, many of whom were its supporters in the broadest sense, in the Vanni in order to seek to protect the LTTE and advance its military cause. The LTTE 'deployed' the civilian population in various ways to support its war effort including by using them as 'human shields' and compelling them to serve as part of their armed forces and support their military objectives. Much of this activity occurred in the Government's designated No-Fire Zones where the civilian population gathered to seek protection. This strategy was employed by the LTTE in an attempt at any cost to prevent the Government from obtaining an outright military victory in the final months of the conflict as the LTTE faced a comprehensive defeat.

14. The Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka² found that there were "credible allegations" that in the time period between September 2008 and 19 May 2009 around 300,000 to 330,000 were held as hostage in the Vanni area by the LTTE and used as human shields at times to seek to avoid being vanquished.' The Report states, inter alia, that:

"Despite grave danger in the conflict zone, the LTTE refused civilians permission to leave, using them as hostages, at times even using their presence as a strategic human buffer between themselves and the advancing Sri Lanka Army. It implemented a policy of forced recruitment throughout the war, but in the final stages greatly intensified its recruitment of people of all ages, including children as young as fourteen. The LTTE forced civilians to dig trenches and other emplacements for its own defences, thereby contributing to blurring the distinction between combatants and civilians and exposing civilians to additional harm. All of this was done in a quest to pursue a war that was clearly lost; many civilians were sacrificed on the altar of the LTTE cause and its efforts to preserve its senior leadership. From February 2009 onwards, the LTTE started point-blank shooting of civilians who attempted to escape the conflict zone, significantly adding to the death toll in the final stages of the war."⁴

15. This specific pattern of conduct by the LTTE in the final months was allegedly used to attempt to draw international attention and intervention, as well as to try, at least, to arrange a cease-fire to prevent the LTTE's demise and to allow it to re-group. It is confirmed in various reports that commented in particular on the use of human shields by LTTE forces:

* In 2011, Amnesty International published a report that concluded that, based on information independently gathered such as eyewitness testimony and information from aid workers, "the LTTE used civilians as human shields and conscripted child soldiers."⁵

* The ICRC Head of Operations for South Asia, Jacques de Maio, informed US officials that the LTTE were trying to keep civilians in the middle of a permanent state of violence. A US cable of de Maio's information states that the LTTE "saw the civilian population as a protective asset' and kept its fighters embedded amongst them."⁶

* On 26 March 2009, the UN Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, John Holmes, informed the UN Security Council that "the LTTE continue to reject the Government's call to lay down their arms and let the civilian population leave, and have significantly stepped-up forced recruitment and forced labour of civilians ... at least two UN staff, three dependents and eleven NGO staff have been subject to forced recruitment by the LTTE in recent weeks."⁷

* Further reports stated that the LTTE used the protection and resources provided by the UN and various NGOs for military purposes: for example, boats given by 'Save the Children' tents from the UNHCR, and a hospital built with INGO support were found to have been used by the LTTE forces to bolster their military campaign.⁸

* The testimony of eyewitnesses like Dr. Shanmugarajah before the Commission of Inquiry on Lessons Learnt and Reconciliation in November 2010 may also be relevant. Dr. Shanmugarajah's testimony described the time period from January to May 2009. He stated that his work at Kilinochchi and Mullaitivu hospitals, that was affected by the nearby fighting, included the treatment of both civilians and LTTE combatants who sustained injuries from shelling attacks nearby the hospital. He also stated that civilians would come to the hospital after being shot by LTTE forces for trying to move to safer areas.⁹

16. It has also been recorded, and it does not appear to be disputed, that LTTE combatants fired artillery from civilian areas and from civilian installations in the No-Fire Zones in order to seek to shield themselves from attack by Government forces:

* The Darusman Report found that the LTTE "fired artillery in proximity to large groups of internally displaced persons (IDPs) and fired from, or stored military equipment near, IDPs or civilian installations such as hospitals."¹⁰

* On 26 March 2009, the UN Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, John Holmes, briefed the UN Security Council on the humanitarian situation in Sri Lanka stating that: "The Government have promised on several occasions to refrain from using heavy weapons and to uphold a 'zero civilian casualty' policy. However, there are continuing reports of shelling from both sides, including inside the 'no-fire zone, where the LTTE seems to have set up firing positions."¹¹

