

Advertise here

HOME NEWS FEATURES SPORTS BUSINESS OPINION EDITORIAL IMAGE GALLERY CONTACT US

NAVIGATE : [Home](#) » » [What the international experts say \(3\)](#)

What the international experts say (3) 'WAR CRIMES IN SRI LANKA'

March 18, 2015, 12:00 pm



Opinion to the Commission from Professor DM Crane and Sir Desmond de Silva, QC re.

Legal Issues pertaining to the use of Human Shields and Hostage Taking by the Liberation Tigers of Tamil Eelam (LTTE) by Professor David M Crane, Sir Desmond de Silva, QC and Advisory Council of Experts

INDEX

INTRODUCTION AND FACTUAL ASSERTIONS

PARA 1 - 5

STATEMENT OF THE LEGAL STATUS OF THE CONFLICT PARA 6 - 8

ISSUES PRESENTED PAGE 4

1. Whether the LTTE's attempts to immunise its military leadership and assets through the criminal act of hostage taking and the subsequent internment of civilians near areas of strategic importance constitutes the international crime of Human Shielding, and;

2 Whether an evaluation of the customary principle of Proportionality relative to the government's military operations is meaningfully affected by the LTTE's intentional use of civilian hostages as human shields for the purpose of using any loss of civilian life to discredit the government, and;

3. Whether civilians may lose their protected status by becoming voluntary "hostages" for the purpose of creating a human shield in order to assist a belligerent party in gaining a military advantage, and;

4. Whether an evaluation of the customary principle of distinction relative to the government's military operations is affected by the LTTE's decision to use combatants not in uniform to enter the conflict with the intent to gain a military advantage by making it more difficult to distinguish between combatants and civilians or to deliberately conduct their operations blurring the distinction between civilians and combatants.

DISCUSSION

A. The Definition Of The International Crime Of Human PARA 9 — 13 Shielding

B. Findings As To The First Question PARA 14 — 17

C. The Customary Principle of Proportionality PARA 18 — 36

D. Findings as to the Second Question PARA 37 — 43

E. Definition of "Direct Participation" PARA 44 — 45

F. Voluntary Human Shielding as "Direct Participation" PARA 46 — 51

G. Findings as to the Third Question PARA 52 — 73

Breaking News

Await Breaking News

Last Updated Jan 19 2017 | 09:08 pm

...

Featured News



ARCHIVES

RELATED LINKS

Friday, 20th January 2017 [Current Issue]

H. Findings as to the Fourth Question PARA 74 — 78

CONCLUSIONS PARA 79 — 84

OPINION TO THE COMMISSION FROM PROFESSOR DAVID M. CRANE and SIR DESMOND de SILVA QC2,

Re: Legal issues pertaining to the use of Human Shields and Hostage Taking by the Liberation Tigers of Tamil Eelam (LTTE).

1. INTRODUCTION AND FACTUAL ASSERTIONS:

2) It is asserted that, for thirty years, the Liberation Tigers of Tamil Eelam (LTTE) were responsible for conducting numerous attacks against the government of Sri Lanka (GOSL or the Government) and its citizens as part of its effort to create a separate Tamil state.³ After repeatedly bailing to reach a peaceful settlement with the LTTE leadership through peace talks, the Government was forced to confront the LTTE's determined effort to utilize the presence of the civilian population of the Vanni so as to immunize their positions from attack, to avoid defeat in battle, and to ensure the preservation of the LTTE leadership to enable them to continue waging their war.

3) After the fall of Kilinochchi in the 2nd January 2009 to the SLA, in order to secure the safety of hundreds of thousands of civilian Tamils the Government set up a series of No Fire Zones (NFZ's). Despite this effort, the LTTE allegedly refused to recognise the NFZs. International law requires that safe areas, ceasefires and truces are accepted by both warring parties: agreement is a pre-requisite for legitimacy. Due to the refusal of the LTTE to recognise any such NFZs the laws relating to such zones have less relevance to any analysis of the situation in the last stages of the conflict. It is asserted that the LTTE fighters took advantage of the NFZs, embedded themselves in the NFZ's and began firing at the military forces from within the zones.⁴ Additionally, the LTTE allegedly held thousands of civilians and some UN aid workers hostage in the NFZs as human shields in order to deter the military from firing upon them while they conducted their attacks.

4) Eventually, the GOSL declared victory on 19th May 2009, but allegations that tens of thousands of civilians were killed in the final phase of the war and that civilian property, such as local hospitals, were damaged have been used to support the argument that the government committed war crimes during this operation. However, the Government contends that civilians and the hospitals were never the intended target of their attacks, rather the SLA were returning fire against enemy targets embedded as they were amidst civilians and close to hospitals.

5) In addition, other allegations have been made that the government killed LTTE leaders after they had already surrendered and had laid down their arms. This is based on video footage received by local media.

6) What follows is a discussion of the legal implications of the LTTE's alleged hostage taking and use of human shields as it relates to the potential liability on the part of the Government of Sri Lanka for alleged war crimes. The discussion will begin with a presentation of existing substantive law followed by an analysis of the facts alleged by the relevant parties in the instant case.

