

Accountability of the Combatant in Asymmetric Warfare with special reference to Findings in the Darusman Report

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Abstract: Sri Lanka having fought a thirty year internal war has achieved many victories apart from the victory on the battle ground in the aftermath of the conflict. Such include the preservation of territorial integrity, racial harmony and restorative justice to victims of war. However, as a state, SL has failed to counter any of the allegations made by the international community on the events happened during the last stages of the war against the LTTE. Accountability of a combatant on the battlefield is a process which needs to be done after careful consideration of all aspects. This paper discusses the IHL violations alleged by the Darusman Report and issues relating to accountability. Data were collected through a sample of 30 officers and other ranks from the Sri Lanka Army using snowball method to select officers and other ranks who were directly engaged in the battle field during the final stages of the war. In-depth and semi-structured interviews were held to ascertain their views on the aspects of war crimes allegations, the role of officers in battlefield and issues of command responsibility and issues relating to accountability of foot soldier viz a viz superior orders as a defence, and to ascertain the training needs of the combat troops in light of laws relating to conduct of hostilities. A descriptive analysis was done on the findings and suitable recommendations were discussed.

Keywords: War crimes, Accountability, Command responsibility, Superior orders

1. Introduction

The 30 year old armed conflict between the Sri Lankan government forces and the LTTE was concluded 13 years ago. The nature of the armed conflict had taken numerous facets since the beginning of the conflict. Initially it was a struggle for freedom against the oppressive governmental decisions to give priority for the major ethnic community, the Sinhalese but later on the modus operandi of the LTTE took a different stance of guerrilla warfare, suicide attacks and terrorism.

Sri Lanka having had well-trained armed forces was initially struggling for identification of combat tactics of the enemy', during the initial stages of the war. It was nearly a decade in war that the forces were able to identify the nature of tactics adopted by the LTTE. Such tactics included the use of many unconventional methods and means of warfare such as suicide attacks, heavy guerrilla tactics.

In the changing circumstances, the government of SL had to prepare itself for 'war' with the insurgents, as it seemed to be at the first instance. In the preparation of a war with insurgents who had used such means and methods of warfare which did not conform to the principles of IHL relevant to Non-international armed conflict, the government forces too was not equipped with such knowledge of international legal norms to be adhered to by a

legitimate armed force combating an internal war with the usually unseen or concealed enemy. The LTTE cadres were clad in civil clothes and were taking human shields during most part of their attacks on the military forces. "They were ordinary fishermen until they started a suicide attack on our boats near Kalmunai"; a senior Naval Officer recollected his memory on a major suicide attack. Another officer has stated that the LTTE cadres who had come on a suicide mission in the Mannar road were concealed as pilgrims to the sacred Madu temple. Thus, this asymmetrical warfare was a crucial factor in determining the applicability of IHL in NIACs.

The situation is tense when apprehension of the enemy had to be done spontaneously and on ground when our own troops are under attack, such a situation being one where the ground soldier is not in a situation to communicate with his superior for each and every step to be taken. To face such a situation and act upon the military necessity according to IHL norms, the foot soldier needs to be given an adequate training and teaching on IHL to a level where he would be adequately equipped of knowledge. The LTTE having been pronounced by the international community of nations to be a terrorist organization, it is required to understand whether the legitimate government forces have clearly understood their legal responsibilities at a time of war fought internally.

The findings of the Darusman Report published in 2011, by the panel of experts headed by Marzuki Darusman on a mandate given by the then secretary general of the UNO, a large scale of IHL violations have been identified to have been caused by both the government troops and the LTTE. The report however credits more of the serious allegations to the GOSL. In contrast, the Paranagama report published in 2014 pursuant to a mandate given by the then President of SL, HE Mahinda Rajapaksa, has credited more blame on the LTTE for violations of IHL in a non-international armed conflict.

In this backdrop it is pertinent to find out whether knowledge of such international norms and related training had been clearly and adequately disseminated among the troops prior to be employed in war and whether such shortcomings if any had been rectified after 13 years of the aftermath of the war to cater for future similar insurrections, which is likely to be more intensified and with the developments in cyber warfare during the past decade.

The analysis needs to focus on both aspects, of training and teaching, since a soldier is needed to be trained to face changing circumstances on the battle ground.