* On 27 January 2009, US Ambassador Robert Blake stated that "The LTTE must immediately desist from firing heavy weapons from areas within or near civilian concentrations."¹² On the same day, Ambassador Blake sent an Action Request to the Norwegian Ambassador, Torre Hattrem, noting that "The U.S. has publicly urged the LTTE to allow IDPs freedom of movement and to not fire from positions in or near IDP concentrations".¹³

* In January 2009, the Bishop of Jaffna Rt. Rev. Dr. Thomas Savundaranayagam wrote a public letter to President Mahinda Rajapaksa stating: "We are urgently requesting the Tamil Tigers not to station themselves among the people in the safety zone and fire their artillery — shells and rockets at the army. This will only increase more and more the death of civilians thus endangering the safety of the people."¹⁴

* A US cable relaying information obtained from the ICRC Head of Operations for South Asia, Jacques de Maio stated that "De Maio said that the LTTE commanders' objective was to keep the distinction between civilian and military assets blurred. They would often respond positively when the ICRC complained to the LTTE about stationing weapons at a hospital, for example. The LTTE would move the assets away, but as they were constantly shifting these assets, they might just show up in another unacceptable place shortly thereafter."¹⁵

* It is also reported that the LTTE continued to pursue its policy of using suicide bombers to target the civilian population during the conflict and even after it had ended.¹⁶

17. It has been emphasised that the lack of uniforms worn by LTTE forces often made it very difficult to be able to draw clear distinctions between civilians and armed forces. It was noted in the Darusman Report that the LTTE's "positioning of mortars and other artillery among IDPs" and the fact that "LTTE cadre were not always in uniform" led to "retaliatory fire by the Government, often resulting in civilian casualties."¹⁷ The Darusman Report further found that forcefully using civilians to dig trenches and

other military facilities contributed "to blurring the distinction between combatants and civilians and exposing civilians to additional harm. "18 As set out below, this is a matter of particular importance when considering the application of the law on distinction and proportionality, particularly in circumstances when human shields are being employed either voluntarily or under compulsion.

18. An obviously vital issue - which is disputed - is the number of civilians who were killed in the final months of the conflict, and in particular (leaving aside who was responsible for these deaths) what proportion of these persons could be regarded as directly participating in hostilities which would have allowed them to be legitimately targeted under THL.

19. The Darusman Report claims that the figure for civilian deaths is "a range of up to 40,000"¹⁹ but concedes that further investigation is required.²⁰ Although the Darusman Report asserts that there are a "number of credible sources" for this figure, none is identified and the Report fails to give any description or breakdown of the circumstances of each of these deaths, the basis for their alleged 'civilian status', or who may be responsible. Other sources estimate the figure to be much lower including a US State Department Report which stated that between January and April 2009 a figure of 6,710 casualties represented deaths of both LTTE cadres and civilians.²¹ It also has to be taken into account that there is evidence that the LTTE sought to exaggerate the number of civilian casualties.²²

20. The true number of people killed in the conflict is of critical significance to the application of the laws of war, especially in respect of whether any civilian loss of life (as opposed to deaths of persons who were killed while participating in hostilities) was proportionate to the military advantage of any particular attack or series of attacks (assuming that such persons were killed in these attacks and not by other means).

Applicable legal standards under International Law

21. The relevant legal rules - which constitute the prevailing law - are dealt with in two parts: (i) an outline of the core principles of distinction, military necessity and proportionality, and the complexities of their application, and (ii) an explanation of whether the use of civilians in the hostilities and particularly as human shields (as part of a deliberate and A-ewidespread policy) prevents military objectives from being attacked lawfully, and if not, under what circumstances are attacks permissible - a critical question which lies at the heart of the inquiry into the final period of the Sri Lankan conflict.

i. Protection of civilians and the principle of proportionality

22. A central tenet of IHL is that the parties to a conflict may not directly target and attack civilians and the civilian population. Article 51(1) and (2), and Article 57(1) of Additional Protocol I prohibit attacks on civilians.²³ Article 52(1) provides the same protection for civilian objects; stating that: "Civilian objects shall not be the object of Attack or of reprisals."²⁴

23. Military objects (whether individuals, equipment, locations etc), on the other hand, may be attacked. Article 52(2) of Additional Protocol I provides that "Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."²⁵

24. As part of the obligation to protect civilian populations, Article 51 of Additional Protocol I prohibits parties from carrying out indiscriminate attacks which do not specifically strike a military object or employ a method or means of combat which can be specifically directed at a military object only. In particular, any attack which strikes both military and civilian objects without distinction constitutes an indiscriminate attack and is prohibited.²⁶ Therefore, a party is obligated to "[d]o everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives."²⁷