STATEMENT OF THE LEGAL STATUS OF THE CONFLICT:

7) In the instant case, the Sri Lankan Conflict qualifies as a non-international armed conflict (NIAC) as a matter of law. In the landmark Tadic decision, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), relying on existing custom, established what is now widely recognised as a two part test for determining whether a conflict qualifies as a NIAC, that is whether there is: (1) protracted, armed violence (2) between governmental authorities and organised armed groups within a state. This twofold test has since been adopted by a myriad of other international criminal courts including the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC) and is widely considered authoritative.

8) As to the first element, one highly dispositive factor is the duration of the conflict. Here, the conflict between the LTTE and the GOSL lasted almost 30 years, certainly sufficient duration to satisfy the first element of the definition. As to the second element, the ICTY has made it clear that some degree of organization by the parties will suffice, thereby establishing a very low threshold for what constitutes an "organised armed group".¹⁵ In the instant case, it is well documented that the LTTE has been a "disciplined and highly effective conventional fighting force" since the late 1990s, possessing both naval and air assets. The LTTE's military capabilities are certainly sufficient to establish the second element of the argument.

9) With both elements satisfied, it is likely that most impartial judges would agree that the Sri Lankan conflict is properly categorized as a NIAC and that any analysis of the legal issues

[Thursday, 19th January 2017](#)

[Wednesday, 18th January 2017](#)

[Tuesday, 17th January 2017](#)

[Monday, 16th January 2017](#)

[Sunday, 15th January 2017](#)

[More Archives](#)

appurtenant to that conflict should be categorised accordingly.

ISSUES PRESENTED:

1. Whether the LTTE's attempts to immunise its military leadership and assets through the criminal act of hostage taking and the subsequent internment of civilians near areas of strategic importance constitutes the international crime of Human Shielding, and;
2. Whether an evaluation of the customary principle of proportionality relative to the government's military operations is meaningfully affected by the LTTE's intentional use of civilian hostages as human shields for the purpose of using any loss of civilian life to discredit the government, and;
3. Whether civilians may lose their protected status by becoming voluntary "hostages" for the purpose of creating a human shield in order to assist a belligerent party in gaining a military advantage, and;
4. Whether an evaluation of the customary principle of distinction relative to the government's military operations is affected by the LTTE's decision to use combatants not in uniform to enter the conflict with the intent to gain a military advantage by making it more difficult to distinguish between combatants and civilians or to deliberately conduct their operations blurring the distinction between civilians and combatants.

DISCUSSION:

Whether the LTTE's attempts to immunise its military leadership and assets through the criminal act of hostage taking and the subsequent internment of civilians near areas of strategic importance constitutes the international crime of Human Shielding:

A. The Definition of the International Crime of Human Shielding:

10. In both international and non-international armed conflicts, customary international law prohibits the use of civilians to shield military objectives and operations. This practice, known as human shielding, has been held as a "grave breach" and a violation of the "laws or customs of war" by the ICTY Trial Chamber.

11. Recently, when addressing the law applicable to the Sri Lankan Armed Conflict in 2009, the United States categorically affirmed this position, declaring that "the civilian population must not be used to shield military objectives from military attack."

12. In 1996, the ICTY determined that the facts contained in an indictment against Radovan Karadzic and Ratko Mladic were sufficient to constitute the crime of Human Shielding. According to the indictment, the accused had captured at least 248 UN personnel and ordered their subordinates to place the hostages at several potential NATO air targets, such as ammunition bunkers and military communication centres, in order to make it difficult for NATO to target those sites.

13) The ICTY has also determined that, as long as protected detainees (civilians or POWs) are being used to shield military objectives from attacks, a war crime has been committed regardless of whether the detainees were actually harmed or attacked. In Blaskic, the accused was convicted of using civilian hostages as human shields to protect his headquarters at the Hotel Vitez, but appealed on the grounds that the hotel was not under attack at the time and that the hostages did not suffer any mental or physical harm.²³ The court affirmed the conviction holding that it was sufficient just to prove that the civilians were placed at the hotel for the strategic purpose of protecting the headquarters.

14) It is also noteworthy that the Israeli High Court found the Israeli Defence Force's (IDF) Early Warning program to be an illegal use of a human shield.²⁵ Under the Early Warning Program, the IDF would solicit Palestinian residents to warn civilians in the West Bank that the IDF would be conducting military operations. The resident would not be asked to do this if the IDF believed he or she was at risk and, according to the IDF, the residents were not forced if they did not want to participate. Nevertheless, the Justices determined that using civilians to conduct missions on behalf of the military is the creation of a human shield because it puts civilians into combat zones and it is being done for the advantage of the IDF. This case demonstrates that the standard in many cases for what constitutes the unlawful act of human shielding has been relatively low, and an advantage sought does not need to rise to the level of immunization from attack before it becomes illegal; any advantage may-be sufficient.

B. Findings as to the First Question

15) There is evidence to suggest that the LTTE were firing artillery at the SLA from the Is' NFZ from

the very outset of its creation. The Bishop of Jaffa in a letter to the President on 25 January, 2009, stated;

"We are also urgently requesting the Tamil Tigers not to station themselves among the people in the safety Zone and fire their artillery shells and their rockets at the army. This will only increase more and more the death of civilians thus endangering the safety of the people."

16) Throughout the final months of the Sri Lanka Conflict in 2009, it has been asserted that the LTTE kept up its attacks on the SLA from all NFZ's that were set up by the Government. This was allegedly done with the intent to immunise themselves from attacks by government security forces; the very same activity and intent which the Monadic court found sufficient to constitute human shielding.

