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## The Human Rights to Food, Medicine and Medical Supplies, and Freedom from Arbitrary and Inhumane Detention and Controls in Sri Lanka

Jordan J. Paust

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# ESSAY

## **The Human Rights to Food, Medicine and Medical Supplies, and Freedom from Arbitrary and Inhumane Detention and Controls in Sri Lanka**

*Jordan J. Paust\**

### ABSTRACT

*This Essay identifies the denial of adequate and available food and the denials of adequate medicine and medical supplies in Sri Lanka as serious human rights violations. Additionally, the Author cites customary international law and international agreements to support his conclusion that the government's denial of these necessities in Sri Lanka constitute war crimes. The Author discusses the human rights violations with respect to: (1) the right to adequate food; (2) the right to adequate medicine and medical supplies; and (3) the right to freedom from arbitrary and inhumane detention and controls. The Author concludes by urging that the U.S. State Department Country Reports, and the international community generally, expose the denials of food, medicine, and medical supplies as serious violations of humanitarian law, and that countries treat food as neutral property during armed conflicts.*

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\* Law Foundation Professor, University of Houston. A.B. 1965, J.D. 1968, UCLA; LL.M. 1972, University of Virginia; J.S.D. Candidate, Yale University; Co-Chair, International Criminal Law Interest Group, American Society of International Law.

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## I. INTRODUCTION

Are the denial of adequate and available food and the denial of adequate and available medicine and medical supplies violations of human rights law? This Essay demonstrates that such denials are not only violations, but are quite serious violations of basic human rights. Such denials of food or medicine and medical supplies tend to be among the most egregious types of human rights violations, since those who can least afford to suffer tend to be victims. Usually only the poorest of the poor, the displaced, the infirm, the disabled, and children suffer from such calculated or foreseeable inhumanity. The denial of food or medicine and medical supplies can lead to slow, painful, inhumane deaths—not among enemy combatants and official elites, but among the poor, the disadvantaged, and children. It is particularly egregious for any person to use the denial of food or medicine and medical supplies as a governmental tactic or political weapon. All such denials must be exposed and opposed. It is most appropriate and necessary that future U.S. Department of State Country Reports (Country Reports) address such egregious human rights violations in Sri Lanka and wherever else they occur.

In a given context, denials of these types also violate related prohibitions under the laws of war termed “human rights in times of armed conflict” and constitute serious war crimes. It has long been recognized that there is a “civil war” occurring in Sri Lanka

that has reached at least the level of an insurgency<sup>1</sup>—thus implicating common Article 3 of the 1949 Geneva Convention (common Article 3)<sup>2</sup> and Additional Protocol II (Protocol II) thereto.<sup>3</sup>

Common Article 3 reflects customary international law,<sup>4</sup> and several tenets of customary international law are mirrored in Protocol II.<sup>5</sup> Human rights norms are also mirrored in the Geneva Conventions. For example, common Article 3 requires that the government treat “humanely” all those “taking no active part in the hostilities.”<sup>6</sup> Moreover, common Article 3 expressly provides that it shall be prohibited “at any time and in any place whatsoever with respect to the above-mentioned persons” to engage in “cruel treatment” of such persons as well as “outrages upon personal dignity, in particular humiliating and degrading treatment.”<sup>7</sup> The protections found in common Article 3 and in Protocol II reach a state’s own nationals.

In case of an armed conflict of an international character, common Article 3 continues to apply as a customary set of minimum standards.<sup>8</sup> With respect to co-nationals, however,

1. See, e.g., Sri Lanka Country Report on Human Rights Practices for 1996, DEPT ST. BULL., at 1 (1997) [hereinafter 1996 Sri Lanka Country Report]. It is more appropriate to consider that the armed conflict lasting more than a decade in which the Tamil people are fighting for self-determination has reached beyond an insurgency as such and implicates Protocol I to the Geneva Conventions. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(4), adopted June 8, 1977, 1125 U.N.T.S. 3, reprinted in 16 I.L.M. 1391 (1977) [hereinafter Geneva Protocol I]. Article 1 (4) affirms that Protocol I supplements the general provisions of the 1949 Geneva Conventions applicable in case of an armed conflict of an international character, and that such include: “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . .” *Id.*

2. E.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter Geneva Civilian Convention]. Concerning applicability of common Article 3 to an insurgency, see, for example, JORDAN J. PAUST, M. CHERIF BASSIOUNI ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 971-76, 980-83, 991-93 (1986).

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted June 8, 1977, 1125 U.N.T.S. 609, reprinted in 16 I.L.M. 1442 (1977) [hereinafter Geneva Protocol II].

4. See, e.g., PAUST, BASSIOUNI ET AL., *supra* note 2, at 764, 825-30, 833, 969; INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: DEFINITION OF WAR CRIMES FOR THE PREPARATORY COMMITTEE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT 24 (Feb. 14, 1997) [hereinafter ICRC WORKING PAPER].

5. See, e.g., PAUST, BASSIOUNI ET AL., *supra* note 2, at 833, 981.

6. Geneva Civilian Convention, *supra* note 2, art. 3.

7. *Id.*

8. See PAUST, BASSIOUNI ET AL., *supra* note 2, at 827-29, 976, 980-81; Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U. J. INT’L L. & POLY 499, 506, 512 & n.43 (1994).

Articles 4 and 13 of the Geneva Civilian Convention limit additional direct protections to those protections covered in Articles 13 through 26.<sup>9</sup> As explained below, there are several allegations and recognitions with respect to the denial of food, the denial of medicine and medical supplies, and the denial of freedom from arbitrary and inhumane detention and controls, implicating common Article 3 and Articles 16, 23, and 24, as well as various articles in Protocol II. Moreover, if specific intent to commit these types of denials is shown, the denials can even constitute international crimes of genocide.<sup>10</sup> These international crimes implicate not merely individual responsibility, but also the duty of the government to seek out, arrest, and initiate prosecution or extradition of those reasonably accused of such crimes.<sup>11</sup>

Are arbitrary and inhumane detention and controls of individuals or groups of persons human rights violations? They are, although legal standards are related to terms such as "arbitrary," "unnecessary," and "strictly required." Additionally, there are human rights protecting the freedom to leave one's country and to seek asylum in foreign lands. Liberty and freedom of movement are not absolute, but there are significant limitations to what restrictions government can impose, even in the case of civil war. Moreover, those detained or controlled are entitled to certain rights specified in human rights instruments, including the Geneva Conventions. As noted, violations of the Geneva Conventions are also crimes implicating individual criminal and governmental responsibilities.

As demonstrated in this Essay, there are serious allegations and significant recognitions of human rights violations in Sri

9. See, e.g., Paust, *supra* note 8, at 512-13.

10. See Convention on the Prevention and Punishment of the Crime of Genocide, art. II, 78 U.N.T.S. 277 [hereinafter Genocide Convention], reprinted in PAUST, BASSIOUNI ET AL., *supra* note 2, at 1081-82, 1084; *infra* text accompanying note 68.

