

Mediating Protracted Conflict

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Résumé de l'article

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ABSTRACT

This article contains an examination of two instances of protracted communal conflict, in Sudan and Sri Lanka. In my view the level of hostilities between the insurgent group and the national government in each case has risen to a level equivalent to that of warfare between sovereign states. The insurgent groups in each case, in Sudan, the Sudan People's Liberation Movement/Army (SPLM/SPLA), and in Sri Lanka, the Liberation Tigers of Tamil Eelam (LTTE), appear to have acquired certain attributes of belligerency. These include the capacity to maintain military control of territory, the ability to administer that territory effectively coercion-free, and a fidelity to the implementation of international human rights law. It is contended these attributes may provide particular mediators, for Sudan, the Intergovernmental Authority on Development (IGAD), and for Sri Lanka, the Norwegian government's Ministry of Foreign Affairs, an ability to move governments from the practice of "discounting" or disparaging the insurgents during negotiations, to a practice of negotiating with the latter in a sober vein. The supposition is that this "movement" on the part of the government renders a ceasefire more attainable.

INITIAL POSITIONS

In an interview with Helena Cobban in June 1999, the American diplomat Dennis Ross, in discussing talks between Syria and Israel regarding security arrangements along their disputed border within or adjacent to the Golan Heights, referred to a document entitled "The Aims and Principles of the Security Arrangement."¹ A principal actor in the effort of the Clinton administration to mediate the dispute over the Golan, Ross indicated the document was not intended to be a formal agreement, but rather was meant "to create a baseline, or pro-

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vide a framework for the ensuing discussions.”² The “Aims and Principles” agreement “set the stage for completion of the more detailed agreement on the transitional and postpeace security agreements.”³

The US mediation effort to bring about a settlement of the Syrian-Israel territorial dispute did not succeed. But the notion of creating a “baseline” from which negotiations can progress further is intriguing. This article holds that “creating new baselines” is what often occurs when a mediating party to a violent and protracted intrastate dispute is able to “move” the initial positions, or modify the needs and demands, of the protagonists in such a manner that conflict settlement becomes more likely. My supposition is that a successful mediation must be able to shift the initial baseline, or “position” held by at least one of the disputants, a position held when the mediating party is first asked to intervene, to a fresh position which more accurately reflects the prevailing circumstances of the conflict.

Attributes of protracted conflict would include circumstances where: first, intermediaries have likely made more than one attempt to broker a resolution or settlement of the dispute;⁴ second, such conflicts have features which serve to aggravate the dispute, but which may not be directly related to original origins of the conflict, e.g., non-existent or poor communication links between the disputing parties; third, each party has been able to deliver non-trivial injury to the other;⁵ and fourth, peaceful interventions have had varying goals, including efforts to establish effective lines of communication, arrange a ceasefire, reach a settlement of the dispute such that further hostilities are unlikely, or gain a resolution of the underlying issues to the conflict where the motivation for further hostilities is removed.

The notion of this article is that in particular examples of protracted communal conflict, mediator’s success is contingent on the intervening party or parties being able to shift the baselines, the “initial positions” of the national government, to alternative positions which recognize certain persuasive attributes of the insurgency. Insurgency has been characterized as “a technology of military conflict characterized by small, lightly armed bands practicing guerrilla warfare from rural base areas.”⁶ Particular attributes of certain insurgencies can be seen as consonant with the attributes of “belligerency,” a rather moribund concept from traditional international law, but the attributes of which may serve as valuable points of reference for a mediator. That is, the mediator may draw from the conceptual map which the idea of belligerency status provides, to establish key “talking points” when conferring with the national government in a particular conflict.

Before going further it should be made clear what is not being suggested. The article does not propose that the mediator in protracted communal conflict would do well to advise the government negotiators to recognize the insurgents as belligerents outright. Governments are often extremely reluctant to take this step, fearing that doing so would by definition undermine their sovereignty over

the full extent of the state's territory. It has been argued that incumbent government recognition of insurgents as a belligerency allows the the government to "take the gloves off," and prosecute the war to the fullest extent (greatest intensity) possible.⁷ It has further been argued that incumbent government recognition of belligerency could actually relieve the government of responsibility for the acts of insurgents against third party states and their citizens; this "relief" would include both military and political acts of insurgent forces.⁸

The insurgency confronting the Columbian government in recent decades has created a circumstance where the government has been quite cautious in its response to and dialog with the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) in order not to create a recognition of FARC as a belligerent, even though the "objective" conditions of belligerency status may indeed be present, in the view of some commentators.⁹ The ability of the Colombian government to actually implement complete territorial control, or to safeguard its population, or to enforce its laws, in effect to govern with unquestioned authority, has come under serious question.¹⁰ The Colombian government, however, continues to believe a denial of belligerency status – Columbian government concession of this status has been sought by the FARC – for the insurgents is in the best interests of the government, because it limits the likelihood of significant third party intervention on the side of the insurgents. Moreover, the Columbian government holds that by continuing to deny belligerency status to the insurgency, the possibility of having to forego foreign assistance to the Columbian government is reduced.¹¹ Whether this is an accurate perception is arguable.