25. These core provisions on distinction must be implemented alongside two equally key principles of 'military necessity' and 'proportionality'. The concept of military necessity requires a balance to be struck between protecting civilians and the necessities of military operations. It is described as a "symbiotic relationship"²⁸ where "military forces in planning military actions are permitted to take into account the practical requirements of a military situation at any given moment and the imperatives of winning... winning the war or battle is a legitimate consideration, though it must be put alongside other considerations of IHL." ²⁹

26. In its commentary on the Geneva Conventions, the ICRC notes that: "The entire law of armed conflict is, of course, the result of an equitable balance between the necessities of war and humanitarian requirements. There is no implicit clause in the Conventions which would give priority to military requirements. The principles of the Conventions are precisely aimed at determining Where the limits lie; the principle of proportionality contributes to this." ³⁰

27. The rule of proportionality is set out in Article 57 of Additional Protocol I.³¹ It is accepted that the loss of civilian life may be incidental and unavoidable during attacks on military objects, but a party to

the conflict is obligated to refrain from launching an attack which would result in the "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. ,32 An attack anticipated to cause collateral damage which is excessive in relation to the military advantage must be cancelled or suspended 33 and if carried out could be categorised as a prohibited ' indiscriminate attack'.34

28. Most significantly for present purposes, there is no clear rule on what constitutes excessive' collateral damage or what is considered appropriate 'military advantage'. In other words, there is no set formula or ratio (of civilian losses to the intended military advantage) to determine the proportionality of any given attack. The UK Manual on the Law of Armed Conflict notes that "[t]he law is not clear as to the degree of risk that the attacker must accept. ,35 The ICRC accepts that it is a "subjective evaluation, the interpretation must above all be a question of common sense and good faith for military commanders. In every attack they must carefully weigh up the humanitarian and military interests at stake."36

29. Evaluation of the proportionality of an attack, and whether the resulting collateral damage could be 'excessive' should thus be based on a thorough assessment of the prevailing facts:

- The ICTY has held that "[i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack. ,37
- In 2009 the US State Department issued a 'Report to Congress on Incidents During the Recent Conflict in Sri Lanka' which stated that: "The principle of proportionality requires that parties to a conflict refrain from attacks on military objectives that would clearly result in collateral civilian casualties disproportionate to the expected military advantage. Accordingly, some level of collateral damage to civilians — however regrettable — may be incurred lawfully if consistent with proportionality considerations. All parties to a conflict must take all practicable precautions, taking into account both military and humanitarian considerations, in the conduct of military operations to minimise incidental death, injury, and damage to civili • d civilian objects."38
- The Israeli Ministry of Foreign Affairs has stated that "the core question, in assessing a commander's decision to attack, will be (a) whether he or she made the determination on the basis of the best information available, given them circumstances, and (b) whether a reasonable commander could have leached a similar conclusion."39

30. A fundamental part of the equation is that the 'military advantage' of an attack must be weighed in the calculation against the civilian loss of life to determine whether the loss incurred was excessive and thus unlawful. The military advantage anticipated from a particular attack should be assessed from the standpoint of the overall objective of the military operation. The ICRC has observed that the military advantage "can only consist in ground gained and in annihilating or weakening the enemy armed forces." " Military advantage may legitimately include protecting the security of the commander's own forces. 41 In the ICJ's Advisory Opinion on the use of nuclear weapons the Court did not rule out the use even of nuclear weapons in seeking a military advantage, stating:

"the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake. ,42

31. Given that the conflict in Sri Lanka was an internal armed conflict, I and not an international conflict, it should be noted that Additional Protocol II, which applies to internal armed conflicts, also prohibits the civilian population from being the subject of attack. Article 13 of Protocol II sets out similar protections as those provided in Protocol I. 43

32. Although the provisions of Additional Protocol II do not expressly include the principles of proportionality as set out in Additional Protocol I, they should be taken into account when considering the present conflict. It has been held that these rules apply in all conflicts irrespective of the nature of the conflict.44 In any event, in order to assess the lawfulness of the military operations in the present case, it is appropriate to draw on these principles and rules of IHL.

ii. Use of civilians in the military campaign and as human shields

33. The use of human shields by parties to a conflict is specifically prohibited under IHL. Article 51(7) of Additional Protocol I provides that: "The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations."45

