

# Paper 17

## Human Rights, Humanitarian Law and the Tamil National Struggle: Evolving the Law of Self-Determination

by Ms. Karen Parker

### 17.1 INTRODUCTION

The Universal Declaration of Human Rights<sup>1</sup> states:

“Whereas it is essential, if mankind is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression that human rights should be protected by the rule of law.” (UDHR, 3rd preambular paragraph).

These words echo the rallying cries of many of the world’s great revolutions that fought against oppressive regimes (monarchies, dictatorships, etc.) and established new forms of government.<sup>2</sup> While the new forms of government may have already failed, in whole or in part, or may fail in the future, the “rebels” who succeeded in

<sup>1</sup>G. A. Res. 217 (III) A, UN Doc. A/810 (1948) (hereinafter UDHR).

<sup>2</sup>The French Revolution, the American Revolution, the Mexican Revolution, the Russian Revolution, the Italian re-unification process, the De-colonization processes in Africa and Asia, the Cuban Revolution, the Chinese Revolution and the recent changes in Eastern Europe all illustrate this point.

overturning the old order generally drafted stirring human rights statements enthusiastically accepted by the majority of the people.

The international community, still reeling from the devastation of World War II and at least temporarily intent on condemning tyranny and oppression did the same when, in 1948, the United Nations promulgated the Universal Declaration of Human Rights. Its 30 articles cover the range of civil, political, economic, social and cultural rights for all people that have become the standards by which all countries are judged.<sup>3</sup> Non-compliance with these standards results in tyranny and oppression.

Unfortunately, the existence of the stirring words of the Universal Declaration of Human Rights does not guarantee that all people will enjoy the enumerated rights. Every country to-

<sup>3</sup>The UDHR protects, *inter alia*, the rights to life; the right to liberty; the right to privacy; the right to procedural protections; the rights to freedom of movement and residence, freedom from torture, freedom from slavery, freedom from discrimination; the right to freedom of thought, religion, expression or opinion; the right to health care, housing, employment and food; the right to education; and the right to seek and enjoy asylum from persecution.

day violates at least some of these rights. And, most tragically, many governments engage in systematic discrimination, torture, disappearances, summary executions, and other gross violations of these rights. Sri Lanka is one of these countries.

While there are international standards for determining at what point government behavior reaches the level of a human rights violation, there are no international standards for determining at what point tyranny and oppression become so severe that rebellion is not only legally justified, but widely supported by the rest of the world. For the most part, even when fully aware of serious and systematic human rights violations, the international community still holds to the status quo and continues to recognize the legitimacy of the regime in question.<sup>4</sup> The support of individual countries for internal resistance to oppression, whether the resistance uses peaceful or forceful means, remains a political, not a legal, matter. Characterizations of resistance that has escalated into a civil war situation, an impartial issue according to humanitarian (armed conflict) law, also has become largely a political, not a legal, matter. If one country supports the goals of the rebels, then those rebels are labeled "freedom fighters": If the country does not support the goals of the rebels, the rebels are labeled

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<sup>4</sup>One of the few exceptions is the 1979 refusal of the Organization of American States to seat the representative of the Somoza regime of Nicaragua. Even when dealing with South Africa, the United Nations failed to seat the opposition, although it did refuse membership privileges to the *apartheid* regime. However, resolutions and practice did require support for the opposition, including the opposition's use of force. For a summary of UN action regarding South Africa and *apartheid*, see United Nations Action in the Field of Human Rights, UN Doc. ST/HR/2/Rev.3, UN Sales No. E.88.XIV.2 (1988) at pp. 95-116.

"terrorists."

The failure of the international community to set common standards and to treat situations in a non-political way has led to unequal treatment of governments that violate their citizens' right and unequal protections for the victims of violations.<sup>5</sup> Some countries are rightfully subject to international censure for violations, others with just as serious violations receive only token action or no action at all.