This is not to propose that in the attempt to mediate protracted communal conflict, the intervening team members themselves adopt the posture that the insurgents are full-fledged belligerents (i.e., capable of engaging in combat at the level of international warfare between states). This approach would suggest the insurgents should be treated as a "state within a state" by the mediators. Such treatment would in turn imply that the mediators would implore the incumbent government to do the same, granting to the insurgents all the rights and obligations attached to belligerency status. Those rights would include the right to "enter foreign ports, to maintain blockades, to engage in search and seizure procedures, and to confiscate contraband."¹² Faced with possibly having to concede such rights, a government negotiating team might well decline to treat the insurgent negotiators as a "state within a state."

COMMUNALISM

My purpose here is only to explain how progress toward a settlement of two specific protracted communal conflicts may have been made more likely due to the character of the mediation efforts exercised in each case. The two cases of protracted communal conflict are in Sudan and Sri Lanka, and each has been identified as a violent conflict of "self-determination" that recently evolved

into a kind of stasis, or been “held in check,” which can be interpreted to mean that open hostilities have been suspended.¹³ In Sri Lanka mediated negotiations between the parties have recently commenced and a ceasefire of some continuity has been concurrently implemented. In Sudan, while mediated negotiations have been ongoing for some time, significant progress has only recently been made. At this writing, a stable and pervasive ceasefire has been consummated in Sudan only between the Khartoum government and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army (SPLM/SPLA). The parties to the conflict in Darfur in Western Sudan between the Khartoum government on one hand and the Sudan Liberation Movement/Sudan Liberation Army (SLM/SLA), and the Justice and Equality Movement (JEM), have not observed a ceasefire, despite increasing global attention.¹⁴

The foremost reason for heightened global attention is, of course, not so much that there is an insurgency in Western Sudan – distinct for the most part from the insurgency in the south led by the SPLM/SPLA – but because of how the Khartoum government has responded to that insurgency, by employing tactics which appear to be clear, heinous violations of international law.¹⁵ The violations of international human rights and humanitarian law have been carried out by units of the Sudan government’s army in part, but in the main by government-controlled or directed Arab militias; these militias have been given the label of *Janjaweed*.¹⁶

The activities of the *Janjaweed* have been augmented by Sudan government military forces ostensibly taking action against the SLM/SLA and the JEM; such actions have included aerial bombardment.¹⁷ There is clear evidence the government in Khartoum, through the military, has supplied different militia groups with weapons and ammunition.¹⁸ The Khartoum government has attempted to impose a level of military order on the militias by designating certain groups as “working with,” but not necessarily as part of the Popular Defense Forces (PDF).¹⁹ The PDF frequently operates in tandem with the regular army (PAF). In practice, it has often been difficult to separate the PDF from the *Janjaweed*.

By way of a further example, the Commission confirmed that PDF forces in one [southern Sudan] state conduct their attacks on horseback and on camels in a specific deployment configuration and using particular types of weapons. Many victims of attacks in the same area and who identified their attackers as *Janjaweed*, described for the Commission attackers wearing the same uniforms, using the same deployment during the attack, and using the same weapons as those employed by local PDF forces.²⁰

This article does not contain the space to take up the conflict in Western Sudan, although the conflicts are not unrelated. This is so at least in the sense that some of the grievances lodged against the Khartoum government by the rebel

groups in the south have also been leveled against the Sudan government by the SPLA/SPLM, namely the unwillingness of the Khartoum regime to deliver the means for the Darfur region to develop, particularly in times of drought.²¹ There is some evidence that the violence in Darfur between different peoples was based more on land disputes between non-Arab blacks (Zuruq), particularly the Fur, and Arab populations, rather than Muslim against non-Muslim.²²

In any case the government in Khartoum, especially after the military coup in 1989, was more than willing to provide arms to the Arab militias to help in defeating the rebel movements. This action prompted contacts between certain non-Arab populations and the SPLM/SPLA. The SPLA did send forces into the Darfur region in the early nineties, in support of the Fur particularly.²³ This effort, although now long ended, was initiated almost certainly because of a recognition by the SPLM/SPLA that both the southern peoples and the non-Arab population in Darfur²⁴ shared a common aim; the achievement of self-determination.