2. Literature Review

A. War crimes allegations against Government forces

A series of war crimes allegations had been levelled against the government troops by the Darusman report. These crimes are alleged to have committed after the ceasefire which ended in 2006. Ahead of these allegations the report has highlighted the legal premises applicable to the conflict, it being a Non- international Armed Conflict. Panel referred to the common article 3 of the four Geneva conventions only which provisions were directly applicable to the situation in Sri Lanka and recognized that SL was not a party to the Protocol 11 of the Geneva Conventions relating to the protection of victims of NIACs (Darusman Report, 2011). The panel also considered certain customary international rules of warfare as applicable to the SL situation.

The panel also has addressed certain Human Rights Law rules to be applicable to certain conduct of the parties, and which are outside the direct events happened on ground. The state has a right under international law to ensure its national security and to defend itself against armed attacks including those of insurgents who may engage in acts of terrorism. Those ends do not however, justify all means to achieve them: all actions for those legitimate purposes must

comply with the requirements of international law (Darusman report, 2011).

In its examination on the legal responsibility of conduct in war, the panel has considered individual criminal responsibility, state responsibility and organizational responsibility. However, the panel has not focused on individual criminal responsibility viz a viz Command responsibility and has merely assigned the blame on the organization on certain kinds of violations.

The report contains major allegations on the conduct of hostilities as follows;

- a. Killing of civilians by way of large scale shelling. The panel has blamed the SL Air Force of indiscriminate shelling on three No Fire Zones.
- b. The panel alleges that the SL Army deliberately launched attacks on the civilian population in the No Fire Zone and on civilian objects such as hospitals, food distribution points and humanitarian objects. The panel makes a further allegation of spreading terror among civilians.
- c. SLA's use of Artillery has been criticised by the panel as a gross violation of IHL since such fires have targeted hospitals and food supply routes. Use of other heavy weapons was also an allegation against the Army.
- d. Failure to take such precautions before an attack such as failing to warn in advance.
- e. Shelling of hospitals and humanitarian objects.
- f. Denial of humanitarian assistance by restricting ICRC ships, reduced amount of food supply to Wanni and impeding humanitarian convoys.

g. Outrages upon personal dignity, enforced disappearances and minimal conditions in IDP facilities.

h. Violation of right to life, arbitrary detention, restrictions on peaceful assemblies, gender based violence.

The above allegations have been denied by various forums at the domestic level challenging the credibility of sources of information received by the panel (Paranagama Report, 2014) (Marga Institute Seminar on accountability, 2010).

B. Command Responsibility

In the battle field the ground troops have a clear hierarchy to give such orders necessary to attack, counter attack, withdraw or ambush. The determinant party of fire orders may differ in rank and authority on many reasons, such as enemy strength, own troops strength, enemy capacity, ground conditions, nature of weapons used and coordination with Naval and air troops. As such, the rank and maturity of the ground commander may differ from situation to situation. In addition to this, if the superior in command has come under attack, the next in line will have to take over.

A crucial thing to decide is how competent would be a ground commander in a particular situation to make rational and lawful decisions spontaneously on ground. A military commander or other superior may sometimes be responsible for crimes committed by a subordinate even though he did not directly order them (Crowe & Weston, 2013). According to Protocol 1 Article 87(1) of the Geneva Conventions, Command responsibility is particularly important in ensuring the respect of IHL because armed forces as well as armed troops are characterized by a hierarchical structure and must even be under a responsible command.

A person may hold a command position for the purpose of command responsibility, either de

jure or de fact. A de jure commander holds a formal position within an organized chain of command, while a de facto commander is not formally in command of subordinates but exercises effective control over them in a practical sense (Crowe & Weston, 2013). It can be seen thus that the responsibility vested in the de facto commander could be more stressful for the person in command, since he would not have sufficient time and space to design nor plan his orders to subordinates nor he has much control over them in comparison to what a de jure commander has.

However, Commanders who are aware that subordinates or other persons under their control are going to commit or have committed a violation, must initiate steps to prevent the violation and, where appropriate, initiate disciplinary or penal action against such persons (Sassoli, 2019). The question is whether command responsibility exists in NIACs as matter of treaty law. According to Sassoli, the ICRC and ICTY jurisprudence, it also applies as customary law to NIACs (Sassoli, 2019). The crimes in question must also concern that are within the commander's effective responsibility and control (Crowe & Weston, 2013). In command responsibility the most troublesome issue has always been the commander's state of mind (Solis, 2010). The issue may be complicated where the command relationship is not clearly defined.