11. See, e.g., Geneva Civilian Convention, *supra* note 2, art. 146; Genocide Convention, *supra* note 10, arts. I, IV, VI-VII; *The Law of Land Warfare*, U.S. DEP'T OF ARMY FIELD MANUAL FM 27-10 [hereinafter FM 27-10], 181-82, paras. 506, 507 (1956); PAUST, BASSIOUNI ET AL., *supra* note 2, at 8, 15, 17, 74-80, *passim*. FM 27-10 also recognizes: "Every violation of the law of war is a war crime." FM 27-10, *supra* at 178, para. 499; see also PAUST, BASSIOUNI ET AL., *supra* note 2, at 24, 84-86, 744 (Bangladesh International Crimes (Tribunals) Act, art. 3 (2)(e) ("violation of any humanitarian rules applicable in armed conflicts")), 761 (U.N. Secretary General notes that S.C. Res. 820 condemned all violations of international humanitarian law and affirmed that individuals will be responsible), 967-69, 984-94, *passim*; 3 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 421 (Jean Pictet ed. 1960) ("The International Law Commission has defined war crimes as: 'Acts in violation of the laws and customs of war.'"); 4 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 583 (Jean Pictet ed. 1958).

Lanka relating to the right to adequate food, the right to adequate medicine and medical supplies, and the right to freedom from arbitrary and inhumane detention and controls. Such denials are sustained by governmental censorship, denials of access to certain areas for investigative purposes, and intimidation of nongovernmental organizations (NGOs), which in turn involve violations of the human right to transnational freedom of speech. Moreover, these denials are sustained by the lack of adequate governmental investigations, arrests, and prosecutions of alleged perpetrators—patterns that facilitate an air of impunity. Country Reports certainly should address deprivations of these human rights. To some extent, the Country Reports do address arbitrary and inhumane detention and controls, censorship, and denials of access to certain areas. For example, a section in the 1997 Country Report on Sri Lanka addressing very limited “Violations of Humanitarian Law in Internal Conflicts,” demonstrates the interface between general human rights law and human rights in times of armed conflict as well as the propriety of U.S. State Department reporting of such violations.<sup>12</sup> The most egregious violations include denials of food and medicine or medical supplies, especially for children. These violations should at least be addressed in portions of a Country Report otherwise addressing the rights of children<sup>13</sup> and practices of discrimination.<sup>14</sup> It would be most appropriate, however, to address violations of the right to food and to medicine and medical supplies in separate sections. Further, under Article 1 of the Geneva Conventions, the United States, as do all signatories, has an obligation “to respect and to ensure respect” for the Conventions “in all circumstances.”<sup>15</sup> One very limited, but necessary, means of ensuring respect is to disclose known and suspected violations of the Geneva Conventions in Country Reports. The 1998 Country Report on Sri Lanka<sup>16</sup> actually focuses on the misuse of food and medicine in a section titled “Use of Excessive Force and Violations of Humanitarian Law in Internal Conflicts.”<sup>17</sup>

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12. See 1996 Sri Lanka Country Report, *supra* note 1, at 9.

13. See *id.* at 14-15.

14. See *id.* at 13-16.

15. Geneva Civilian Convention, *supra* note 2, art. 1.

16. Sri Lanka Country Report on Human Rights Practices for 1997, DEPT ST. BULL. at 1 (1998) [hereinafter 1997 Sri Lanka Country Report].

17. *Id.* at 8-10.

## II. THE DENIAL OF ADEQUATE FOOD

### A. *The Problem*

There are several serious allegations and significant recognitions of failures of the government of Sri Lanka and its officials, officers, and agents to provide adequate and available food to populations in northern regions, including allegations that crops have been intentionally destroyed. There are also allegations that these failures are often deliberate: that the failure to provide adequate food is used as a political tactic or weapon of war against noncombatants in the northern regions for various purposes. Such purposes allegedly include the intent to break down civilian support processes so that civilians are forced to move to detention centers or government controlled areas; the intent to assure suffering, insecurity, and, thus, instability in various regions; the intent to engage in punishments or reprisals against unsympathetic civilians; and the intent to keep food out of the hands of insurgent forces. There are also allegations that, if not deliberate, the government's failures to provide adequate and available food are the result of government policies pursued in the context of known starvation and malnutrition, despite the high likelihood that such policies will result in further starvation and malnutrition.

Some of the allegations and impacts are demonstrated in a 1997 report published by the U.S. Committee for Refugees (USCR). For example, the report states: "Many groups and individuals involved with the displaced say that government ministries and the military deliberately withhold or delay supplies for the displaced. That should end."<sup>18</sup> The 1997 USCR report also recognizes that "[m]any people live in fear . . . [there] is little employment; most are dependent on food aid"<sup>19</sup> and that "[t]he government's ban on fishing . . . reduces the availability of fish,

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18. U.S. COMMITTEE FOR REFUGEES, CONFLICT AND DISPLACEMENT IN SRI LANKA at 4 (Mar. 1997) [hereinafter USCR REPORT]. See also International Committee of the Red Cross, *Sri Lanka*, in ICRC ANNUAL REPORT 1996, at 140-42 (1997) [hereinafter ICRC REPORT] ("[T]he need for humanitarian aid grew in the east of the country owing to restrictions imposed by the government on the transport of goods to areas in which LTTE [Liberation Tigers of Tamil Eelam] forces were present. . . . Acceptance by all parties of the ICRC's mandate . . . was indispensable. . . . Unfortunately, that acceptance was sometimes difficult to achieve. . . . [T]he Sri Lankan authorities . . . were reluctant to permit the use of certain chemicals essential for disinfection; [leading] to delays.").

19. USCR REPORT, *supra* note 18, at 8.

usually an important source of nutrition . . . .<sup>20</sup> The USCR further states: "The overall situation for people in the Vanni . . . is worrisome. [There is] inadequate nutrition, water, health care, and shelter, all [of which] place the population at risk."<sup>21</sup>

In a section on USCR Findings, it is recognized that there is some malnutrition and that "a large number of people . . . did not have regular access to food and were increasingly vulnerable."<sup>22</sup> Moreover, this section points out that actual transport of food into the region was inadequate and often significantly below government promises and demonstrated needs.<sup>23</sup> The USCR reports that several humanitarian organizations say the government manipulates assistance as part of a political strategy to keep displaced people in need; relief workers say that food is much less than that needed and that the government does not send what it promises.<sup>24</sup> The USCR's formal recommendations state that "[t]ens of thousands of people are at risk because the government will not provide them food aid, allegedly because it views them as sympathetic"<sup>25</sup> to the Liberation Tigers of Tamil Eelam (LTTE), an insurgent group of Tamil people, which has been fighting for self-determination for more than thirteen years.<sup>26</sup> "If the government will not assist these people, it should allow the international community to do so."<sup>27</sup> Denials of food are exacerbated in governmental detention centers.<sup>28</sup> The 1998 Country Report on Sri Lanka notes that government organized convoys of food in 1997 were significant, but "the food situation in the Vanni was serious," adding:

Experts noticed an increase in anemia and a lower birth rate . . . . Nutrition levels were below the national average, and there were confirmed cases of malnutrition, including hundreds of cases of malnourished children [and estimates of 400,000 people in need of food assistance]. [The] Government agreed with NGOs and international organizations that

20. *Id.* at 16.