SELF-DETERMINATION

The comment has been made that:

[T]he most common outcome of self-determination conflicts is a settlement between governments and group representatives that acknowledges collective rights and gives them institutional means for pursuing collective interests within states. Sometimes a group gains better access to decision-making in the central government, often it gains regional autonomy, and of course some settlements include both kinds of reforms. Thus the outcome of self-determination movements seldom is a redrawing of international boundaries, but rather devolution of central power and redrawing of boundaries within existing states.²⁵

To be sure, the “self-determination” to which the above quote refers is not that associated with “colonial domination, alien occupation, or a racist regime.”²⁶ This is not to deny, for example, that particular factions within the Tamil community do regard the hierarchy in Sri Lankan society as a domination of Tamils by the Sinhalese, and these Tamil factions see the Sinhalese domination as an “alien” one.²⁷

To recognize wars of national liberation as cases where the insurgents are belligerents would be a “new form” of belligerency, set apart from the traditional interpretation. The prevailing view seems to be that “the law of war is to apply automatically in wars of national liberation; no recognition of belligerency by the incumbent government or by third states is necessary.”²⁸ The above quote from Monty Marshall and Ted Gurr pertains to “ethnic” or “communal” self-determination where the conflict between communities is not produced because of an alien or colonial domination, but rather is generated by an internal contest

between two cultures, or “nations” existing in one state. The subordinate community has engendered an insurgency because a significant proportion of the former have come to believe their position in the state cannot be improved otherwise. Because mediation by outside third parties appears to have been instrumental in producing progress toward a settlement of the conflicts in Sudan and Sri Lanka, what is sought after in this article is explaining how the mediators in each of these cases were able to achieve that progress.

The investigation in this article is only toward mediation efforts in protracted communal conflict where it is clear that in order for hostilities to cease, or to not re-commence, and in order to remove the persistent threat of secession, the internal political order of the state will likely have to be reconstituted. This implies that in the perception of most outside observers the incumbent government is not capable of imposing its will to gain a resolution of the conflict and presumably to retain the political *status quo* (or a close approximation thereof) basically intact. The mediator in the cases presented here may likely need to achieve goals antecedent to the avoidance of secession. These goals would include obtaining a ceasefire, a consent to an exchange of prisoners of war, or a contingent or “interim” agreement (where additional discussions at a later time are required to resolve unrequited matters), with a full overarching understanding where all the underlying issues which brought on the hostilities are dealt with to the satisfaction of all parties being the ultimate goal.²⁹ Any of the above objectives, if achieved, would be a significant advance over what would be the *status quo ante* (continuing hostilities with no discussions underway), when the protracted conflict in question is of an “ethnic” or communal character.

The discussion herein is directed toward those protracted conflicts which have communal feuds at their base.³⁰ The term “communal conflict” can be used interchangeably with “ethnic conflict,” but in this article the former is preferred because one of the characteristics of ethnic groups is a “group consciousness” or awareness by the members of the group, of their affinity for each other based on one or more of the attributes listed below. Thus, ethnic groups have been termed “psychological communities.”³¹ Such groups are collectivities of individuals, a community, who share a common sense of membership in that community. Two or more such groups in conflict with each other can then be understood as engaging in communal conflict.

Such conflicts are those in which a distinct “people” (usually but not always a numerical minority) is distinguishable from a particular nation-state’s general population by various measures, including lineage or kinship, language, religion, geographical origin, or historical experience.³² This sub-group of the state’s population determine they have been subject to political domination or subjugation, economic exploitation, cultural oppression, or generally have had a “harm” inflicted upon them by the dominant (usually but not always a majority) population; and this harm is of sufficient magnitude to pose a grave threat to the

subordinate community's preservation as a viable entity.³³ Consequently, the subordinate community has demanded a change in how they are treated by the central government (a frequent perception of the subordinate community, is that the central government is controlled by the dominant community or population). "Protracted communal conflicts over the rights and demands of ethnic groups have caused more misery and loss of human life than has any other type of local, regional, or international conflict in the five decades since the end of World War II."³⁴