C. Defence of Superior Orders

On the battle ground it is a common phenomenon that, both officers/ superiors in command have to make certain decisions which may not have been there in the initial plan of events or the operational plan. In such circumstances, the orders which may have been given by the superior prior to launch on the battle ground may not have been the order the subordinates get on the ground. In such circumstances, unless the soldier is trained enough to understand and evaluate the legality

of the orders spontaneously given by his superior, especially during a tense battle situation, he would be either merely carrying out the order received without any evaluation as to the legality of the order received.

The Rome Statute provides that, the defence of superior orders can only be relied upon if the person was under a legal obligation to obey the orders, or he did not know that, the order was unlawful and the order was not manifestly unlawful (Crowe & Weston, 2013). The question is then, how does an average soldier understand whether he is under a legal obligation to follow an unfamiliar order in a tense battle situation?

In situations where the laws of armed conflict have been disseminated through military manuals or other means, it is unlikely that a person could rely on the defence in relation to a war crime (Crowe & Weston, 2013). This idea connotes that, a soldier sent to battle ground has to be adequately equipped in terms of knowledge on such principles of law relating to conduct of war and means and methods of warfare. The Lieber Code on the law of war is silent on the defence of superior orders.

Superior orders may not be specifically may not be considered by a court unless the accused did not know and could not be expected to have known the order's illegality (Solis, 2010). The question is how can an average soldier who had sworn to obey his superior's orders make a rational decision on the battle ground as to the thin line between illegal and manifestly illegal orders?

3. Methodology

Through journals, books, and literature on military manuals, a substantial analysis of the literature was conducted, followed by moderate interviews conducted on a sample of 30 consisted of serving military officers, senior non-commissioned officers and low rankers who had served in various capacities during the Eelam War 111 beginning from 2006, to

recognise the nature of understanding, knowledge and training they had received on such applicable international legal norms relevant to the conduct of hostilities in a non-international armed conflict. Snowball method was used to select the sample.

The allegations levelled against the government forces as to commission of war crimes was discussed during the literature review to understand whether such allegations made by the Darusman Report were rationally based. How the superior subordinate relationship on battle ground affected the obedience to orders and the contribution of knowledge imparted on IHL towards the carry out of legitimate orders of superiors were investigated through in-depth interviews. To fulfil the research objects, literature was evaluated using theoretical facts and practical factors relevant to the study. The major barriers they had associated with in complying with IHL standards in asymmetric warfare where guerrilla tactics and many unconventional means and methods of warfare have been discussed.

In-depth and semi-structured interviews were used as a data collecting method on the basis of the interviewee's experience in battle field. Defining the role of strategic roles were made also made through this study. Data was examined using content analysis as the method of data analysis.

4. Results and Discussions

Sri Lanka has been the subject of discussion in the United Nations and many human rights forums for the past thirteen years in the aftermath of the war, due to serious allegations of war crimes conducted during the third phase of the Eelam war. The main allegations were made by the Darusman Report of 2011, which had credited much of the violations to the account of the government forces. It should be the responsibility of any democratic government in SL to conduct an impartial inquiry into the said allegations and clear the names of military

commanders who had contributed towards defeating one of the most ruthless terrorist organizations in the world. Thus to have a clear idea on the account of events happened during the period under review, the view of a sample of both superior commanders and subordinate members of the SL army were chosen.

A. Interviewee profile for interviews

A brief summary of the thirty interviews is presented in Table 1 as follows;

Table 1. Interviewee profile

Interviewee	Nos	Rank	Experience
E01	2	Brigadier	30 years
E02	2	Colonel	27 years
E03	5	Lieutenant Colonel	23-25 years
E04	5	Major	18 years
E05	2	Warrant Officer	20 years
E06	4	Sargent	18 years
E07	10	Non-commissioned officer	14 years

When considering the enormous number of prosecutions on international crimes happened in many parts of the world from time to time, most of the trials were attempted to find individual criminal liability for the heinous crimes committed. When going through the large number of literatures found on this aspect, in the majority of cases, the accused have tried to evade responsibility by trying to take the defence of superior orders for the commission of their unlawful conduct in the battle field. On the other hand command responsibility lies at the heart of many convictions in the international tribunals. Thus, during the interviews.