34. The use of civilian objects as shields is similarly prohibited in Article 12(4) of Additional Protocol I which provides that: "Under no circumstances shall medical units be used in an attempt to shield military objectives from attack."⁴⁶ The ICRC commentary on the Geneva Conventions notes that this prohibition applies in both international and non-international armed conflicts. ⁴⁷

35. A distinction must immediately be drawn between those civilians who voluntarily act as shields, as opposed to those who are forced to participate in this unlawful activity. The former category can be regarded as persons who take part in the hostilities and who thus lose their status and protections as civilians while participating in the hostilities. They may be legitimately targeted while taking part in hostilities and are not to be "taken into account when assessing collateral damage."⁴⁸ Article 51(3) of Additional Protocol I and Article 13(3) of Additional Protocol 11 both provide that civilians enjoy protection "unless and for such time as they take a direct part in hostilities." The ICRC commentary notes that once the civilian ceases to take part in the hostilities, the civilian regains his right to protection.⁴⁹

36. Involuntary or forced human shields, on the other hand, retain their civilian status and protections under IHL at all times. In a situation where civilian or civilian objects are involuntarily used as shields, Article 51(8) of Additional Protocol I states that the violation of the prohibition against shielding "shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the preliminary measures provided for in Article 57 [cited above] ,⁵¹ The ICRC's commentary on Article 51(8) does not forbid attacks on military objectives in the event that they are shielded by civilians but explains that it is compulsory to apply the provisions relating to the protection of civilians before proceeding with such an attack.⁵¹

37. Accordingly, the "use of [involuntary] human shields does not necessarily bar attack on a lawful target"⁵² but the attack must nevertheless be conducted in accordance with the rules of IHL, including the application of the principle of proportionality to assess whether the military advantage of the attack outweighs the humanitarian protections afforded to the civilians in question. The fact that the enemy has acted unlawfully and placed civilians in harm's way can be taken into account as an important factor when assessing whether the number of civilian casualties is so excessive as to outweigh the military advantage. In other words, specific allowance can be made for the enemy's unlawful conduct in the 'proportionality' calculation as it is inevitable that civilian casualties will be higher in these circumstances.

38. This position has been widely endorsed:

- The UK's Manual of the Law of Armed Conflict provides that "if the defenders put civilians or civilian objects at risk by placing military objectives in their midst or by placing civilians in or near military objectives, this is a factor to be taken into account in favour of the attackers in considering the legality of attacks on those objectives", and that "The enemy's unlawful activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected."⁵³
- The ICRC's Model Manual on the Law of Armed Conflict for Armed Forces states that the attacking commander is "entitled to take the defending commander's actions into account when considering the rule of proportionality." ⁵⁴
- Human Rights Watch has stated in relation to human shields used in the conflict in Iraq that "a military objective protected by human shields remains open to attack, subject to the attacking party's obligations under IHL to weigh the potential harm to civilians against the direct and concrete military advantage of any given attack, and to refrain from attack if civilian harm would appear excessive."⁵⁵
- Similarly, a policy paper from the US Joint Chiefs of Staff states that "Joint force targeting during such situations is driven by the principle of proportionality, so that otherwise lawful targets involuntarily shielded with protected civilians may be attacked, and the protected civilians may be considered as collateral damage, provided that the collateral damage is not excessive compared to the concrete and direct military advantage anticipated by the attack."⁵⁶
- In addition, leading scholars, experts and publicists in IHL have stressed that "the proportionality assessment... cannot be detached from the shielding party's actions and ought to take into account the incentive to illegally use civilians as human shields."⁵⁷ It has been explained that "the measure of proportionality must be adjusted" particularly "when the use of involuntary or unknowing human shields is part of a widespread or systematic policy."⁵⁸ The principle of proportionality must be applied but "the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that — if an attempt is made to shield military objective with civilians — civilian casualties will be higher than usual. ,⁵⁹
- ⁵⁷ A leading expert and publicist Major-General A.P.V. Rogers similarly states that a court approaching the issue should take into account the use of human shields and give the necessary weight to this consideration so as to redress the balance between the rights and duties of the opposing parties "which otherwise would be tilted in favour of the unscrupulous."⁶⁰

39. The basic rule is thus that it is not unlawful under IHL to target military objectives (including soldiers, military equipment, locations etc) when they are guarded or surrounded by involuntary civilian human shields or hostages. This rule is contingent on adherence to the laws applicable to military attacks - including respect for the principles of proportionality - but by taking into account that the 'proportionality' equation must be considered in light of the unlawful use by the opposition of civilians and by adjusting the proportionality ratio accordingly.