21. *Id.* at 19; see also Jawed Naqvi, *Army Accused as Tamil Refugees Face Starvation*, GLASGOW HERALD, Aug. 7, 1996, at 12; Barbara Crossette, *UNICEF Report Calls Children Major Victims of Recent Wars*, N.Y. TIMES, Dec. 11, 1995, at A11 (noting the special risks faced by children; "[c]hildren should be made 'zones of peace,' UNICEF advises, allowing food and medicine to reach them in wartime."); Anthony Spaeth, *The Last Days of Jaffna Town*, TIME, Nov. 13, 1995, at 48 ("Food and medicine are scarce").

22. USCR REPORT, *supra* note 18, at 20; see also ICRC REPORT, *supra* note 18, at 141 ("The plight of the displaced civilians who fled into the Vanni region in April was a source of great concern to the ICRC and other humanitarian organizations working in the area. . . . Signs of malnutrition were detected mainly in the east of the country, in particular Batticaloa and Trincomalee districts.").

23. See USCR REPORT, *supra* note 18, at 20.

24. *Id.* at 24.

25. *Id.* at 29.

26. See, e.g., 1996 Sri Lanka Country Report, *supra* note 1, at 1.

27. USCR REPORT, *supra* note 18, at 29.

28. See *id.* at 32.



monthly deliveries of 6,000 metric tons were needed to provide a nutritional minimum of 15 kilos per person. However, subsequent monthly shipments averaged only 3,400 metric tons.<sup>29</sup>

### B. Legal Requirements

Under human rights law, there is a recognized right to adequate and available food.<sup>30</sup> For example, Article 25 of the Universal Declaration of Human Rights (Universal Declaration)<sup>31</sup>, which is an authoritative aid for interpretation of human rights obligations under Articles 55 (c) and 56 of the U.N. Charter,<sup>32</sup> declares that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food.”<sup>33</sup> This human right to adequate food is also recognized in the 1966 International Covenant on Economic, Social, and Cultural Rights.<sup>34</sup> Article 11 of this covenant declares that States Parties “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food . . . .”<sup>35</sup> It adds: “States Parties will take appropriate steps to ensure the realization of this right . . . .”<sup>36</sup> Paragraph 2 of Article 11 further declares that States Parties recognize “the fundamental right of everyone to be free from hunger” and that states “shall take . . . the measures . . . which are needed” including, for example, those necessary to “improve methods of production, conservation and distribution of food . . . .”<sup>37</sup>

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29. 1997 Sri Lanka Country Report, *supra* note 16, at 9. The report also stated that the “LTTE appropriated government-supplied food for use by non-civilians.” *Id.*

30. See generally Donald E. Buckingham, *A Recipe for Change: Towards an Integrated Approach to Food Under International Law*, 6 PACE INT’L L. REV. 285 (1994); Panel Discussion, *International Law and the Food Crisis*, 69 AM. SOC’Y INT’L L. PROC. 39-63 (1975). For historic recognition of “life needs” of food, clothing and medicines as “the common right of all mankind,” see HUGO GROTIUS, *DE JURE BELLI AC PACIS* 78, 87 (L.R. Loomis trans. 1949) (1625).

31. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc 8/810, at 71 (1948).

32. See, e.g., RICHARD B. LILICH & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS* 11, 39, 65 (3d ed. 1995); JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 191, 199-200, 228 n.182, 245 n.372, 256 n.468 (1996); Buckingham, *supra* note 30, at 291.

33. G.A. Res. 217A, U.N. Doc. A/810, at 76 (1948).

34. International Covenant on Economic, Social, and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

35. *Id.* art. 11, 993 U.N.T.S. at 7.

36. *Id.*

37. *Id.*

Whatever the full contours and permeations of the right to food might be,<sup>38</sup> it is clear that it constitutes a violation of human rights law to deny adequate food to a given population. Moreover, it would be especially unlawful and egregious to deny the right to adequate food as a government tactic to control certain persons or as a weapon of war.<sup>39</sup> Limitations are permitted under the 1966 International Covenant on Economic, Social, and Cultural Rights only if "determined by law" and "only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."<sup>40</sup> The limitations provision in the Universal Declaration sets a higher threshold, allowing relevant derogations only to the extent needed to meet "the just requirements of . . . public order and the general welfare in a democratic society."<sup>41</sup> Starvation and malnutrition, if intentional or foreseeable consequences of governmental action and a policy of denial, are not compatible with the right to adequate food<sup>42</sup>—nor would they promote the

38. See generally FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 9, 14, 50, 74, 86 (2d ed. 1996); *supra* note 30; *infra* note 42.

39. See Buckingham, *supra* note 30, at 295 nn.42-43, 297-301; *infra* text accompanying notes 52-67. Professor Buckingham also quotes a 1984 General Assembly resolution and General Principles adopted at an international conference, both of which recognize the human right to food and declare that "food should not be used as an instrument of political pressure," Buckingham, *supra* note 30, at 295 n.42 or "as a means of exerting political pressure," *id.* at 295 n.43.

40. International Covenant on Economic, Social and Cultural Rights, *supra* note 34, 993 U.N.T.S. at 5.

41. G.A. Res. 217A, *supra* note 31, art. 29(2), at 77.

42. See also G. J. H. van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views*, in *THE RIGHT TO FOOD* 97 (1984), reprinted in HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 279 (1996):

"[T]he right to food includes the duty on the part of the State to prevent others from depriving people . . . from their main resource base to satisfy their food needs . . . [and] requires a State to take steps in case members of its population prove incapable of providing themselves with food of sufficient quantity and quality . . . . At any rate, a State violates this obligation when, in the face of food shortage, it does nothing."

*Id.* at 282-83; Max Van der Stoep, *Situation of Human Rights in Iraq*, U.N. Doc. A/48/600 (1993), reprinted in STEINER & ALSTON, *supra*, at 324:

In view of the Government of Iraq's obligations to take steps to provide for adequate food . . . the existence of prohibitions, restrictions and administrative requirements interfering with access constitute violations . . . the Government stopped distributing rations . . . . Instead, the Army is said to have established checkpoints which have the effect of stopping people from procuring food . . . .

*Id.* at 325. The use of food as a weapon is more clearly proscribed than the above-mentioned violations of the right to food. Also, whatever steps a state might take progressively and generally to implement the right to food, use of food as a weapon

general welfare within the meaning of human rights treaty law. In no way is intentional or foreseeable starvation or malnutrition allowable as a "just requirement" for public order or general welfare.

A strategy or policy of denial and neglect would also violate Article 5 of the Universal Declaration, mirrored in Article 7 of the 1966 International Covenant on Civil and Political Rights, which prohibits "cruel, inhuman or degrading treatment or punishment."<sup>43</sup> Such a human right is fundamental because it is recognized in every relevant human rights instrument, including the 1949 Geneva Conventions<sup>44</sup> and Protocols thereto.<sup>45</sup> Clearly, the tactic of starvation or a policy of denial and neglect in the face of starvation and malnutrition is "cruel" and "inhuman," if not also "degrading" treatment of those affected. The use of such a tactic as a measure of reprisal might run afoul of the "punishment" aspects of the covered prohibition, but it would also constitute an impermissible "treatment" of a population.