In protracted communal conflicts, the perception of the subordinate group is that the response of the central authorities has been inadequate at best, or non-existent, or hostile. The subordinate community, or a significant component thereof, has therefore "mobilized" politically,³⁵ and in the instances in which this article is interested, this political mobilization has evolved into a resort to violence to bring about a change in their status. The desired change in status can range from an explicit recognition of the rebelling group's distinctiveness, resulting in a grant of autonomy (meaning a measure of self-determination or self-rule), to the outright "fission" of the nation-state such that a second state is created, a mechanism generally known as secession. One observer has commented, although speaking of instances of secession, or attempts thereof, by groups (the Ibo in Nigeria, the Bengali in Pakistan) other than those under examination here, but also in reference to the Southern Sudanese in Sudan:

The ruling elites did not respect these communities as equal partners in the construction of their respective countries. These three communities, in return, were unwilling to respect the legitimacy of those elites to continue to rule them. Confronted with escalating threats to their physical or cultural security, they chose to try to withdraw from the state itself.³⁶

The autonomy of a group within a state can be understood as being present at many different "levels." An autonomous area has been defined as "regions of a state, usually possessing some ethnic or cultural distinctiveness, which have been granted separate powers of internal administration, to whatever degree, without being detached from the state of which they are a part."³⁷ "Personal"³⁸ and political (territorial) autonomy have been construed as permitting "in some real sense the right to be different and to be left alone; to preserve, protect, and promote values which are beyond the legitimate reach of the rest of society."³⁹

The two protracted communal conflicts under evaluation here are in Sri Lanka, where the adversaries are the minority Sri Lankan (as distinguished from the Indian) Tamils and the Sinhalese, and in Sudan, where the conflict is between the northern Arabic speaking Islamic peoples and the southern non-Arabic speaking, non-Islamic, predominately black African population. In each case a rebellion has emerged. In Sri Lanka the Tamil population generally has attempted to gain, at a minimum, greater autonomy from the central government in

Colombo. But some groups, the Liberation Tigers of Tamil Eelam (LTTE) in particular, until recently have sought outright secession. Currently, the LTTE is content with working toward the creation of a "homeland" for the Tamil people in the northeastern region of Sri Lanka.⁴⁰ In Sudan the southern Sudanese generally have sought greater autonomy from the central government in Khartoum. Some groups, the SPLM in particular, have (at least during certain periods in the past) sought outright secession, but currently are content to work toward self-determination, while retaining the option of secession in the future.⁴¹ At present, the idea of secession has been "suspended" until a referendum on the issue can be conducted several years in the future.⁴²

The rebellious populations in both of these cases fit into a category that has been labeled *ethnonationalist*: "regionally concentrated peoples with a history of organized political autonomy with their own state, traditional ruler, or regional government who have supported political movements for autonomy at some time since 1945."⁴³ My contention is that the predominant reason for the protracted character of these rebellions is due to their communal, or "ethnic" character. That is, each rebellious community in these two instances seeks a recognition from the central state authority of their "distinctiveness," and an acknowledgment of their different and discrete character as a separate "nation," with an identity apart from the larger dominant society. But what is demanded in terms of recognition from the central authorities includes changes in national policy which the state authorities have not, until recently, been willing to implement. In each of the cases included here, the primary demand of the rebellious community (until recently) was secession, the political separation from, and territorial division of the state.⁴⁴ But the demands for the creation of an independent sovereign state, a new political entity resting on territory severed from Sri Lanka and Sudan, respectively, were not warmly received by the governments in either Colombo or Khartoum. Consequently, the rebellions in each case have progressed (in terms of magnitude) to insurgencies (organized and violent resistance to a central authority, the state), and then, in my judgement, have possibly progressed to an extent equivalent to *de facto* "belligerent" status,⁴⁵ and further into what might be termed "belligerent communities."⁴⁶

INSURGENCY

To be sure, this hierarchy of armed opposition to national governments has no current use in practice. Most observers hold there has not been an application of belligerency status to an insurgency by the international community since the American Civil War.⁴⁷ The best evidence often provided to establish the *disuse* of the belligerency standard as an application to internal conflict is the refusal of the international community to apply that standard to the Spanish Civil War. In traditional international law, applying the belligerency standard to an insurgency obligates third parties to adopt a position of neutrality. Failing to adopt such a position (i.e., providing material to one side in the civil struggle) could be con-

strued as an act of war against the party not receiving aid. European powers did not deem it advisable to evoke the standard because several powers preferred to be unfettered in their efforts to provide aid to one or the other of the contesting parties in the Spanish conflict.⁴⁸

However, in this article the interest is not in how belligerency status may or may not provide a standard for determining when it is appropriate for third parties to intervene in an internal war (in the sense of supporting one of the combatant's efforts to achieve a military victory), by providing material aid to either insurgent groups, or to national governments.⁴⁹ The concern here is with how the *attributes* of a belligerent community may serve as a *referent* for mediation efforts between insurgencies and national governments. The supposition is that in the two internal conflicts of interest here, for an extended period the central authorities in Sudan and in Sri Lanka chose not to recognize certain capacities and qualities which, only after arduous effort, the SPLM and the LTTE had obtained.