This same failure has stifled the concept of self-determination of people in international law, when tyranny and oppression are directed at an ethnic group. Whereas most concepts in international law have evolved naturally due to normal legal and factual developments, the concept of self-determination has remained largely confined to its most narrow meaning: the right of people to independence from foreign or colonial domination. It has not accommodated the most pressing issue of the 1980's and 1990's – what are a people, especially an ethnic group,<sup>6</sup> to do when they are subjected to years of gross violations of human rights by the government, when they have exhausted all reasonable peaceful means of redress, and when there is no realistic expectation of improvement without drastic measures. One answer is that the principle of self-determination should be invoked in these circumstances, as a last resort, to protect and defend the human

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<sup>5</sup>This same failure holds true when there is armed intervention and occupation or control of a country by foreign powers. For example, China invaded and annexed Tibet in 1949. Iraq invaded and attempted to annex Kuwait in August, 1990. Except for a few United Nations resolutions in the early 1960s, the international community has abandoned the Tibetans to Chinese rule for 40 years. However, the Iraqis were forced out of Kuwait in 7 months.

<sup>6</sup>The oppressed group may comprise an ethnic minority or an ethnic majority.

rights of ethnic groups.

Using the example of Sri Lanka, this paper will examine the principle of self-determination and its relation to human rights and humanitarian law. It will show that, in certain circumstances, exercise of the right to self-determination and its support by the international community may be the only way to ensure those basic rights granted to all people in the Universal Declaration of Human Rights. Failure to respect the right to self-determination may condemn people to years of violations.

## 17.2 THE TAMIL PEOPLE AND HUMAN RIGHTS VIOLATIONS

In Sri Lanka, the Tamil minority has been subjected to nearly forty years of unequal treatment. Although independence from Britain was largely a pacific affair in 1948, 1949 saw the first anti-Tamil act – legislation that disenfranchised the estate Tamils and denied them citizenship rights.<sup>7</sup>

Anti-Tamil actions and Tamil reactions increasingly led to the government carrying out gross and systematic violations of human rights.<sup>8</sup> The government became largely Sinhala-dominated and overtly functioned as a government for Sinhala people, not for all residents of Ceylon equally.<sup>9</sup> The situation deteri-

orated dramatically in the late 1970's, leading to the founding of the Tamil United Liberation Front (TULF) and increasing calls for Tamil separatism by large numbers of Tamils. It was during this period that the Tamil community began organizing militant resistance, which since at least 1984, is at a level to automatically invoke humanitarian law and the duties and rights of combatants.<sup>10</sup>

By 1979, the Sinhala government led by J. R. Jayawardene of the United National Party promulgated the Prevention of Terrorism Act (PTA), which, with the Emergency Regulations, became the instruments for the most egregious oppression of the Tamil community. Since the massacres of Tamils in the 1983 rioting, there has been an unrelenting persecution and oppression of Tamil people in Sri Lanka.<sup>11</sup> In 1985, the Working Group of the Swedish Red Cross stated:

“There was a general consensus that within Sri Lanka today, the Tamils do not have the protection of the rule of law, that the Sri Lankan government presents itself as a democracy in crisis, and that neither the government nor its friends abroad appreciate the serious inroads on

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*Question* (Delhi, 1989). On this point, see esp. N. Satyendra, “What is the Tamil Question?” and other articles in *Forty Years of Human Rights Violations by Sri Lanka - What is the Answer?* (International Federation of Tamils, [1990]).

<sup>10</sup>This was recognized by the United Nations in 1987 in United Nations Commission on Human Rights resolution 1987/61.

<sup>11</sup>*Forty Years of Human Rights Violations by Sri Lanka: What is the Answer?* (International Federation of Tamils, [1990]) cites numerous publications documenting the many atrocities carried out against the Tamil people in Sri Lanka. Citations include reports of the International Commission of Jurists, Amnesty International, LawAsia, The Dutch Working Group, Minority Rights Group, International Educational Development, the Swedish Red Cross, etc.

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<sup>7</sup>For a brief summary of the Tamil struggle, see D. Feith, “The Tamil Struggle: A Brief Historical Survey” in N. Seevaratnam (ed.), *The Tamil National Question* (Delhi, 1989).

<sup>8</sup>See, *Forty Years of Human Rights Violations in Sri Lanka - What is the Answer?* (International Federation of Tamils [1990]).