17) While a distinction may be drawn between the facts in Mladic, where the accused individuals were placing protected persons in strategic areas, and the instant case, where the LTTE were merely entering NFZs where civilians were already heavily concentrated, this distinction is not legally relevant. As Blaskic noted, Geneva Convention IV, Art. stands for the premise that even the mere presence of protected persons cannot be used to render a military target immune from attack. In other words, a belligerent who hides within an area with high concentrations of civilians is committing the crime of Human Shielding even if the belligerent party is not 'actively placing them into a location. Furthermore, there are numerous reports of LTTE holding UN personnel and their families hostage in the NFZs in order to prevent or make difficult any counter attack by the SLA; facts which are nearly identical to those which the Mladic court relied upon in its determination of the sufficiency of the indictment against the defendants for the crime of Human Shielding.

18) For all the aforementioned reasons, the LTTE's activities as alleged, both in hostage taking and redeployment to the NFZ's with the intent of immunising its assets from attack—if true—would likely support LTTE liability for the crime of Human Shielding.

Whether an evaluation of the customary principle of Proportionality relative to the government's military operations is meaningfully affected by the LTTE's intentional use of civilian hostages as human shields for the purpose of using any loss of civilian life to discredit the government: ;

A. The Customary Principle of Proportionality:

19) The laws and customs of war prohibit the "launching [of] an attack which may be expected to cause 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" This principle has been applied coequally to operations involving both attack and the exercise of self-defence, with the principle operative factor being whether damage and loss of life is excessive in relation to any anticipated military objective. 34 Relative to self-defence, the International Court of Justice (ICJ) has held that customary international law "warrant[s] only measures which are proportional to the armed attack and necessary to respond to it..." In determining proportionality generally, as demonstrated in the Case Concerning Oil Platform and the Advisory Opinion on Nuclear Weapons respectively, international courts will consider, inter alia, both the scale of the operation as a whole, and the risk associated with the weapons used.

20) Modern warfare has seen a dramatic increase in the use of human shields as the battlefronts have moved from open fields to urban population centres. Involuntary human shields, that is, persons who are "forcibly located around a military objective" in order to prevent that position from being targeted are the most frequently encountered situation of human shielding. However, involuntary human shielding has also been interpreted in the Commentary on the Additional Protocols to include not only the forcible location of civilians but also the act of taking advantage of voluntary movements of persons. In situations where a belligerent employs involuntary human shields, those persons being used as such cannot be considered as taking an active part in hostilities, and thus their presence would have to be weighed in any analysis of the proportionality of an attack.

21) Despite the frequency of occurrences and plethora of definitions relative to human shielding, authoritative case law providing guidance on the issue is relatively sparse. To further complicate the issue, international legal commentators are split as to what extent the presence of involuntary human shields affects the proportionality analysis. The prevailing view holds that persons used as involuntary human shields do not lose their protected status and thus casualties resulting from an attack are only defensible as collateral damage provided they are not excessive when compared to the military advantage anticipated by the attack.

22) By contrast, a view which has gained some recognition holds that requiring the impeded party to factor involuntary human shields into the proportionality equation at all would allow the shielding party to profit from a clear violation of the laws of war, and thus should not be allowed.

23) There has to be an allowance made between the (ICRC) prevailing view and the minority view.

There appears to be significant support among commonly cited publicists for the notion that casualties resulting from the use of involuntary human shields are at least somewhat diminished in the proportionality analysis. However, even these scholars disagree as to the circumstances where such diminished value may be appropriately assessed.

24) Yoram Dinstein has posited that in cases involving involuntary human shields, "the actual test of excessive injury to civilians must be relaxed", making allowances for the unavoidable fact that, "if an attempt is made to shield military objectives with civilians, civilian casualties will be higher".

25. An example of this, he argues, can be found in the Israeli bombardment of Beirut in June and July of 1982 where, despite the high number of civilian casualties, some commentators recognised that the number was "not necessarily excessive given the fact that military targets were placed among the civilian population."

26) In such cases, Dinstein has argued that, since the belligerent state is not vested by the laws of war with the power to immunise an otherwise lawful target by placing civilians in harm's way, the ultimate responsibility for civilian casualties should fall upon the shielding party rather than on the impeded party.

27) What is more, this principle does enjoy some support in the area of state practice. For example, in the context of its 2006 conflict with Hezbollah, there were several reports of Hezbollah militants using Lebanese civilians as human shields, firing rockets and otherwise conducting combat operations from within residential areas. Because of this, the IDF had launched thousands of air and artillery strikes into southern Lebanon that caused the deaths of over 1000 Lebanese civilians. 50 Israel has since been accused of war crimes as a result of those deaths.

28) In response, the Israeli Ministry of Foreign Affairs adopted the above principle in a statement which declared: "the deliberate placing of military targets in the heart of civilian areas is a serious violation of humanitarian law, and those who choose to locate such targets in these areas must bear responsibility for the injury to civilians which this decision engenders."

29) The Ministry re-emphasized this point in a similar statement a year later, which stated that while the attacking party still has the responsibility to minimize civilian casualties, the ultimate responsibility for civilian loss will lie with the party deliberately placing civilians in harm's way.