The contention put forward here is that significant progress in the negotiations between the contestants in both conflicts only occurred when the mediators in each case was able to induce the central authorities in both countries to accept the fact that their adversaries were not only capable of denying the government a military solution, but had acquired a level of legitimacy in governing that portion of the state's territory controlled by the insurgent forces. The amount of evidence which can be marshaled to support this contention will be limited, because it has not been possible to be privy to the discussions that have taken place between the Sudanese government and the SPLM/SPLA, mediated by the emissaries of the four states (Eritrea, Ethiopia, Kenya, and Uganda) drawn from the Intergovernmental Authority on Development (IGAD).⁵⁰ Nor has it been possible to access the talks that have been held between the Colombo government in Sri Lanka and the LTTE mediated by the Norwegian government envoys.⁵¹ It may, however, be possible to draw inferences, given the path the mediated negotiation have followed, that in each case the third party mediator was able to persuade the national government to substantively alter its view of the insurgency it faced, based on the degree of legitimacy the insurgency had acquired.

It might be argued that "drawing inferences" is not sufficient as an analytic method to derive support for the thesis articulated here. On this point there is not a response hard edged enough to completely dispel the criticism; this fault in method is readily accepted. My contention, however, is that information pertaining to civil wars comparable to the two under investigation here might be gathered in the future, civil wars with insurgencies containing the attributes of belligerency. In those still to be conducted inquiries, further inferences might be drawn which, if similar in direction, might give more credibility to those formulated here.

My argument is that this change of viewpoint on the part of the central

authorities of each state was necessary for the talks, on-going in each case, to have an attentiveness to the *level of participation* in governing the state which the insurgent group would accept. An important realization on the part of the insurgents that has been an additional factor in making discussions on insurgent participation in state governance possible has been the move away from an insistence on a separate state for the insurgent community. Both the SPLM and the LTTE, at least their key leadership, have now publicly stated that their motivations in continuing the struggle for self-determination does not necessarily include separation from the nation-states of either Sudan or Sri Lanka.⁵²

In December 2002, Sri Lankan government spokesperson Gamini Peiris stated “[n]ow that the [Tigers have] ruled out separatism, we are working on how to share power and yes, we fully agree to the federal status formula.”⁵³ But two years earlier in October 2000, the government of Sri Lanka had a decidedly different conviction regarding the possibility of sharing power with the LTTE. “The stage for peace talks is over. We will now work for a complete eradication of terrorism and we will also eradicate the terrorist leader.”⁵⁴ The question of interest for this article is how the Norwegian mediators were able to “move” the Sri Lanka government from the earlier “baseline” position in October 2000, to the later one in 2002.

Just prior to the spring 1993 Abuja II⁵⁵ negotiations between the Khartoum government and the SPLM-Mainstream,⁵⁶ President Omar al-Bashir, as the Sudan government’s chief formulator of policy, made remarks on the government’s view of Sudan’s future. He re-affirmed the position that majority decision-making should prevail, which meant the Muslim majority of Sudan had the right to establish the type of constitutional system preferred by the majority, and if this meant a system based on *shari’a*, and an absence of religious diversity, then so be it. Apparently believing the government’s negotiating position had been strengthened by recent battlefield successes, Bashir made the following comment. “We will not abandon our principles for any reason . . . What we now apply in Sudan in God’s will. We will never satisfy humans to displease the almighty God.”⁵⁷

But in July, 2002, President Bashir indicated his views about the prospects for a pervasive and enduring settlement had undergone revision. In a joint statement with John Garang, leader of the main insurgent group SPLM/SPLA, Bashir stated that in their discussions at Machakos in July, he and Garang had “underscored the need to reinforce the peace process by rallying popular support behind it and building national consensus on a comprehensive political settlement . . . [they] undertook to ensure that all efforts are deployed to resolve the outstanding issues which will be discussed in the next phase of the peace talks.”⁵⁸ During the July talks the two sides were able to sign the Machakos Protocol, a document that contains “provisional” agreement on self-determination in southern Sudan, the role of religion in governing the north and the south, the structure of the nation-

al government (i.e., federal, confederal, power sharing or some other idea) and sets parameters for future talks. As in the Sri Lankan case, my inquiry is interested in what mechanisms or arguments may have been mustered by the IGAD mediators to move the Khartoum government from the acerbic position of 1993 to the far more conciliatory 2002 position. The additional efforts of the “quartet” of international observer states (UK, US, Norway, and Italy, as well as a UN delegation) should not be overlooked. After the July 2002 accord the government at times issued statements indicating it had lost patience with the peace process; but these occasions seemed often to coincide with developments on the battlefield. Khartoum remained “committed” to finding agreement, and ultimately, one was found.⁵⁹