<sup>9</sup>Brian Senewiratne aptly calls this the failure of the government to build a nation. See, B. Senewiratne, “An Evaluation of Solutions to the Sri Lankan Ethnic Conflict and Sinhala-Buddhist Chauvinism and the Buddhist Clergy” in N. Seevaratnam (ed.) *The Tamil National*

democracy which have been made by legislative, administrative and military measures which are being taken. The extreme measures which are currently being adopted by the government inevitably provoke extreme reactions on the other side. The normal life of the population of the North has been seriously affected. The continuing colonization of Tamil areas with Sinhalese settlers is exacerbating the situation.”<sup>12</sup>

### 17.3 THE TAMIL PEOPLE AND ARMED RESISTANCE

Tamil armed resistance meeting the international requirements for an internal armed conflict has been occurring in Sri Lanka since at least 1983, when the Liberation Tigers of Tamil Eelam (LTTE) met the elements of the requirements: military operations, organized command, control over territory, and organizational capacity.<sup>13</sup> They also openly carry arms and distinguish themselves from the civilian population, other requirements of combatant forces recognized in international humanitarian law.

<sup>12</sup>Report of the Working Group, Swedish Red Cross, at the Second Consultation on Ethnic Violence, Development and Human Rights (Netherlands, 1985). This situation has continued to the present time.

<sup>13</sup>The test used to determine if an armed group is protected by the Geneva Conventions and other humanitarian laws in a civil war situation, as opposed to being a terrorist group is set out in Article 1 of Protocol Additional II to the Geneva Conventions of 1949, which provides coverage when there is an “armed conflict . . . which takes place in the territory of a High Contracting Party . . . between its armed forces and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” UN Doc. a/32/44/Annex II (1977), *reprinted* in 16 I. L. M. 1442 (1977). Although Sri Lanka has not yet ratified Protocol Additional II, the test is considered the customary international law test for civil war.

The international community has recognized that conditions are met to invoke at least internal armed conflict rules – the 1987 United Nations Commission on Human Rights resolution on the topic dealt almost exclusively with the application of humanitarian law to the conflict in Sri Lanka.<sup>14</sup>

Invocation of the civil war rules does not necessarily mean that the opposition forces such as the LTTE gain international recognition as a government or alternate government. Humanitarian rules are clear that application of civil war rules does not affect the legal status of the parties to the conflict.<sup>15</sup> However, the combatants are legally obligated to comply with the rules and are entitled to all the protections in the rules. For this reason, opposition armed forces are said to have combatant status when humanitarian law is invoked – they become parties to the conflict.<sup>16</sup>

### 17.4 FAILURE OF INTERNATIONAL ACTION

The international community has been obligated to address the gross violations of human rights and the existence of an armed conflict meeting at least international standards for an internal armed conflict according to human rights and humanitarian law principles. Nonetheless, except for rigorous condemnation of abuses of Tamil rights by non-governmental organizations at the United Nations human rights forums and elsewhere, and by certain rap-

<sup>14</sup>UN Commission on Human Rights resolution 1987/61.

<sup>15</sup>The Geneva Conventions I - IV of 1949, Article 3.

<sup>16</sup>During the time that the Indian Peace Keeping Forces were involved in armed conflict against the LTTE in Sri Lanka, the international armed conflict rules applied to India. India was an intervenor in a civil war – itself a violation because international law requires the states observe the duty of neutrality relative to another state’s civil wars.

porteurs and working groups of the United Nations Commission on Human Rights,<sup>17</sup> the Tamil cause and situation has received only sporadic attention by governments and the United Nations as a whole.<sup>18</sup>

While we may never know the total effect of such silence and inattention on the lives and rights of thousands of Tamils, it is clear that the failure of the international community to respond in a consistent, impartial, appropriate and timely fashion, has definitely made the situation

of the Tamil people much worse. It has also made prospects for a peaceful solution that recognizes the territorial unity of Sri Lanka as well as the rights of the Tamil people wishful thinking. The Tamil people have regrettably, but justifiably, lost all confidence that a Sinhala dominated government will ever protect their full rights, and may no longer support any notion of territorial unity.