30) Amnon Rubenstein, another highly qualified publicist, agrees with Dinstein's view that the proportionality evaluation should be adjusted when involuntary human shields are used. However, Rubenstein asserts that such adjustment is only appropriate when the targeted objective poses a "clear and present danger" to the impeded party's troops or civilians, such as targeted positions from which mortars or missiles are being fired.

31) However, for the reasons that follow, it appears that this view might be regarded as quite compelling from a policy standpoint, a fact which is of considerable weight if not only due to the absence of controlling custom or case law.

32) These uncertainties in international law could not have made it easy for Sri Lankan field commanders. Deciding whether to act or refrain from acting against the position of an adversary — especially when that position presents a clear and present danger to military assets and civilians— is a decision which carries grave consequences if made incorrectly. Here, it is asserted that Sri Lankan commanders often faced the difficult choice of neutralizing active LTTE artillery positions at the cost of casualties among purported civilian groups, or refraining from action at the cost of suffering military losses or failing to protect its own civilian population. In either scenario, the legal uncertainty as to the proper value assigned to casualties resulting from human shielding within an analysis of proportionality likely made it very difficult for Sri Lankan field commanders to conform their conduct to the law; and it is asserted that this difficulty was frequently and deliberately exploited by the leadership of the LTTE.

33) The difficulties facing a field commander are compounded by the blurring of the differences between combatants and civilians where hostages are taken. This "forced choice" aspect is faced by many modern military commanders who have to contend with terrorist organisations suborning civilian populations into acting as human shields. They have to make on the spot decisions as to whether civilians are assuming the risk involved by their voluntary actions, or if they are civilians acting under duress.

34) The growing phenomenon of human shielding is a symptom of the increasing prevalence of asymmetric warfare in which weaker parties seek to defend against attacks by technologically superior foes by using the presence of civilians to deter military strikes.

35) In his recent study on proportionality, Professor Michael Newton recognises the problems within the ICRC definition and subsequent interpretive guidance, which did not go as far as stating that

voluntary human shields who were actually functioning as direct participants in the hostilities forfeit their protected status. Indeed, he makes, it clear, that a number of the military experts who contributed to the interpretative guidance, particularly those with battlefield experience vociferously disagreed with that conclusion and despite considerable argument, failed to achieve a joint consensus on this point.

36) In an equally concerning trend, weaker parties have also engaged in a tactic known as "Jawfare" which "exploits legal norms to impede the enemy's operations", essentially punishing law abiding nations for their observance of the laws of war and rewarding the non-state actors who disregard them. As Rubenstein points out, if this trend continues in its failure to account for the interests of impeded states, IHL itself is in danger of "falling into disrepute."

37) However compelling this imperative might be, it is also important not to unnecessarily diminish or destroy the protection of civilians who have become hostages against their will. The Rubenstein approach, like the underpinnings of IHL itself, seeks to maintain a favourable balance between military necessity and humanitarian concerns by limiting diminished protection to situations where the target represents a clear and present danger to the impeded party. 5 8 For this reason, it is the most effective approach in addressing the exigencies of modern asymmetric warfare without needlessly diminishing protection for civilians.

Findings as to the Second Question:

38) In the instant case, given that the law in this area is not well settled, a precise application of the law is very difficult. However, it is reasonable to conclude upon the facts asserted here that if any diminution of civilian protection is appropriate for cases involving involuntary human shields (or even if it is not), the military operations carried out against the LTTE by the GOSL were within the bounds of proportionality as a matter of international law.

39) First, the humanitarian operation launched by the GOSL was justified by a host of compelling military objectives, namely ending the nearly 30 year campaign of violence by the LTTE which included assassinations on duly elected officials and attacks on civilian objects such as the Central Bank of Sri Lanka, the international airport," and the Mavilaru sluice gate, in the latter case depriving the populace of access to water. As the Case Concerning Oil Platform demonstrates, the scale of the operation as a whole can be factored into a proportionality analysis. In applying that principle to the facts asserted in this case, it is clear the termination of such insidious and wholesale threats to civilian life represents a compelling military objective which already sets the bar fairly high relative to the acceptable level of civilian casualties in achieving that objective. This is a factor that could weigh heavily in favour of a finding of proportionality on behalf of GOSL operations overall as this is a factor which must be put into the balance of the proportionality equation. Even taking the highest figures ascribed to the deaths of Vanni civilians, assuming that there were up to 330,000 civilians in the NFZ as the Darusinan Report contends --7,000 of whom were killed-- this presumes a loss of life of approximately 2% of that civilian population. The respected UTHR report compiled by a group of Tamil academics places the "hostage" population at 300,000.66 If there were as many as 40,000 killed, this would be a loss of approximately 12% of that population. Whatever the figure in terms of a hostage rescue operation where some 295,000 were saved — it is a successful operation.