BELLIGERENCY

A belligerent community is an insurgency which has attained a more formidable status relative to the community’s adversary, a particular national government; in the cases presented here, the governments of Sri Lanka and Sudan. The insurgency has first, established a competent military organization and an operative government; second, been able to engage in a level of combat equivalent to international warfare between states; third, gained control over, or the occupation of, a substantial portion of the territory of the state in question; and fourth, generally observed the laws of war between states.⁶⁰ A second author has provided the following similar conditions which must obtain in order for a rebel group to attain recognition as a belligerency:

first, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside states to define their attitude by means of recognition of belligerency.”⁶¹

Pointed questions have been asked regarding the utility of the belligerency doctrine to the present day international community. One of the more damaging critiques put forward has been the assertion that there actually are no conflicts in the present day that rightfully correspond to the criteria attached to the doctrine of belligerency.⁶² A second criticism is that there is no international body able to conclusively “determine when the belligerency standards have been met.”⁶³ There is a significant debate pertaining to whether third party recognition of belligerent status is necessary in order for a belligerency to exist at all, with most scholars concluding that such recognition is indeed a necessary condition.⁶⁴ Once declared, belligerency status allows third parties to render material aid and support to both the national government and the rebelling group; when the

rebellious group remains only an insurgency, such support from third parties is only able to be provided to the national authorities.⁶⁵

However, my interests are not in determining when diplomatic support and material aid to either the insurgents or governments should be permissible. To reiterate, in customary international law, prior to the point in time when the question of whether belligerency status may be appropriately bestowed on an insurgency, intervention was permissible only to the government of a state.⁶⁶ In its 1986 decision in the case brought by Nicaragua against the US for the latter's support of the Contras, the International Court of Justice (ICJ) noted:

The principle of non-intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another state – supposing such a request to have actually been made by an opposition to the regime in this instance. Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a state, were also to be allowed at the request of the opposition.⁶⁷

The ICJ was affirming the fact that the non-intervention norm has indeed been understood as accepted state practice in international law, although not in the political realm, as the case brought by Nicaragua makes clear. The non-intervention norm is well articulated by the UN General Assembly. The latter body has made note that “every state has the duty to refrain from organizing, instigating, assisting, or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts.”⁶⁸ At the same time it is then apparently the case, that *short of* the ascription of belligerency status to an insurgent group, “there is no rule of international law which forbids the government of one state from rendering assistance to the established legitimate authority of another state with a view of enabling it to suppress an insurrection against its authority.”⁶⁹ But it would seem then, that if nothing else, acquisition of belligerency status by an rebellious group would “level the playing field” on which the government and the insurgents are in conflict.

It has been proposed here that attributes of the belligerency doctrine may assist a mediator in altering the perception of a national government engaged in conflict with a formidable insurgent. This proposition has been suggested because of a supposition that the mediator must demonstrate to the national government that the domestic “playing field” has, to a significant extent, been “leveled.” This is not so much in terms of the insurgents’ battlefield capabilities; the government will have been more than capable of judging the military competence of the adversary with which it is grappling. It is another attribute or criterion of belligerency which, wielded by discerning mediators, could be a pivotal

instrument in the effort to gain ground toward an agreement. The attribute which is held to be critical is that which articulates the need for evidence that the insurgency abides by international law. The insurgent group must respect the recognized standards for the treatment of prisoners of war and for the treatment of non-combatants.⁷⁰ Among other things this would mean that non-combatants could not be deliberately targeted, and that in the prosecution of hostilities efforts must be made to limit the “collateral damage” inflicted on civilians. In general, particularly in modern day usage, insurgent groups seeking the label of belligerent must abide by and apply international human rights law in their conduct, which implies among other factors granting prisoner of war status to captured military personnel of the national government.⁷¹

In recent times the best illustration of an insurgent group (in this instance two groups) demonstrating an adherence to international human rights law is the Colombian case. The *Ejercito de Liberacion Nacional* (ELN) and the FARC in Colombia have both exhibited a willingness and ability to impose constraints on the prosecution of the civil war in Colombia.