40. It is strongly contended by some scholars that "this adjustment is necessary precisely to achieve greater protection for civilians"⁶¹

- Rubenstein and Raznai identify that use of human shields by a party "can - in order to compensate for its military disadvantage, or, alternatively, to enhance its military capacity - effectively immunize a military objective from an attack by placing enough civilians at risk, thereby gaining a direct benefit from violating international law." They explain that in these circumstances the application of the proportionality requirement should not shift "the responsibility from the shielding party to the impeded one" as this "increases - and perhaps even legitimizes - the danger to civilians during hostilities, rather than reducing it". They add that "if one party continuously and persistently uses civilians as shields, the adversary would eventually and inevitably forsake its commitment to spare civilians and would attack enemy combatants and targets despite the human shields' presence. Ongoing and systematic use of civilians as human shields would justify this adjusted assessment, since it would also create an incentive to lessen the use of the human shields tactic, ultimately enhancing civilian protection during armed conflicts."⁴²

- W. Hays Parks emphasizes that "While an attacker facing a target shielded from attack by civilians is not relieved from his duty to exercise reasonable precautions to minimize the loss of civilian life, neither is he obligated to assume any additional responsibility as a result of the illegal acts of the defender. Were an attacker to do so, his erroneous assumption of additional responsibility with regard to protecting the civilians shielding a lawful target would serve as an incentive for a defender to continue to violate the law of war by exposing other civilians to similar risk."⁴³

- The ICRC has stated that "if one of the Parties to the conflict is unmistakably continuing to use this unlawful method for endeavoring to shield military objectives from attack, the delicate balance established in the Conventions and the Protocols between military necessity and humanitarian needs would be in great danger of being jeopardized and consequently so would the protection of the units concerned"⁶⁴

41. An appropriate adjustment must therefore be made in determining whether the civilian loss is justified in circumstances in which the other side has violated IHL to itself seek to gain a military advantage. As has been noted, in these circumstances, 'proportionality' must itself be proportionate.⁶⁵

Application of these legal standards to factual circumstances

42. As noted above, it was widely reported that LTTE forces systematically used civilians as human shields in the final stages of the conflict in an attempt to survive as a military force and thus to gain a military advantage. The taking of an estimated 300,000 to 330,000 civilians as hostages and their use as human shields at times for military purposes so as to defend the LTTE's military objectives may, on any view, be said to have constituted widespread violations of the prohibition on the use of civilians and civilian objects as human shields.⁶⁶

43. It would have been very difficult for the Government forces to determine at the time the extent to which these civilians were voluntarily serving as human shields, and were thus legitimate military targets while taking part in the hostilities. In any event, the Government forces were entitled under IHL, however harsh this sounds, to regard the deaths of civilians who were forced to participate as human shields as in theory justifiable 'collateral' consequences of their attacks, given the military objective of the attacks. Such terrible losses, of course, must not have outweighed the military objective, sought and eventually achieved, by the Government's conquering of the LTTE in order to end the conflict once and for all. This issue may well be the focus of any and every proper review of the lawfulness of the actions of Sri Lankan Government forces in the later stages of the conflict.

44. This is of course not a straightforward calculation to make but the Government forces would have been assisted by the rules of IHL which permitted commanders to adjust the ratio of civilian deaths as set against the intended military advantage in favour of the attainment of the military objectives given that the forces they opposed pursued a widespread unlawful policy of using civilians to seek to press their own military advantage and to undermine the military mission of the advancing forces. It might also be argued as reasonable for Government forces to have assessed the specific circumstances (involving tens of thousands of civilians being marshaled by the LTTE to avoid defeat at any cost in the final weeks of the conflict) to be at that end of the spectrum which would most favour a marked adjustment in the 'proportionality' calculation to take account of the widespread unlawful conduct of the LTTE and of the revealed past conduct of the LTTE to expose innocent civilians to death, for example by its policy of suicide bombings. As noted above, this policy continued in the final phases of the conflict and thereafter. The military objective of putting an end to the implementation of this policy and the obvious danger it caused to citizens, would be a factor that Government forces could have

taken into account when assessing the proportionality of any attacks aimed at destroying the perpetrators of this policy and the collateral effects of such attacks on any civilians.