#### 17.5 THE RIGHT TO SELF-DETERMINATION – THE NARROW VIEW

The right to self-determination, the free determination of a people's political status as well as their economic, social and cultural development, is considered by many the cornerstone of human rights.<sup>19</sup> It is the first right identified in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the two major international human rights treaties.<sup>20</sup>

Most authorities agree that the right originally applied to people not in control of their traditional territory due to foreign or colonial occupation and domination.<sup>21</sup> The dominated people held the right to self-determination as long as the colonial power was present. When the colonial power was removed, whether by force

<sup>17</sup>See, e.g., Report of the Special Rapporteur on Torture, UN Doc. E/CN.4/1987/13; Report of the Special Rapporteur on Torture, UN Doc. E/CN.4/1990/17; Report of The Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/1987/15 and Corr.1 and Add.1; Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/1990/13; Report of the Special Rapporteur on Summary or Arbitrary Executions, UN Doc. E/CN.4/1990/22.

<sup>18</sup>The high water mark of concern and appropriate, albeit modest, action at the United Nations was the 1987 session of the United Nations Commission of Human Rights under the sage leadership of Chairman Ambassador Alioune Sene. The Commission adopted resolution 1987/61, recognizing the application of international humanitarian (armed conflict) law rules. In an earlier action, the Commission, in its decision 1984/111, appealed to the parties in Sri Lanka to restore harmony. The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted resolution 1983/16 which addressed the issue of the communal violence. Sub-Commission resolution 1984/32 expressed concern over the continuing violence, recognized the "responsibility of the government of Sri Lanka to protect all section of the community" (preambular paragraph 2) and appealed to the Sri Lankan government to inform the United Nations Commission on Human Rights of efforts made to investigate the violence and results achieved in promoting communal harmony. In spite of the extreme escalation of violence, armed conflict and oppression of the Tamil people and the devastating operation of the Indian Peace-keeping Force, there has been no resolution of the Commission in Sri Lanka since 1987 and no resolution of the Sub-Commission since 1985.

<sup>19</sup>see. e.g. Gros Espiell, The Right to Self-Determination, UN Doc. E/CN.4/Sub.2/405/Rev.1 (1979), UN Sales No. E.79.XIV.5 (1980): "...Human rights and fundamental freedoms can only exist truly and fully when self-determination also exists. Such is the fundamental importance of self-determination as a human rights and a prerequisite for the enjoyment of all the other rights and freedoms." (citations omitted).

<sup>20</sup>Sri Lanka has ratified both of these treaties.

<sup>21</sup>See, The United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, UN G. A. Res. 1514, 15 UN GAOR, Supp. (No. 16) at p. 66 (1961).

or peacefully, the right to self-determination was extinguished.

The right also recognized that the boundaries established by the colonial power were to be the boundaries of the de-colonized state. This was true even if, as in the case of Sri Lanka, the colonial power had artificially created a unitary state from territories traditionally held by different ethnic groups, each governing their territories independently of another group. Once the colonial power left, the right to self-determination would only be applied again if another power seized control of a whole or a part of the territory, such as when Morocco seized Sahara from the Saharan people when the Spanish colonizers left.

Of course, underlying divisions among different ethnic groups artificially forced into a unitary state by the colonial powers and maintained at the time of liberation have led to great strife and separations or attempted separations upon removal of the colonial power. Both Nigeria and Pakistan underwent civil wars based on political-ethnic differences. In the case of Pakistan, there was first the partition from India. Then, East Pakistan was able to sever itself from West Pakistan and became Bangladesh. Statehood was gained not because the Bangladeshis were recognized as having a legal right to self-determination, but because they won separation through military means. The Biafran people, the losers in the Nigerian civil war, were never viewed by the international community as having the right to self-determination, but might have established a state that subsequently would have been recognized as such if they had won the war or obtained a political agreement with the Nigerian government. In both these situations, the people in question had governed themselves independently prior to British-imposed unitary rule.

The current Tamil national struggle has not been viewed as justified in the exercise of self-determination by the majority of the world's governments. This is because the foreign power, Britain, left in 1948. The one unitary government was considered "indigenous", even though the two major ethnic groups, the Tamils and the Sinhalese, each had separate kingdoms prior to colonial rule, and each group clearly meets the international law definition of "people" – each has its own language, ethnicity,<sup>22</sup> religion and culture.<sup>23</sup> The international community has not accepted the view that the Sinhala-dominated government is a foreign or colonial power over the Tamil nation. Thus, all the arguments about the historic separation of the Tamil people and their full functioning as an independent country prior to colonial rule have fallen on deaf ears.