The right to adequate food or medicine and medical supplies also finds expression in the U.N. Convention on the Rights of the Child.<sup>46</sup> Article 27 of this treaty recognizes "the right of every child to a standard of living adequate for the child's physical, mental . . . development" as well as the duty "in case of need [to] provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."<sup>47</sup> Starvation or a policy of denial and neglect violates such rights and duties and it would not be an excuse that the "need" of children was created by actions or inactions of a state. The Convention on the Rights of the Child also prohibits "cruel, inhuman or degrading treatment or punishment."<sup>48</sup>

With respect to common Article 3 of the 1949 Geneva Conventions, starvation or a policy of denial and neglect involving starvation and malnutrition would violate the prohibition of "cruel

is clearly beyond the state's discretion. At a minimum, a state cannot deny adequate and available food to a given civilian, civilian group, or population.

43. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, art. 7, 999 U.N.T.S. 171, 175. The 1966 Covenant does not permit any derogation of this right. *Id.* art. 4(2).

44. *See, e.g.*, Geneva Civilian Convention, *supra* note 2, arts. 3, 5, 16, 27 & 32.

45. *See, e.g.*, Geneva Protocol I, *supra* note 1, arts. 10, 75-77; Geneva Protocol II, *supra* note 3, arts. 4, 5 & 7.

46. G.A. Res. 44/25, U.N. GAOR, 44th Sess. Supp. No. 49, at 166, U.N. Doc. A/RES/44/25 (1989), *reprinted in* 28 I.L.M. 1448 (1989). The United States is the only state that has not ratified this treaty. Concerning the related 1959 Declaration on the Rights of the Child and its relevance concerning "[c]ustomary norms invoking the right to food," *see* Buckingham, *supra* note 30, at 295 (citing G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (1959)).

47. G.A. Res. 44/25, *supra* note 46, art. 27.

48. *Id.* art. 37.

treatment" and the duty to treat civilians "humanely."<sup>49</sup> Further, the actions would constitute "humiliating and degrading treatment" of civilians forced to starve or to suffer near starvation or malnutrition while also watching family members and friends fall victim to the same denial of rights.<sup>50</sup> A violation of common Article 3 is not merely a violation of customary human rights in times of armed conflict, but also constitutes a war crime.<sup>51</sup>

In the case of an armed conflict of an international character (e.g., upon recognition of a "belligerency")<sup>52</sup> additional protections relating to the right to food are recognizable. For example, Article 38 of the Geneva Civilian Convention recognizes the right of protected persons "to receive the individual or collective relief that may be sent to them."<sup>53</sup> Article 23 of the Geneva Convention adds the duty of every signatory to "permit the free passage of all consignments of essential foodstuffs . . . intended for children under fifteen, expectant mothers and maternity cases."<sup>54</sup> Only food destined to enemy combatants can be withheld and in such a case there must be "serious reasons for fearing" such an outcome.<sup>55</sup> In fact, if food is likely to be used by both the general population and enemy combatants, the destruction or denial of food in circumstances where one can reasonably foresee that the general population will suffer (including children under fifteen, expectant mothers, and maternity cases) will necessarily involve the indiscriminate use of food as a weapon.

More generally, Article 16 of the Geneva Convention assures that "[t]he wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect . . . [and that] other persons exposed to grave danger" shall be protected.<sup>56</sup> Article 24 adds: "[C]hildren under fifteen, who are orphaned or are separated from their families . . . are not

49. See Geneva Civilian Convention, *supra* note 2, art. 3.

50. *Id.*

51. See, e.g., *supra* note 11; PAUST, BASSIOUNI ET AL., *supra* note 2, at 986-94; 4 COMMENTARY, *supra* note 11, at 40 (scheme related to crimes), 591 (citing common Article 3 in connection with discussion of the general section on criminal sanctions); *Kadic v. Karadžić*, 70 F.3d 232, 242-43 (2d Cir. 1995); ICRC WORKING PAPER, *supra* note 4, at 2, 24; Report of the International Law Commission on the Work of its Forty-eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, at 110, U.N. Doc. A/51/10 (1996) (text of Draft Code of Crimes against the Peace and Security of Mankind addressing war crimes).

52. See, e.g., PAUST, BASSIOUNI ET AL., *supra* note 2, at 971, 975, 980-83; Paust, *supra* note 3, at 506-07.

53. Geneva Civilian Convention, *supra* note 2, art. 38.

54. *Id.* art. 23. Concerning the meaning of "essential foodstuffs," see, for example, 4 COMMENTARY, *supra* note 11, at 180 ("[T]hat should be understood to mean basic foodstuffs, necessary to the health and normal physical and mental development . . . . Examples are milk, flour, sugar, fats and salt.").

55. Geneva Civilian Convention, *supra* note 2, art. 23.

56. *Id.* art. 16.

[to be] left to their own resources . . . ."<sup>57</sup> In occupied territory, as recognized in Article 55 of the Geneva Convention, there is a "duty of ensuring the food and medical supplies of the population" and, "in particular, [to] bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate."<sup>58</sup>

Protocol I to the 1949 Geneva Conventions provides more specific standards. Article 54 of Protocol I expressly recognizes that "[s]tarvation of civilians as a method of warfare is prohibited."<sup>59</sup> This prohibition is part of customary international law. The "[d]eliberate starvation of civilians" has already been recognized as a war crime in the List of War Crimes prepared by the Responsibilities Commission of the Paris Peace Conference in 1919.<sup>60</sup> Article 54 of Protocol I also declares:

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs . . . for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.<sup>61</sup>

Two exceptions to this prohibition, which do not seem to apply to the situation in Sri Lanka, concern: (1) food used as sustenance *solely* by members of enemy armed forces, and (2) food used "in direct support of military action, provided however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement."<sup>62</sup> Thus, Article 54 of Protocol I recognizes that food going to both civilians and enemy combatants must not be attacked.<sup>63</sup> Further, if food is destined for the general population as well as enemy combatants, the use of food as a weapon in such circumstances would seem unavoidably to involve use of an indiscriminate weapon or tactic. Article 51, paragraph 4 of

57. *Id.* art. 24.

58. *Id.* art. 55; see also Buckingham, *supra* note 30, at 297 & n.49; Geneva Civilian Convention, *supra* note 2, arts. 59-60.

59. Geneva Protocol I, *supra* note 1, art. 54 (1); see L.R. Penna, *Customary International Law and Protocol I: An Analysis of Some Provisions*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 201, 221 (1984) [hereinafter STUDIES]; ICRC WORKING PAPER, *supra* note 4, at 17-18 (prohibition of starvation is customary international law); *infra* notes 62-67. Cf. 1 HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 68-9, 172, 446-48 (1986).

60. PAUST, BASSIOUNI ET AL., *supra* note 2, at 24.

61. Geneva Protocol I, *supra* note 1, art. 54 (2).

62. *Id.* art. 54 (3) (a) & (b); see also *id.* art. 51; A.P.V. ROGERS, LAW ON THE BATTLEFIELD 44 (1996).