The ELN has long recognized the need to impose humanitarian restrictions on the conduct of hostilities and has even promoted the signing of a humanitarian agreement by all the parties to the conflict. [The ELN] has publicly affirmed that [it] is a ‘political-military organization with responsible command and territorial control [which give it] the capacity to apply Protocol II for purposes of regulating the internal conflict.’⁷² After capturing 60 soldiers in an assault on the jungle outpost of Las Delicias (Caqueta department) in August of 1996, the FARC issued a statement in which they claimed to be providing their captives with the humane treatment dictated ‘by the provisions established in Protocol II additional to the Geneva Conventions for prisoners of war.’⁷³

There is a secondary, but perhaps no less important aspect of this criterion calling for the respect of the international law of war and human rights law. A rebellious group that has shown itself capable of applying human rights law – and this means observing human rights in all those areas where its forces have control over territory of the state – would then have indicated the probable presence of a fidelity or *allegiance* to the insurgents by the territory’s population, rather than to the national government. The *absence* of human rights violations by the insurgent group is an indication that repression of the populace has not been necessary in order to gain an ability to administer or to govern the territory in question.

The test for the recognition of an armed opposition group as a belligerent also provides that the opposition group abide by international law. Of particular concern is the requirement that the opposition group comply with those laws of war demanding respect for human

rights. This element of the belligerency test is important for several reasons. First, human rights violations by the armed opposition against its fellow citizens provides evidence that the group is not the legitimate representative of the people. Opposition groups human right's violations erode popular support – the very support that is crucial to the opposition's ultimate success.⁷⁴

Thus, the attribute of belligerency posited here with greatest utility to a mediator is that which calls for an adherence to international law. The insurgency must practice and be able to enforce adherence to the spirit and the letter of international law, on the part of its military forces and, if present, police units. Scrutiny of the insurgent's ability to fulfill this criterion of belligerency provides a test of the insurgent's legitimacy, in many instances the one quality the government would most want to withhold from its adversary. A mediator able to provide evidence to the government that the insurgents possess this quality would have, in my view, a persuasive argument to employ in conferring with government negotiators.

This is likely to be particularly true in the circumstance where the negotiations are "proximity" talks, where the negotiators for the respective parties do not actually meet face to face, but rather are in the same city, or conference complex, or even building.⁷⁵ The mediating team then "shuttles" between locations conveying the questions, positions, demands, needs, and concessions of one party to the other. An admission by the government that the insurgent party is viewed as legitimate, even by a minority segment of the population, is a large concession, and as such, it may be more difficult to make such an admission in the immediate presence of the other side. Proximity talks allow the "space" sometimes needed to make such an admission. At least during certain periods both of the cases evaluated here (Sudan and Sri Lanka) were clearly instances where the government in each country did enter into this type of circuitous negotiation with the insurgent group.⁷⁶

It must be said that on one level the very fact the government "side" has deigned to speak with the insurgents, even only indirectly, signifies a certain "recognition." But to my mind, this kind of recognition is an admission that the insurgency has attained a level of military capacity, which at a minimum, must be conceded. In my estimation it would be going too far, however, to believe that such an admission is a tacit acknowledgment of the insurgents' political legitimacy, *at the inception* of the proximity talks.

DISCOUNTING

Thus, as a potential explanation for the recent progress in the negotiations between the parties in the internal conflicts in Sudan and Sri Lanka, it is first proposed that the mediators have taken note of certain insurgent attributes, i.e., the ability to administer the territory they control, and a willingness and capability

of abiding by international law (particularly human rights law). In the judgement of the mediators, these insurgent qualities provide evidence of the legitimacy of the insurgents' claims of political authority. Adopting a mediating posture that has been referred to as "reflective behavior,"⁷⁷ the mediating team attempts to "bring around" the government side in the talks, such that the latter becomes more receptive with regard to the merits of the mediator's view. Mediators utilizing reflective strategies would seek to reduce the degree of complexity and uncertainty inherent in protracted communal conflict by assembling and conveying to each party knowledge and information about the conflicting issues and especially about the *qualitative* nature of the other side. The mediator attempts to "achieve some convergence of expectations by reducing distortion, ignorance, mis-perception, or unrealistic intentions."⁷⁸ If this persuasive argument on the part of the mediator is successful, what I term the "discounting" problem can be overcome.