According to this narrow view of self-determination, neither the wide-spread, systematic violations of the human rights of an ethnic group such as the Tamil people nor the existence of an armed conflict at the level of civil war automatically invoke the right to self-determination. The international community has no effective

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<sup>22</sup>Some historians stress that language, culture and religion (in that order) are stronger areas of differences between Tamil and Sinhalese than ethnicity. See. e.g. D. Feith, "The Tamil Struggle: A Brief Survey" in Seevaratnam (ed.), *The Tamil National Question* (Delhi, 1989) at p. 74.

<sup>23</sup>Sir Hugh Cleghorn, the first British colonial secretary of Ceylon wrote in 1799: "Two different nations, from very ancient period, have divided between them the possession of the island: the Sinhalese inhabiting the interior in its Southern and Western parts from the river Wallouve to that of Chillaw, and the Malabars [Tamils] who possess the Northern and Eastern Districts. These two nations differ entirely in their religions, language and manners." Cited in J. Karan, "The Tamil National Struggle" in N. Seevaratnam (ed.), *The Tamil National Question* (Delhi, 1989).

remedies for improving Tamil rights absent political pressure – to date ineffective because of the power of the governments that have protected Sri Lanka diplomatically.

It is obvious that this narrow view of self-determination does not enhance the enjoyment of human rights. On the contrary, this view fosters continued violations – unacceptable in the over-all scheme of the rule of law and human rights.<sup>24</sup>

#### 17.6 EVOLVING THE LAW OF SELF-DETERMINATION: SELF-DETERMINATION AND RACIAL OPPRESSION

One way to evolve the law of self-determination, so that it is invoked to protect people in the situation in which the Tamil people find themselves, is to develop the application of self-determination to ethnic groups subjected to severe racial discrimination by the ruling government.

The general view is that the right to self-determination is held by people, not governments or individuals. The International Court of Justice reinforced this interpretation in its opinion in *Western Sahara*,<sup>25</sup> in which the Court stated “the principle of self-determination [is] a right of people.”<sup>26</sup> The United Nations Special

<sup>24</sup>Neither the United Nations Charter itself nor human rights instruments allow for an interpretation of rights that would jeopardize other protected rights. The Charter requires joint and separate action, as necessary, to address pressing humanitarian concerns and to achieve full enjoyment of human rights. UN Charter, Articles 1, 55, and 56. The UDHR grants to all persons “a social and international order in which the rights and freedoms set forth in [the] Declaration can be fully realized.” UDHR, Article 28.

<sup>25</sup>1975 I. C. J. 12.

<sup>26</sup>Id p. 31.

Rapporteur, Hector Gros Espiell, in his Report on the Right to Self-Determination, also defined self-determination as a people’s right:

“Self-determination is essentially a right of people ... of a specific type of human community sharing a common desire to establish an entity capable of functioning to ensure a common future.” (UN Doc. E/CN.4/Sub.2/405/Rev.1 (1980) at p. 9; UN Sales No. e.79.XIV.5).

As has been set out, the concept of “people” has caused great difficulties in the international community. For many governments, “people” does not mean “minorities” – were that the case, many of the world’s post-colonial states would have great difficulty maintaining unitary states. The nations in Africa, for example, would have to be completely redrawn along ethnic lines. Many of these groups, like the Tamils in Ceylon, ruled themselves independently prior to the colonial era. For this reason the international community originally chose to apply self-determination to the territorial boundaries of the colonial-imposed unitary state.

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Her work involves consultations with governments, international bodies, opposition groups, non-governmental organizations and attorneys; fact-finding missions; and representations before national, foreign and international courts and tribunals.

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Because of her special emphasis on humanitarian (armed conflicts) law, she works with victims and for compliance with the Geneva Conventions and other humanitarian norms in the Sri Lanka. She also presents legal arguments defending the Tamil right to self-determination.

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