63. See, e.g., MICHAEL BOTHE, ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 338-39 (1982).

Protocol I affirms the customary rule that “[i]ndiscriminate attacks are prohibited” and that such attacks include:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol.<sup>64</sup>

In Protocol II to the Geneva Conventions, applicable in cases of armed conflicts not of an international character (*e.g.*, an insurgency), one also finds certain aspects of the human right to adequate food. Article 13 of Protocol II recognizes the more general duty of “general protection” of the civilian population and individual civilians “against the dangers arising from military operations,” and the customary rule that “[t]he civilian population, as such, as well as individual civilians, shall not be the object of attack.”<sup>65</sup> Article 14 is more specific. Paragraph 1 of Article 14 affirms: “Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population such as food-stuffs . . . .”<sup>66</sup>

Clearly, the prohibition of the use of food as a weapon pertains both in armed conflicts of an international and non-international character.<sup>67</sup> The use of starvation as a strategy or policy of denial of food certainly involves criminal responsibility

64. Geneva Protocol I, *supra* note 1, art. 51(4).

65. Geneva Protocol II, *supra* note 3, art. 13 (1) & (2).

66. *Id.* art. 14.

67. See also S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg., ¶ 7, U.N. Doc. S/RES/787 (1992) (condemning as violations of humanitarian law the deliberate impeding of the delivery of food and medical supplies to the civilian population in Bosnia-Herzegovina); S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1992); S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., ¶ 5, U.N. Doc. S/RES/794 (1992) (“Strongly condemn[ing] all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population . . . .”); *Declaration on the Protection of Women and Children in Emergency and Armed Conflict*, G.A. Res. 3318, U.N. GAOR, 29th Sess., 2319th plen. mtg. ¶ 6, U.N. Doc. A/RES/3318 (1974) (“women and children belonging to the civilian population . . . shall not be deprived of shelter, food, medical aid or other inalienable rights”), *quoted more fully in* Buckingham, *supra* note 30, at 298 n.53; *Report of the Secretary-General Pursuant to Paragraph 2 of Security Resolution*, U.N. SCOR, 48th Sess., ¶ 6, at 808, U.N. Doc. S/25704 (1993) (violations of humanitarian law include “impeding the delivery of food and medical supplies to the civilian population”); 1995 Indictment of Karadžić and Mladić by the International Criminal Tribunal for Former Yugoslavia, para. 22 (regarding inadequate food and medical care for civilians detained in camps, including women, children, and elderly persons), *reprinted in* PAUST, BASSIOUNI ET AL., *supra* note 2, at 61, 65; Buckingham, *supra* note 30, at 296-301; Paust, *supra* note 8, at 516-17 & n.62; ICRC WORKING PAPER, *supra* note 4, at 17-19, 32; *supra* notes 59-63.

when starvation is intentional or deliberate. A policy of denial and neglect involving starvation can also constitute a violation of humanitarian law when used wantonly or in reckless disregard of consequences, including the indiscriminate use of food as a weapon. In the future, food, like medicine and medical supplies, should always be treated as neutral property during an armed conflict. Starvation, even of enemy combatants, seems necessarily inhumane because it involves unnecessary and lingering death and suffering.

If such a strategy or policy of denial and neglect with respect to food occurs "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such," it would amount to a crime of genocide if committed through acts of killing members of the relevant group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, or imposing measures intended to prevent births within the group.<sup>68</sup>

### III. THE DENIAL OF MEDICINE AND MEDICAL SUPPLIES

#### A. *The Problem*

There are several serious allegations and significant recognitions of failures of the government of Sri Lanka and its officials, officers, and agents to provide adequate and available medicine and medical supplies to populations in northern regions. As in the case of the denial of food, there are allegations that these failures are often deliberate and constitute a political tactic or weapon of war. Similarly, there are allegations that even if the government's acts are not deliberate, some of these failures are the result of governmental policies pursued in the context of inadequate supplies of medicine and medical supplies and, thus, with highly foreseeable consequences that these policies will result in greater shortages and the denial of medical care.

Some of the allegations and impacts are demonstrated in the 1997 USCR Report. For example, the Report stated that

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68. See Genocide Convention, *supra* note 10, art. II; PAUST, BASSIUNI ET AL., *supra* note 2, at 1081-1112; Attorney General of Israel v. Eichmann, Sup. Ct. of Israel, 1962, *reprinted in* PAUST, BASSIUNI ET AL., *supra* note 2, at 1039, 1040-41 (starvation is genocide and a more general crime against humanity); Buckingham, *supra* note 30, at 298-99 (addressing starvation within the context of the crimes of genocide and apartheid, adding that such prohibitions, "along with the Geneva Conventions, point to a consistent state practice and *opinio juris* prohibiting the use of food as a weapon of warfare.").

“displaced persons in the Wannu require more medicines and medical supplies” and that “[m]any groups and individuals involved with the displaced say that government ministries and the military deliberately withhold or delay supplies . . . .”<sup>69</sup> In Jaffna, it is stated that “[t]he hospital and its patients suffer . . . from a shortage of medical . . . equipment, and shortages and delays in receiving medicines. Some patients have died as a result.”<sup>70</sup> The report also states: “the government’s irregular provision of medicines . . . has contributed to health problems and deaths in the Wannu. Not only has the government delayed shipments of medicines, but it has also blocked NGOs from providing medicines from their own stocks.”<sup>71</sup> Among the USCR’s formal recommendations, it is stated that “persons in the Wannu require more medicines and medical supplies” and that “[m]any groups and individuals involved with the displaced say that government ministries and the military deliberately withhold or delay supplies.”<sup>72</sup>

Denials of medicine and medical supplies are exacerbated in government detention centers.<sup>73</sup> In its findings, the USCR states:

Inadequate health care is a serious problem in the Wannu . . . . [medical] equipment, and medicines are in dangerously low supply . . . . USCR found conditions in both hospitals alarming . . . . Doctors . . . have nothing with which to treat people . . . . [A] doctor said that the hospital was constantly short of drugs. He explained that the government sends medicines, but [based on] what it [sent to] the population in [1995], before the arrival of displaced persons swelled the population [and that during one quarter in 1996] the government only sent 25 percent of the medicines it was supposed to send.<sup>74</sup>

This is in sharp contrast to the 1997 Country Report, which states that in some regions “[t]he Government continued to supply [displaced persons] with food, medicine, and other essential supplies.”<sup>75</sup> Within the 1997 Country Report, however, one finds a shocking confirmation of war crime policies and activities with respect to medicine and medical supplies:

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69. See USCR REPORT, *supra* note 18, at 4; see also ICRC REPORT, *supra* note 18, at 142 (“Sri Lankan authorities . . . also sometimes refused permission for the transport north of medical supplies crucial for the treatment of war-wounded and the activities of mobile health-care teams run by the Sri Lanka Red Cross Society under ICRC supervision. The work of those teams was severely jeopardized by the extremely slow pace of government authorization.”).

70. USCR REPORT, *supra* note 18, at 15; see also *supra* note 21.

71. USCR REPORT, *supra* note 18, at 24; see also text accompanying *supra* note 69.

72. *Id.* at 29.

73. *Id.* at 32.

74. *Id.* at 22.