40) The GOSL, while declaring the NFZs, had to contend with LTTE efforts to utilise human shields to immunise their positions from attack. Once inside the NFZs, the LTTE carried out artillery and mortar strikes on security forces while simultaneously endangering the lives of the civilians in the area and shooting those that attempted to flee. As Gordon Weiss, who was working on ground at the time of the conflict later stated,

"...The population also served as a recruiting pool, a practice that would become more voracious and unforgiving as the fighting progressed. Just what proportion of those in the Tiger ranks were forced to serve against their will can never be known but it is certain that the rate of reluctant recruits increased dramatically as the last battles sapped the remaining experienced tiger stalwarts into the fight. There were numerous accounts of brutal forced recruitment of children in the final days, including the daughter of one UN staff member, who eventually managed to desert and escape the siege. Most ominously of all, there is good evidence that at least on some occasions the Tamil Tigers fired artillery into their own people. The terrible calculation was that with enough dead Tamils, but all would eventually be reached that would lead to international outrage and intervention... "

41) Under the Rubenstein view, the fact that the LTTE was using their shielded position within the NFZs to carry out artillery strikes against GOSL forces represents precisely the sort of clear and present danger Rubenstein argued could logically support a diminution of the value of civilian casualties in a proportionality calculation. In addition, under the Dinstein view, the ultimate responsibility for civilian casualties resulting from the LTTE's practice of taking and keeping hostages near military assets would fall on the LTTE and not the GOSL, since the laws and customs of war do not permit a belligerent to immunise a position from attack through the use of involuntary human shields.

42. Under the Dinstein view, civilian casualties are a consequence of any military situation involving the use of involuntary human shields and so the analysis ends where they are intentionally used by one side to frustrate attacks by another.

43) Under the prevailing view, the anticipated military advantage sought must be proportional to the civilians endangered in the targeting of that objective with no associated reduction in the value of civilian casualties. Yet, even under this view, which affords no leniency regarding civilian casualties, it is likely that one could find that the destruction of the LTTE and the removal of some 295,000 civilians from danger of death, a proportional amount of civilian casualties. 68 This would be particularly so in view of the fact that it is now impossible to estimate what proportion of those civilians were killed by the LTTE firing upon them with a view to achieving an international propaganda victory by assigning those deaths to SLA forces. Indeed the arithmetic is further complicated by the number of LTTE fighters not in uniform whose deaths could be treated as civilian when in fact they were full combatants.

44) In summary of this issue, it appears that a proportionality analysis under either the prevailing view, or either of the scholarly views would support the legality of the operations carried out by the forces of the GOSL. However, the absence of authoritative custom or case law determining the precise effect of the use of involuntary human shields on the proportionality calculation suggests that the law in this area is not well settled.

Therefore, there is room for state practice, informed by the exigencies of wise policy, to wield meaningful influence upon this area of customary international law. With these things in mind, the adoption of a balanced position such as that represented by the Rubenstein approach as set out at paragraph 40, is most likely to garner the widespread diplomatic support or acquiescence necessary to progress the formation of custom in this area of the law.

Whether civilians may lose their protected status by voluntarily becoming "hostages" for the purpose of creating a human shield in order to assist a belligerent party in gaining a military advantage:

A. Definition of "Direct Participation":

45) Under customary international law, there is a distinction drawn between the protection afforded to civilians and the protection afforded to civilians taking direct part in hostilities. As a matter of IHL in the context of both NIAC and IAC, "civilians enjoy protection from attack unless and for such time as they take a direct part in hostilities. In other words, when civilians directly participate in hostilities, they become lawful targets and are thus not taken into account in a proportionality assessment when military targets in their proximity are attacked. This exception to the general protection civilians enjoy against the dangers of military operations is widely accepted, but it is confined to the "temporal limits of the activity in question".

46) The ICRC has noted that a more precise definition of "Direct Participation" may not be found through a reading of treaty law, state practice, or international jurisprudence, and thus the notion must be interpreted in accordance with "the ordinary meaning given to its constituent terms in light of the object and purpose of IHL." Recognizing this reality, the ICRC convened a panel of experts and published interpretive guidance detailing three constitutive elements of Direct Participation which reflect "the ICRC position on how existing IHL should be interpreted" elements declare that in order for an act to be considered direct participation in hostilities (1) "a certain threshold of harm must be likely to result from the act, (2) there must be a relationship of direct causation between the act and the expected harm, and (3) there must be a belligerent nexus between the act and the hostilities between the parties to the conflict. The Interpretive Guidance is not without its critics, with one noted scholar pointing out that the Guidance "does not reflect a consensus document" and that "key features... have proven highly controversial.

However, despite its critics, the constitutive elements of the Interpretive Guidance remain important insofar as they have shaped the discussion among highly qualified publicists on whether participation as a voluntary human shield constitutes direct participation in hostilities.

B. Voluntary Human Shielding as "Direct Participation":

47) Voluntary human shielding occurs as a matter of law when a person seeking to shield a position remains in an area with the intent to frustrate enemy operations. Several highly qualified publicists agree that when civilians voluntarily act as human shields in this manner, they may be considered to be taking a direct part in hostilities in appropriate situations. In such cases, depending on the site being shielded, the presence of civilians serving as human shields can directly cause actual harm to the attacking party even if it is passive, thus resulting in a discount or reduction of the value of that civilian presence in the proportionality analysis.

48) With the forced choice of human shields, there will be greater loss of life as a result of a planned military strike of and the attendant harm to the human shields surrounding the military target. "In such a scenario:

"Not only is the political organisation forcing its citizens to be voluntary human shields, but its actions force unwanted choices upon their enemies as well. Such considerations should call for adjustments in the way these states or political organisations are regarded both legally and morally... "

49) Nevertheless, even in such situations, the civilians themselves may not be the object of attack, but they may be subject to incidental harm from an attack on the site they are seeking to protect.⁸² However, following the themes enumerated in the Interpretive Guidance, there is some disagreement as to just-what situations are appropriate for such a designation. This disagreement has focused on similar factors to those enumerated in the ICRC's interpretive guidance.