50% of the sample consisted of superior commanders in battle and the rest 50% were from subordinate troops. E1 and E2 were on the view that troops under command were mostly

not armed with adequate knowledge on the IHL standards during the conduct of hostilities. E1-E5 were of the opinion that even some were aware of the principles, basically, a precise knowledge was not there with the troops especially the soldiers. All officers were of the opinion that the military did not have sufficient time to teach and train the young officers and soldiers before employing them on the battle since during the ceasefire most of the training needs were focused on combat training. They were further of the view that, there was a vast knowledge gap in terms of the distinction between the applicability of Human Rights Law and Humanitarian Law during an armed conflict.

E3 and E5 stated that they were young officers then who not acclimatised to the unconventional, asymmetric warfare. As mentioned by E1, who was a member of the armed forces during the JVP insurrection, stated that he was in many uncertainties when taking serious operational decisions since coordination between the Tri forces ground commanders were not adequate during the early phases of the final battle. 50% of them believe in enhanced joint forces training to overcome any future breaches of laws of war due to lack of joint forces corporation.

40% of officers were on the view that, the correct position of chain of command was occasionally confused during heavy battle with the need to replace the battle commanders killed in action. 30 % were of the opinion that orders in the battle ground could not be clearly identified as lawful nor unlawful due to inability to appreciate the ground situation, since the enemy was taking human shields. All officers were of the view that subordinate troops in most instances had to act without a superior order when communication lines were obstructed. All officers were of the opinion that it was unfair to implicate a military superior for command responsibility when fighting asymmetric warfare.

All were on the view that allegations levelled by the Darusman Report do not have a rational base and was biased towards the opponent in battle, the LTTE. All of E1-E4 were of the opinion that training needs on IHL and IHRL is still considerably high for other ranks since most part of the education needs are concerned towards conventional warfare.

E5-E7 who are other ranks who have been directly engaged in the final phases of the war stated that although they had received a considerable combat training, they were not adequately aware of many IHL principles. However, 80% of them stated that they were given general guidelines on the limitations on conduct of hostilities before engaging them in the battle ground. 70 % of them stated that during heavy battle they did not have the capability nor space to evaluate the orders given by their superiors. 45% were of the opinion that they had not received any further training on IHL nor IHRL after 2009. 35% of them mentioned that although they had followed some short courses conducted by the Army on IHL and HR, there still are many areas which they need clarifications about.

70% were of them were of the opinion that even a moderately trained soldier would not hesitate his superior's orders on the battle ground even though he may feel it to be illegal.

The following suggestions can be considered as a summary of recommendations made by the majority of the interviewees; in order to incorporate international legal standards on the conduct of hostilities.

- Direct military officers in combat arms for suitable postgraduate studies in the fields of law, human rights, criminology and crime psychology.
- Address the training needs of officers and soldiers by including fundamental norms of IHL and IHRL within the Army.

- Enhance coordinated training between the tri forces.
- Finding suitable overseas training opportunities for other ranks, especially on leadership training.
- Increase workshops, webinars and other practical events to enhance awareness on IHL and IHRL.
- Improve the existing training manuals on IHL and HR with examples of case studies.
- Create a dialogue on the drawbacks experienced during the past conflict, among both officers and other ranks by as a participative approach.

5. Conclusion and Recommendations

Accountability in war is a necessity for any armed force, which can be considered the first step after the conclusion of hostilities. Such did not take place so far in SL in the aftermath of the thirty year internal war with the LTTE. This failure has brought down the reputation of our country as well as the Tri forces since the international community of nations are influenced by the allegations levelled by the findings of the Darusman report. Accountability which is determined on two angels of a particular conduct relies fundamentally on the concept's individual criminal responsibility and command responsibility. While individual criminal responsibility of the lower ranks of a military force largely depends on superior command; although conceptually superior command is not a sound defence, it is a factor to be considered in relation to ground realities. As such, command responsibility is placed as a heavy burden on the superior commanders fighting asymmetric war with a terrorist group.

As opined by the majority of the interviewees, a well -designed programme of educating the

members of the military, well -coordinated training between the Tri forces, exposure to overseas training and development of military manuals incorporating necessary legal standards could help prevent any unlawful events in future combat situations with a sound decision making process even in tense conflict situations. Assistance of eminent academics needs to be obtained in the development of military manuals.

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