75. See 1996 Sri Lanka Country Report, *supra* note 1, § 2d, at 11.



[I]n April, the army seriously restricted the movement of supplies by international organizations and NGO's to LTTE-controlled areas. Restricted supplies include materials the LTTE might use in its war effort, such as surgical supplies and antibiotics . . . . There have also been serious delays in approving the movement of many other supplies into LTTE-controlled areas.<sup>76</sup>

War crime policies and activities are further documented in the 1998 Country Report:

The Government maintained a long-list of prohibited "war-related" medical items, such as sutures, Plaster of Paris, IV's, bandages, and some drugs. NGOs and other groups desiring to take these items to LTTE-controlled areas in the Vanni needed permission from local officials as well as the Ministry of Defense. Delays were common and approval was sometimes denied, lest supplies fall into the hands of the LTTE. As a result, many medical items in the Vanni were in short supply. This shortfall contributed to an already-serious deterioration in the quality and quantity of medical care furnished to the civilian population.<sup>77</sup>

More shocking is the recognition that "[t]he Government refused to permit relief organizations to provide medical attention to wounded LTTE fighters . . . ." <sup>78</sup>

### B. *Legal Requirements*

Under human rights law, there is a recognized right to adequate medical care, including the right to available medicine. Article 25 of the Universal Declaration recognizes the right of "[e]veryone . . . to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care . . . ." <sup>79</sup> This fundamental human right is expanded upon in the 1966 Covenant on Economic, Social, and Cultural Rights. Article 12 of that covenant provides that States Parties "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."<sup>80</sup> It further declares that "[t]he steps to be taken . . . shall include those necessary for . . . [among others] [t]he creation of conditions which would assure to all medical service and medical attention in the event of sickness."<sup>81</sup>

76. *Id.* at 13; see also *supra* text accompanying note 69.

77. See 1997 Sri Lanka Country Report, *supra* note 16, at 9.

78. *Id.* at 10. This criminal policy is not avoided by the fact that the Government "has offered to treat any LTTE wounded entrusted to government care," especially when "observers believe that a 'take-no-prisoners' policy was in effect . . . ." *Id.*

79. Universal Declaration of Human Rights, *supra* note 31, art. 25.

80. International Covenant on Economic, Social and Cultural Rights, *supra* note 34, art. 12.

81. *Id.*

Unquestionably, it would be a violation of human rights law to deny adequate medicine and medical supplies and treatment to a given population, groups of persons or individuals, and it would be especially unlawful and egregious to deny such rights as a governmental tactic to control certain persons or as a weapon of war. Such a strategy or policy of denial and neglect would also violate of Article 5 of the Universal Declaration, mirrored in Article 7 of the 1966 Covenant on Civil and Political Rights, which prohibits "cruel, inhuman or degrading treatment or punishment."<sup>82</sup>

These human rights also find expression in the U.N. Convention on the Rights of the Child.<sup>83</sup> Article 24 of this treaty, like the 1966 Covenant on Economic, Social, and Cultural Rights, recognizes "the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health," adding "[the] States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services."<sup>84</sup> Other duties mentioned in the article include the duty to "pursue full implementation of this right . . . [and to] take appropriate measures . . . [t]o ensure the provision of necessary medical assistance and health care to all children."<sup>85</sup> Another duty, related to the right to adequate food, expresses the obligation to take appropriate measures "[t]o combat disease and malnutrition . . . through the provision of adequate nutritious foods and clean drinking-water."<sup>86</sup>

Common Article 3 of the 1949 Geneva Conventions, in addition to its general duty of humane treatment and prohibition of "cruel treatment" noted above, contains the specific requirement that "[t]he wounded and sick shall be collected and cared for."<sup>87</sup> The government's refusal of medical treatment of wounded insurgents is a violation of common Article 3. Moreover, the intentional failure to provide adequate medicine, other medical supplies and medical treatment or a policy of denial and neglect involving similar and foreseeable consequences would violate the prohibition of "cruel treatment" and the duty to treat civilians "humanely."<sup>88</sup> Further, these government actions would constitute "humiliating and degrading treatment" of those forced to suffer the lack of adequate health care, and they would constitute a clear violation of the duty to collect and care for those

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82. International Covenant on Civil and Political Rights, *supra* note 43, art. 7.

83. G.A. Res. 44/25, *supra* note 46.

84. *Id.* art. 24.

85. *Id.*

86. *Id.*

87. Geneva Civilian Convention, *supra* note 2, art. 3.

88. *Id.*

who are wounded or sick.<sup>89</sup> As the authoritative commentary by the International Committee of the Red Cross (ICRC) adds, the duty to respect and protect the wounded and sick is “a categorical imperative which cannot be restricted.”<sup>90</sup> Therefore, the intentional withholding of medicine and medical supplies from LTTE-controlled areas, as recognized by the State Department, is a clear violation of common Article 3 and a war crime. This is true whether or not medicine and medical supplies were foreseeably destined solely for use by enemy combatants or enemy wounded and sick. Medicine and medical supplies are neutral<sup>91</sup> and protected property in time of armed conflict, and may not be withheld.

In the case of an armed conflict of an international character, additional protections<sup>92</sup> relating to medicine, medical supplies, and medical treatment and facilities are recognizable. For example, Article 38 of the Geneva Civilian Convention recognizes the right of protected persons “if their state of health so requires, [to] receive medical attention and hospital treatment.”<sup>93</sup> Article 23 adds the general duty of signatories to the Geneva Convention to “allow the free passage of all consignments of medical and hospital stores.”<sup>94</sup> In occupied territory, as recognized in Article 55, there is a “duty of ensuring the food and medical supplies of the population” and, “in particular, [to] bring in the necessary foodstuffs, medical stores and other articles if the resources of the

89. *Id.*

90. See 4 COMMENTARY, *supra* note 11, at 40-41; see also *id.* at 180 (medicine and medical supplies are entitled to absolutely free passage and they include “any pharmaceutical products used in either preventive or therapeutic medicine, as well as consignments of medical, dental or surgical instruments or equipment.”); S.C. Res. 787 (1992), *supra* note 67, ¶ 7; S.C. Res. 771, *supra* note 67, at 25; S.C. Res. 794, *supra* note 67, ¶ 5; *Declaration on the Protection of Women and Children in Emergency and Armed Conflict*, *supra* note 67, ¶ 6; *Report of the Secretary-General*, *supra* note 67, ¶ 6; *Indictment of Karadžić and Mladic*, *supra* note 67, para. 22.

91. See also 1 COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATIONS OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 276 (Jean Pictet ed., 1952) (the prohibition of intentional destruction of “medical material and stores” in Article 33 of the GWS reflects “the spirit of the Geneva Convention, an essential aim of which is to ‘neutralize,’ as it were, all persons or objects potentially useful to the wounded and sick.”); 4 COMMENTARY, *supra* note 11, at 180 (“consignments of medical and hospital stores . . . cannot be a means of reinforcing the war economy and can therefore be sent to the civilian population as a whole” and protections also “apply to medical consignments intended to be used for the treatment of wounded and sick of the armed forces” of an enemy); Maurice Torrelli, *La protection du medecin dans les conflits armes*, in *STUDIES*, *supra* note 59, at 581, 584-86, 592.

92. Common Article 3 of the Geneva Conventions now provides a minimum set of guarantees and prohibitions under customary international law during any armed conflict. See *supra* notes 4 & 8.