50) Of the three aforementioned constitutive elements, the first two have garnered the most discussion and debate. Advocates for stronger protection for individuals voluntarily serving as shields claim that voluntary human shields rarely constitute an actual harm because they do not represent a physical threat to combatants or an obstruction to military operations.⁸³ Such advocates find support for their position in the commentary to Additional Protocol I which "explains that direct participation implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place" and that acts must be "intended to cause actual harm to the personnel and equipment of the armed forces". On the other hand, their opponents take the position that the frustration of military objectives --objects whose nature makes an effective contribution to military action and whose destruction offers a definite military advantage-- "contributes to military action in a direct causal way", and is thus direct participation."

51) Others who advocate in favour of diminished protection for civilians taking direct part in hostilities point out that:

"Voluntary human shields who seek to exploit their presumed civilian status to enhance the survivability of belligerents, their weapons systems, command and control facilities and infrastructure that directly support a belligerent state's war effort have clearly become involved in combat..."

52) The Israeli Supreme Court took a similar position in its judgment in the "targeted killings" case. In that case the Israeli Supreme Court sitting as the High Court of Justice dealt with the petitioner's challenge to Israel's targeted killings policy as contrary to both international and Israeli law on the grounds that it violated the rights of those targeted and those caught in the zone of fire. ⁸⁷ The court rejected this argument, concluding that if a civilian participates as a human shield "of their own free will out of support for the organization, they should be seen as taking a direct part in the hostilities." In such situations, the court reasoned, an analysis of proportionality is not required because a civilian who takes direct part in hostilities is not entitled to the protections usually afforded to civilians.

C. Findings as to the Third Question

53) With regard to the issue of whether and to what extent 300-330,000 civilians went voluntarily with the LTTE as they began their retreat after the fall of Killinochchi on the 2 January 2009, is impossible to tell. It is, however, clear that a very large portion may have gone with the LTTE for a variety of reasons. Robert Blake, former American ambassador spelt it out eloquently when he stated,

"...As the Sri Lankan army was pushing north into the Tamil areas, the predominantly Tamil areas that were controlled by the LTTE for more than two decades, they displaced... the Sri Lankan army displaced a large number of Tamil civilians and they all began to move northwards. The LTTE systematically refused international efforts to allow those internally displaced persons to move south. To move away from conflict areas where they could have been given food and shelter and so forth. So they systematically basically refused all efforts and in fact violated international law by not allowing freedom of movement to those civilians. So had the LTTE actually allowed people to move south, none of this would have happened in the first place, so it's important to make that point. I think that often gets lost in the debate on this..."

25) Thus we arrive at a position where it is possible to say, that but for the alleged hostage takings by the LTTE -either voluntarily or forced- there would have been no civilian casualties in any significant numbers.

In addition, Sir John Holmes speaks as follows:

"As the LTTE retreated, the Tamil civilian population from the area they had controlled were going with them, which obviously exposed them to huge risks. How voluntary was this? It was hard to say for certain."

55) As a matter of logic, there is a powerful case for saying that it is extremely unlikely that some 20,000 cadres of LTTE, at that stage, could have taken up to 330,000 hostages against their will. The probability is that a large section of the civilians went voluntarily with the LTTE in order to play a part, albeit passive, in the LTTE war effort. It is asserted that this effort included seeking international intervention on the basis of a humanitarian crisis. Such an intervention, if it occurred, would or may have prevented the LTTE leadership from losing the war, which, after their defeat at Killinochchi (2 January 2009) looked inevitable. After the fall of Killinochchi there appeared to be a point of no-return for the Tamil Tigers. 93 An important question that arises is the extent to which the civilian population voluntarily played their part in furthering the war crimes of the LTTE, even if only to achieve international intervention and thus preserve the LTTE leadership from losing the war.

Whether an evaluation of the customary principle of distinction relative to the government's military operations is affected by the LTTE's decision to use combatants not in uniform to enter the conflict with the intent to gain a military advantage by making it more difficult to distinguish between combatants and civilians or to deliberately conduct their operations blurring the distinction between civilians and combatants:

56) An adversary commits the crime of perfidy when he engages in an act that is intended to make the other party believe that it deserves protection under IHL in order to obtain a military advantage. There is an overwhelming consensus that simulating a civilian status with the intent to deceive the enemy and obtain a militancy advantage is a sufficient act to constitute the crime of perfidy. However, simply failing to wear a distinguishable military uniform is not, on its own, perfidious conduct. Additionally, conduct that constitutes the ordinary "ruses of war", such as the use of camouflage, mock operations, misinformation, and decoys -will not be considered perfidious because they are only designed to mislead the enemy rather than deceive him into believing that the actor deserves a protected status. Finally, perfidy, like most war crimes is often "perpetrated by a multitude of persons . . . acting in unison or, in most cases, in pursuance of a policy". As a general principle of customary international law, where all participants share the same intent to commit a crime, even if that intent did not extend to the ultimate result – such as death-- all participants may still be held liable if the death was a natural and foreseeable result of their common criminal plan.

57) The ICTY has made it clear that IHL strictly prohibits the feigning of civilian status in an internal armed conflict under the rule against perfidy." State practice has also shown that those who conceal themselves as civilians in order to conduct an attack to be engaging in perfidious conduct. In *U.S. v. Jawad* a Military Commission Judge found that the government could prosecute an individual as an unlawful combatant for perfidious conduct as a result of feigning civilian status. In that case, the accused had dressed in civilian attire in order to approach U.S. military personnel and kill them with a grenade that he had concealed.