45. It would seem that the Government forces would have been entitled to take into account a variety of factors at the time, which reasonable commanders in their same position would have thought necessary and prudent to consider when deciding on the nature, target and proportionality of any military attack:

- There were undoubtedly LTTE military objects situated throughout the Vanni including in the No-Fire Zones which could be legitimately targeted with the aim of completely overwhelming and destroying the LTTE to bring to a conclusive end to this extended conflict.
- As was widely known, the LTTE's strategy was to use the civilian population of the Vanni (whether voluntarily or not) for the sole purpose of defeating the Government's military campaign to conquer the LTTE and for the LTTE to continue to exist and be able to fight against the Government.⁶⁷
- As already highlighted, any assessment of the portion of civilians who were voluntarily assisting the LTTE, and hence participating in the hostilities, would have been extremely difficult or impossible to make accurately; but this could not of itself free the Government forces from their duty to act with the legitimate military objective of ending the conflict.
- Moreover, the LTTE had conscripted civilians of all ages into the LTTE forces⁶⁸ making it very difficult for the Government forces to differentiate between civilians and fighters, as well as between fighters and human shields.
- The absence of any uniforms worn by the LTTE combatants would have made the distinctions to be drawn between civilians and fighters even harder, for the Government forces.⁶⁹
- Various reports indicate that LTTE forces fired artillery from civilian areas or near civilian installations to attempt to shield themselves from attack and total destruction.⁷⁰ LTTE forces also stationed weaponry in civilian locations such as hospitals.⁷¹
- It was known that the LTTE forces were using heavy artillery which was fired from locations in the Vanni, including the No-Fire Zones.⁷² These weapons and locations would have been regarded as legitimate military targets and could themselves have been targeted with weaponry appropriate and proportionate to seeking the destruction of the LTTE's weapons.⁷³

46. The conduct of the Government would have to be measured by considering each of these and all other relevant factors. As a starting point, at least, it would have to be taken into account that the Government of Sri Lanka stated throughout the conflict that it was actively distinguishing between civilians and those involved in hostilities in its planning of attacks. For example, in suggesting the demarcation of a 'no-fire zone' for keeping civilians and IDPs away from fight, the Government directed that "the presence of Internally Displaced Persons (IDPs) and civilians should be taken in account, to guarantee their safety and security, in order to avoid any collateral damage."⁷⁴ A US cable dated 27 January 2009 noted that the "Government has gained considerable credit until this point for conducting a disciplined military campaign over the past two years that minimized civilian casualties."⁷⁵

47. This would only be a starting point as the factors that then arose in the conflict – certain of which have been outlined above – would have to be appraised as those which characterised the subjective conditions faced by the commanders in the field. No definitive ratio for acceptable civilian losses under IHL (even though all losses are lamentable) exists or can be pinpointed in this Opinion. Indeed, there is no known case law that assists on the specific subject of proportionality in the context of human shields.⁷⁶

48. Particular attacks and the overall pattern of attacks must fall to be assessed on the particular circumstances at the time and how they would have been known to the commanders charged with the mission of winning (and ending) the war. It is clear that a well-established set of rules under IHL would permit some loss of civilian lives in the specific circumstances of the final phase of the conflict in the Vanni. It may also be argued that the justifiable number of such losses could take account of the opposing party's unlawful reliance on the civilian population, which in the present case was by all accounts substantial and widespread and likely in the mid- and longer- term to lead to yet more substantial loss of life.

49. It is clear from the above analysis of the law and from authoritative commentary (from the ICRC and from legal authorities of the ICTY and other courts) that assessments of the lawfulness of attacks must take account of the reaction of commanders on the ground to the situations they faced. Post facto, such 'would-be' assessments can only be reconstructed by top-level military personnel from countries completely uninvolved in the conflict. This is an exercise those criticising the Government of Sri Lanka have not performed.

Conclusion

50. The conclusions expressed in this Opinion are unavoidably confined by the available evidence about the factual circumstances and are without the benefit of a full investigation into the particular circumstances of each attack.

51. However, the Opinion sets out a legal framework within which the Government forces could have been permitted to act without transgressing the limits of IHL, and against which their actions can be measured in accordance with properly defined legal standards.

52. Any future inquiry, whether by the UN or any other body, is strongly encouraged to draw on this legal framework for its work, and to avoid making findings based on generalised statements about the law that lack rigorous analysis. Similarly unfortunate would be any such inquiry failing to understand the need for calculations to be made of what, for any particular attack, would have been the assessments of the putative reasonable commander in the field.

Sir Geoffrey Nice QC

Rodney Dixon QC

London

22 August 2014

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