93. Geneva Civilian Convention, *supra* note 2, art. 38.

94. *Id.* art. 23.

occupied territory are inadequate.”<sup>95</sup> Article 56 adds: “To the fullest extent of the means available to it . . . [there is a] duty of ensuring and maintaining . . . the medical and hospital establishments and services, public health and hygiene in the occupied territory.”<sup>96</sup> Again, medicine and medical supplies are considered neutral property and may not be diverted even from enemy hands.

Among the fundamental guarantees listed in Article 75 of Protocol I to the Geneva Conventions is the prohibition of “violence to . . . health, or physical or mental well-being of persons.”<sup>97</sup> Among the fundamental guarantees listed in Article 4 of Protocol II to the Geneva Conventions, applicable in case of an armed conflict not of an international character, one also finds the prohibition of “violence to . . . health and physical or mental well-being of persons.”<sup>98</sup> The use of medicine and medical supplies as a weapon of war would certainly thwart the policies that lie behind the prohibition of violence to health and well-being.

#### IV. THE DENIAL OF FREEDOM FROM ARBITRARY AND INHUMANE DETENTION AND CONTROLS

##### A. *The Problem*

There are several serious allegations and significant recognitions that the government of Sri Lanka and its officials, officers, and agents engage in violations of human rights laws concerning freedom from arbitrary and inhumane detention and controls. For example, the 1997 USCR Report recognizes the following: government control and displacements of civilians in northern areas;<sup>99</sup> the “disappearance” of civilians<sup>100</sup> and the failure to disclose names of detainees;<sup>101</sup> mistreatment of “and other human rights violations” concerning civilians in government controlled areas;<sup>102</sup> the fact that persons detained in Vavuniya and so-called “welfare centers” are detained in an “unfair and

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95. *Id.* art. 55.

96. *Id.* art. 56.

97. Geneva Protocol I, *supra* note 1, art. 75 (2) (a); *see also id.* arts. 69-70 (concerning outside relief efforts).

98. Geneva Protocol II, *supra* note 3, art. 4 (2) (a); *see also id.* art. 18 (concerning outside relief efforts).

99. *See* USCR REPORT, *supra* note 18, at 1, 13, 17, 18.

100. *Id.* at 3, 10, 17.

101. *Id.* at 3, 17.

102. *Id.* at 3, 17, 32-34.

unnecessary" manner and that conditions are "inexcusably poor;"<sup>103</sup> the arbitrary detention of persons even after they have been screened for security reasons;<sup>104</sup> the need to "substantially upgrade the facilities" used for detention;<sup>105</sup> the denial by the Sri Lankan government of the right of persons to flee to India and seek asylum;<sup>106</sup> and the fact that there are significant controls and restrictions upon movement in and from Jaffna and elsewhere.<sup>107</sup> The U.S. Mission to the fifty-third session of the U.N. Human Rights Commission in Geneva in April 1997, declared its "particular concern [with respect to] the unsolved disappearances of more than 700 persons in Jaffna."<sup>108</sup>

There are also allegations of related violations by members of the LTTE. Allegations concerning members of the LTTE include alleged attacks on those suspected of having "collaborated with the Sri Lankan military or government,"<sup>109</sup> and "threats of reprisals against those involved in reconstruction programs."<sup>110</sup>

The 1997 Sri Lanka Country Report contains numerous statements and recognitions of related violations of human rights, including: political and other extrajudicial killings and reprisals; disappearances; torture and other cruel, inhuman, or degrading treatment or punishment; arbitrary arrest, detention, or exile; and denials of freedom of movement, travel, and emigration, mostly at the hands of government officials, officers, and agents.<sup>111</sup> The 1997 Sri Lanka Country Report is noticeably silent and inadequate, however, with regard to the impact of these

103. *Id.* at 4, 29-34.

104. *Id.* at 30.

105. *Id.* at 5, 34.

106. *Id.* at 5, 35-36.

107. *Id.* at 8, 13, 17-18.

108. Nancy Rubin remarks to U.N. Commission on Human Rights, M2 Presswire, Apr. 11, 1997, available in LEXIS, News Library, M2PW File.

109. USCR REPORT, *supra* note 18, at 14.

110. *Id.* at 4, 14, 17. The ICRC has also been concerned about LTTE denial of ICRC delegate "access to the places in which . . . [detainees] were being held," although they were "allowed to see the detainees themselves." See ICRC REPORT, *supra* note 18, at 143; see also *id.* at 144 (ICRC visited 3196 detainees in 228 government-run places of detention and 64 detainees held by the LTTE).

111. See 1996 Sri Lanka Country Report, *supra* note 1, at 2-7, 11-12. Concerning LTTE actions, for example, the Report states that LTTE commits extrajudicial killings and that "LTTE was responsible for an undetermined number of civilian disappearances in the northeastern part of the island" and that most of the police officers and security force personnel captured "are believed to be dead." *Id.* The LTTE often denies taking prisoners even though "it is suspected of holding some." *Id.* at 4-5; see also *id.* at 8 (claims regarding LTTE courts). Members of LTTE are also accused of using torture and tolerating poor prison conditions, but information is sketchy. *Id.* at 6. LTTE is also accused of using excessive force during combat operations and using civilians as human shields. *Id.* at 9; see also Amnesty International, *Sri Lanka's Wavering Commitment to Human Rights* (Aug. 1966) (concerning claims against the government and LTTE) [hereinafter Amnesty International Report].

violations on children, violations concerning the rights of children to food and medicine and medical supplies, and violations of the populations right to freedom from exposure to grave danger.<sup>112</sup>

The 1997 Country Report also affirms recognitions of censorship and "lack of access" to certain areas by various private and government investigative groups;<sup>113</sup> the egregious lack of adequate investigations, arrests, and prosecution of alleged governmental perpetrators;<sup>114</sup> routine failures to follow "crucial safeguards" concerning arrested or detained persons;<sup>115</sup> and refusals to allow the statutorily created Human Rights Task Force (HRTF) access to areas and to various persons.<sup>116</sup> The pattern of behavior established by the government's refusal to allow nongovernmental and HRTF investigations, as well as the refusal to adequately investigate denials of human rights, coupled with evidence of government impunity, constitute circumstantial evidence of the policy of denial of rights noted in all three sections of this Essay. The 1997 Country Report also contains a section on "Violations of Humanitarian Law in Internal Conflicts," but it is far too limited in its focus and coverage.<sup>117</sup> The 1998 Country Report is replete with similar concerns and incidents,<sup>118</sup> despite efforts of a new Human Rights Commission, which was created in March 1997, began work "mid-year," and opened an office "officially on January 8, 1998, in Jaffna."<sup>119</sup>

### B. Legal Requirements

Under human rights law, there are recognized rights to freedom from arbitrary and inhumane detention and controls. For example, Article 9 of the Universal Declaration, which is an authoritative aid for interpretation of human rights obligations under Articles 55 (c) and 56 of the U.N. Charter, declares: "No one shall be subjected to arbitrary arrest, detention or exile."<sup>120</sup> This right is supplemented by the rights to "liberty and security of person" recognized in Article 3 and the right to "freedom of movement and residence within the borders of each state" and "to leave any country, including his own," recognized in Article 13 of

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112. See 1996 Sri Lanka Country Report, *supra* note 1, at 14-15.