The U.S. also utilised the principle that suicide bombings are sufficient to constitute the crime of perfidy in the al-Nashiri case where the accused was charged with using perfidious and treacherous conduct in the 2000 bombing of the USS Cole. The government alleged that he had masterminded the attack in which the attackers approached the USS Cole on a civilian vessel in order to get close enough to detonate its bombs. Israel has also historically adopted similar principles. In the 1994 Swarka case, an Israeli Military Tribunal found that two members of the Egyptian military had committed perfidy and could not benefit from POW status after disguising themselves as civilians in order to get closer to Israeli military forces and launch attacks from civilian territory. 105 Another example can be found in Afghanistan in connection with Operation: Enduring Freedom (OEF). In that scenario the Taliban used civilians to approach U.S. forces and attack them from residential areas, which ultimately forced them to "wait for insurgents to attack and then attempt to ensnare them. This latter example illustrates one of the major problems the U.S. has faced as a result of perfidious conduct.

59) Under the facts in the instant case, one could find that the actions of the LTTE amount to perfidy. It is alleged that the LTTE has had a long history of engaging in perfidious conduct throughout the 30 year conflict with the GOSL. For years, it allegedly disguised its attackers as civilians to gain access to the SLA forces and then kill them through the use of suicide bombs. In 2002, LTTE suicide bombers accounted for "over one third of the total suicide bombings in the world."

60) According to the UN Secretary General's Panel of Experts Report on the conflict, the LTTE continued this practice during the last three months. of the war in 2009 by conducting numerous suicide missions against SLA forces, which resulted in the deaths of civilians as well. These allegations of suicide attacks represent clear illustrations of perfidy because the LTTE allegedly disguised themselves as civilians in order to obtain better access to GOSL forces for the purposes of increasing effectiveness of its attacks.

61) A number of those fighting for the LTTE failed to wear a recognisable military uniform thus blurring the difference between LTTE fighters and civilians. 112 Based on the above-mentioned state and international practice, an- act of feigning civilian status with the intent of gaining an advantage

amounts to unlawful perfidious conduct.

62) As with most other war crimes, the party who intended the conduct to be carried out, as well as all co-perpetrators who shared the same intent may be held liable for consequences which were natural and foreseeable results of that conduct. Therefore, it is likely that one could find that the LATE had committed perfidy during the last three months of the conflict, and could thus be held liable for an unknown number of deaths that resulted. As will be explained in the next section, this fact could potentially exonerate the SLA from liability for deaths resulting from their failure to precisely distinguish between lawful and unlawful targets.

63) As stated earlier, the customary principle of Distinction between civilian and military targets is one of the fundamental principles of IHL. The principle of Distinction prohibits indiscriminate attacks, that is, those attacks that are not directed solely against military objectives.

64) Such attacks usually take the form of inherently indiscriminate methods or means of combat which, by their very nature, cannot be directed at a specific military objective, such as the carpet bombing of an entire urban area.

65) Another obligation associated with the principle of Distinction which is possibly more illustrative of the customary obligation owed by all parties to a NIAC is the obligation to take "all practicable precautions, taking into account military and humanitarian considerations, to minimize incidental death, injury, and damage to civilians."

66) Put another way, "the general rule is that feasible precautions must be taken to avoid or minimize death and injury to the civilian population." Feasibility in this context is defined as "those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations" and is an obligation which belongs to both attackers and defenders in a NIAC.

67) Examples of one such feasible precaution is ensuring the attack was conducted using the most precise weapons available to the party in question. It is important to note that in determining the reasonableness of a commander's knowledge or belief that the death of civilians would not be excessive, the analysis is based on facts known to the commander at the time of the decision, not afterward.

68) As has been alluded to in several contexts throughout this Opinion, there is a troubling trend with regards to adversaries engaging in practices, such as human shielding, that make it more difficult for their opponents to comply with IHL. The same is true with regards to distinction and perfidy. Especially in conflicts where asymmetric warfare is present, the weaker adversaries have resorted to acts of perfidy by feigning civilian status in order to make it difficult for the other to distinguish between appropriate military targets and civilians, 12' and the instant case likely falls into this category of conflicts.

69) In other contexts this conduct has led to several instances in which the members of the side complying with IHL face the choice of either not responding in the face of danger or risking the lives of innocent civilians.

70) For instance, the principle of distinction is usually violated in situations where the presence of members of an armed group in an area is used to justify the destruction of that entire area.

71) An illustration of this example of unlawful conduct can be found in a statement made by the Sudanese Minister of Defence in 2005 that the presence of even one rebel was sufficient for making the whole village a legitimate military target.

72) Another illustration comes from a statement made by Mr. Stephen Smith, the Australian Minister of Foreign Affairs regarding the actions of the LTTE during the last three months of the conflict in Sri Lanka. There, the Minister expressly condemned the numerous civilian deaths as a result of the LTTE's use of "bombs and artillery" in the NFZs and targeting of civilians that attempt to leave the conflict zones as a violation of the rules of war.

73) Moreover, in *Blaskic*, the ICTY held that the accused had committed grave breaches of IHL by indiscriminately killing Muslim women and children. 121 In that case, amidst combat in the Lasva valley in April 1993, the soldiers under the direction of the accused indiscriminately fired artillery shells "without regard for where the shells landed" and, even after the combat was over, the soldiers entered civilian houses while killing Muslim women and children.

74) On the other hand, in 2009, the Israeli High Court of Justice found that the principle of distinction was not violated during "Operation Cast Lead" when the IDF hit medical transports, buildings, and ambulances with its rocket attacks toward Hamas. The Court reasoned that, because Hamas militants

had resorted to using such locations traditionally protected by IHL, they became legitimate military targets and that the civilian deaths that occurred as a result were the responsibility of Hamas.

C. Findings as to the Fourth Question:

75) With the LTTE's liability for perfidious conduct and forced recruitment of civilians; in addition to the execution of civilians who were trying to escape and the placement and firing of their weaponry from within civilian and hospital zones, 131 it is necessary to consider who properly bears liability for the civilian deaths that resulted from hostilities between the parties.

76) If the facts asserted above are true, it is most unlikely that the SLA could be held liable for incidental civilian deaths from any failure on the part of the SLA to distinguish lawful targets from civilians because the liability is more likely to fall upon the LTTE as the party intending to foster and exploit the environment which made distinction difficult in the first place.

77) This principle of liability was illustrated by the Israeli Supreme Court in 2009 when it held Hamas was liable for the civilian deaths resulting from IDF strikes on otherwise protected objects due to Hamas's decision to use those objects for their operations. It follows logically that civilian deaths are a natural and foreseeable result of perfidious conduct intended to make it difficult to comply with the principle of distinction in the context of an armed conflict.

78) Based on the foregoing analysis, it is clear that, the LTTE's alleged engagement in perfidious conduct by feigning civilian status, blurring the distinction between combatants and civilians, compelling civilians into the front line, executing civilians who sought to escape, and generally putting civilians in harm's way as a part of their strategy results in the LTTE having to bear the principle liability for civilian casualties. As noted, the principle of distinction requires that adversaries conduct attacks with discrimination and take all feasible precautions to minimize the civilian casualties.

79) It is asserted that the GOSL attempted to minimize civilian casualties by setting up NFZs and scaling down the methods of attack so that they were more precise. The area of the first NFZ was a fraction of the territory then controlled by the LTTE. Instead of conducting its warfare from that territory, the LTTE moved into the NFZ, demonstrating their intent to conduct their war against the SLA whilst embedded amongst civilians and civilian structures. By engaging in perfidy and human shielding, it was the LTTE that failed to take the necessary precautions to minimize civilian casualties and so it is the LTTE that was truly liable for failure to comply with the principle of distinction and thus for civilian deaths that resulted.

VII. CONCLUSIONS:

80) As unfortunate as it is, the civilian casualties should be considered collateral damage and the ultimate responsibility for their loss would rest on the LTTE due to their grave breaches of IHL.

81) First of all, the LTTE likely committed the international crime of using human shields during an internal armed conflict. According to principles derived from international court opinions like Mladic and Blaskic, any belligerent who conducts military operations in areas of high civilian concentration or forcefully places civilians in danger to make it difficult for the other side to comply with IHL has committed the crime of Human Shielding.

82) By placing its military assets in the NFZs, attacking GOSL forces from therein, and forcing civilians to remain there at gunpoint, the LTTE is liable for the crime of Human Shielding. This is a very different picture to that which has been presented to the world by some commentators, namely, that the GOSL declared an NFZ in order to get civilians to locate themselves in that NFZ for the purpose of the SLA seeking to then eliminate them by shelling those very areas.

83) This unlawful use of human shields by the LTTE is a legally operative factor in determining whether the GOSL's attacks against the LTTE were proportional. As discussed, what impact human shielding has on proportionality is an unsettled area of the law. Of the many opinions that exist, the Rubenstein approach, which diminishes the protection requirement in the face of clear and present danger, is the best approach. The SLA complied with proportionality by endeavoring to create NFZs, however, the LTTE's steadfast refusal to agree to such zones may be a clear indication that it was the LTTE's intention that there should be no safe zones for Tamil civilians so as to be able to exploit such civilians for their own military or political advantage.

84) Furthermore, it is noteworthy that if civilians willfully participate in a human shield with the intent to assist in the military objectives of the LTTE, they are considered direct participants and lose their protected status, taking them out of the proportionality assessment. It is important to emphasize that any voluntary human shields are legitimate targets.

85) In conclusion, as the nature of conflict changes, IHL needs to keep abreast with modern

asymmetric warfare so as to allow a rethinking of the rules of war that does not favour the violators of international law. Currently the West is faced with these very problems with organisations such as ISIS operating out of civilian and urban areas and endangering the lives of civilians. With such threats continuing to present themselves, Sri Lanka and the situation it faced in the recent past should help pioneer thinking in this regard towards a favorable resolution of the existing lack of consensus in this area of international law. At the end of the day the rule of law must govern the battlefield and civilians ultimately protected.

Professor David M. Crane

Sir Desmond de Silva, QC

Advisory Council of Experts

 Hits: 6196  [Send to Friend](#)

දිවයින

නවලිය

විදුසර



UPALI NEWSPAPERS (PVT) LTD
Copyright © Upali Newspapers (Pvt) Ltd.
All Rights Reserved.

Solution by [Lankacom](#).