113. *Id.* at 3-4, 10; see also Amnesty International Report, *supra* note 111.

114. See 1996 Sri Lanka Country Report, *supra* note 1, at 3-6, 9; see also Amnesty International Report, *supra* note 111.

115. See 1996 Sri Lanka Country Report, *supra* note 1, at 4, 7-8.

116. See *id.* at 7. The task force was also disbanded by the government, thus adding to the pattern of denial described in this Essay.

117. See *id.* at 9, § 1 g.

118. See 1997 Sri Lanka Country Report, *supra* note 16, at 2-8, 10-13.

119. *Id.* at 2, 13-14.

120. Universal Declaration of Human Rights, *supra* note 31, art. 9.

the Universal Declaration.<sup>121</sup> Under the Universal Declaration, such rights are subject to limitations only if the limitations are "determined by law solely for the purpose . . . of meeting the just requirements of . . . public order . . . in a democratic society."<sup>122</sup>

The same rights are recognized in the 1966 Covenant on Civil and Political Rights. Article 9 of this covenant states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."<sup>123</sup> Relevant derogations are permitted only "to the extent strictly required . . . provided that such measures are not inconsistent with [countries'] other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin."<sup>124</sup> Article 12 also recognizes "liberty of movement and freedom to choose [one's] residence," as well as the freedom "to leave any country, including his own."<sup>125</sup> Article 14 contains a special derogation clause that permits restrictions of these rights only if they are "necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others."<sup>126</sup> The test, not unlike that concerning derogations with respect to Article 9, is based on contextual "necessity" (*i.e.*, necessary, strictly required).<sup>127</sup> Additionally, the "disappearance" of persons is also a recognized violation of customary human rights law addressing arbitrary detention and murder.<sup>128</sup>

121. *Id.* arts. 3 & 13.

122. *Id.* art. 29(2). Article 13 also mentions other permissible purposes for limitations, which are not relevant to this Essay. Concerning legal criteria and tests with respect to such derogation provisions, see, for example, Symposium, *Security of the Person and Security of the State: Human Rights and Claims of National Security*, 9 YALE J. WORLD PUB. ORD. 1 (1982).

123. International Covenant on Civil and Political Rights, *supra* note 43, art. 9(1).

124. *Id.* art. 4(1).

125. *Id.* art. 12.

126. *Id.* art. 14.

127. See, *e.g.*, Jordan J. Paust, *Political Oppression in the Name of National Security: Authority, Participation, and the Necessity Within Democratic Limits Test*, 9 YALE J. WORLD PUB. ORD. 178 (1982).

128. See, *e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (c) (1987) [hereinafter RESTATEMENT]; PAUST, BASSIOUNI ET AL., *supra* note 2, at 1128-34; *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass. 1995) (finding that torture, summary execution, disappearance, and arbitrary detention are recognized violations of international law); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 710-11 (N.D. Cal. 1988). These sources affirm that arbitrary detention is itself a violation of customary international human rights. See RESTATEMENT § 702(h); *Xuncax*, 886 F. Supp. at 184-85, 188; *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541-42 (N.D. Cal. 1987). Additional authority is found, for example, in *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993) (denying

In a time of armed conflict of an international character, parties to the conflict "may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."<sup>129</sup> The phrase "as may be necessary" demonstrates, however, that, like more general human rights law, unnecessary detention and controls are impermissible. Arbitrary detention clearly would be unnecessary detention. Moreover, Article 42 of the Geneva Civilian Convention declares: "[t]he internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary."<sup>130</sup> There are serious allegations and significant recognitions noted above that arbitrary and unnecessary detention, internment, and controls of various civilian persons in Sri Lanka occurs. This would be a violation of Geneva law in a time of a recognized "belligerency" or other armed conflict of an international character.

Article 32 of the Geneva Convention further specifies that states are "prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands."<sup>131</sup> Serious allegations and significant recognitions exist that various actions to cause physical suffering have occurred, including the denials of adequate food and medicine and medical supplies noted above. Similarly, Article 16, which applies to a state's own nationals, creates a duty to assist all persons "exposed to grave danger."<sup>132</sup> It would be a violation of this article for government personnel to expose civilians to grave danger by forcing the civilians to live in dangerous areas or to be exposed in other ways.

In Sri Lanka, Article 51, paragraph 7 of Protocol I is relevant to allegations with respect to both the government and LTTE. On the one hand, "[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations."<sup>133</sup> On the other hand, "[t]he Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to

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motion to dismiss suit brought by foreign citizens for atrocities committed under direction of military leader); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795-98 (D. Kan. 1980) (holding that detention of a Cuban refugee is a violation of international law).

129. Geneva Civilian Convention, *supra* note 2, art. 27.

130. *Id.* art. 42.

131. *Id.* art. 32.

132. *See id.* arts. 4, 13 & 16; Paust, *supra* note 8, at 512-13.

133. Geneva Protocol I, *supra* note 1, art. 51(7).



attempt to shield military objectives from attacks or to shield military operations."<sup>134</sup>

Reprisals, collective punishments, and "all measures of intimidation or of terrorism" are expressly prohibited by the Geneva Civilian Conventions.<sup>135</sup> Collective penalties and systematic terrorism are also among the customary prohibitions in the 1919 List of War Crimes.<sup>136</sup> To generalize, reprisals are retaliatory acts against persons for what they did in the past and collective punishments involve the punishment of persons, not for what they have done, but for what others have done. This form of punishment is inconsistent with the human rights precepts of individual dignity and worth, that guilt must be personal, that no one should be subjected to arbitrary arrest or detention, and that no one should be subjected to cruel or inhumane treatment or punishment.<sup>137</sup> There are serious allegations and significant recognitions that both reprisals against and collective punishments of civilian persons have occurred in Sri Lanka. Of course, the prohibition of intimidation or terrorism prevents the government from using these measures to control a population, groups of civilians, or individuals by various means—including forced relocation to dangerous areas, arbitrary detention, refusal to disclose names of victims, facilitation of the "disappearance" of individuals, and the related use of food and medicine and medical supplies as a political weapon.

Internment, as such, creates other responsibilities under the Geneva Civilian Convention,<sup>138</sup> including the need for adequate food and water "sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies,"<sup>139</sup> as well as medical care.<sup>140</sup> There are serious claims and significant recognitions that the government of Sri Lanka does not comply with these norms. In the case of occupied territory, Article 49 prohibits the "[i]ndividual or mass forcible transfer, as well as deportations of protected persons."<sup>141</sup> Evacuations are permissible "if the security of the population or imperative military reasons so demand," but then the occupying power "shall ensure, to the greatest practicable extent, that

134. *Id.*

135. Geneva Convention, *supra* note 2, art. 33; Geneva Protocol I, *supra* note 1, arts. 20, 75(2)(d); Geneva Protocol II, *supra* note 3, arts. 4(2)(b).

136. PAUST, BASSIOUNI ET AL., *supra* note 2, at 24.

137. See, e.g., Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 *How. L.J.* 145, 192-93 & n.206 (1984).

138. See, e.g., Geneva Civilian Convention, *supra* note 2, arts. 79-135.

139. *Id.* art. 89.

140. *Id.* arts. 91-92.

141. *Id.* art. 49.