The discounting problem occurs when one of the parties to a negotiation is unwilling to grant to the other side an equal stature in the talks. This problem has been prominent in certain kinds of mediation.⁷⁹ The Israeli-Palestinian negotiations have been put forward as illustrating this class of negotiations, where the Israeli negotiators are believed to be the party exhibiting "discounting" behavior toward the Palestinian representatives.⁸⁰ The government after all, is "sovereign," and, as the *de jure* authority of a nation-state, has a status technically comparable to all other nation-states in the international community, as is the case, for example, in the United Nations General Assembly. The task of the mediator is to show that, in the cases herein, the SPLA and the LTTE are arguably not only the *de facto* sovereign for part of the state's territory, but equally importantly, are able to administer that territory,⁸¹ and are able to enforce international law within it. Belittling the authority of the insurgents impedes progress toward an agreement, and the mediating team must strive to make a compelling argument in this regard. The government must be willing to concede the validity of the insurgent's participation (as at least a junior partner, if not an equal) in the discussions, and as such, the needs, interests, and values of the insurgents must be "taken seriously," rather than discounted.

Note that it is not being suggested that the insurgents be recognized formally as a belligerent by the government,⁸² only that the latter acknowledge the insurgent's possession of the ascribed belligerency status attributes. Thus, the mediator need not delve into the debates concerning whether or not belligerency status "exists" contingent on whether it has been recognized, either by third parties or by the incumbent government, or whether there are "objective conditions" which, if present, bring with them belligerency status, irrespective of whether a belligerency has been "declared" in a formal sense.⁸³ A recognized belligerency status for the insurgents is not a necessary condition for the persuasive mechanism to be of use to a mediator.

SRI LANKA AND THE LTTE

In the midst of the US Civil War, in a decision which effectively rendered the Confederacy a belligerent, the Supreme Court stated that “[w]hen the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; *have cast off their allegiance*; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war”⁸⁴ (emphasis added). Except for the aspect of having declared their independence, the LTTE would seem to fit the description of belligerent. The LTTE has long called for the establishment of a “homeland” for the Tamil people, which to some observers effectively meant the establishment of an independent political entity.⁸⁵ “In 1985, during the peace conference in Thimpu, the united Tamil groups made it one of their four points to be acknowledged that because they were a nation of their own they had an exclusive right to their homeland in the North and East, *where none but they should be allowed to settle*,”⁸⁶ (emphasis added).

In recent years the LTTE has lost its former full control of the Jaffna peninsula to the Sri Lankan government forces. The Jaffna peninsula is one of the areas in the “North” which, for the LTTE, is to constitute a large portion of a Tamil homeland.

Representatives of six Tamil groups formulated in 1985 a list of four principles that could serve as the basis of a political settlement: a recognition of Sri Lanka Tamils as a distinct nationality, the creation of a Tamil homeland by joining together the existing Northern and Eastern provinces, the right of self-determination of the Tamil nation, and the right to full citizenship of all Tamils living in Sri Lanka.⁸⁷

The matter of whether a Tamil homeland should be comprised of both the Northern and Eastern provinces (the Northern province is overwhelmingly Tamil, while only 40 percent of the Eastern province’s population is Tamil) continues to be a particularly contentious issue between the Hindu Tamil and Buddhist Sinhalese communities. When the Sri Lankan government and the government of India signed the Indo-Sri Lankan Agreement to Establish Peace and Normalcy in Sri Lanka in July 1987, an agreement which *proposed* to merge the two provinces and “devolve” considerable political autonomy to the new single province governed by a Provincial Council, severe rioting erupted in Sinhalese communities in Colombo and southern Sri Lanka.⁸⁸ The proposed merger had been made contingent on a referendum regarding the merger being held in the Eastern province after a one year interim period. But the referendum was never held and the merger has not occurred.

For years the LTTE had rejected the idea of a devolution of political authority, coupled with retaining the territorial integrity of the Sri Lankan state, as the solution to the communal conflict on the island. The LTTE strove to gain

military control and governing authority in the Northern and Eastern provinces. "What the militants wanted to show was that they controlled these areas, and that the writ of the Sri Lankan government did not run there."⁸⁹ But achieving the goal of controlling this region of Sri Lankan territory meant something more than mere devolution and autonomy for the LTTE; it would signal the ability to someday demand separation from the rest of the country. The LTTE, for its part, seemed adamant in its position of accepting nothing short of a separate Tamil state.⁹⁰

However, by September 2002, the position of the Tigers had changed. Anton Balasingham, one of the lead negotiators for the LTTE, remarked during the first round of Norwegian government sponsored negotiations between the parties that "the LTTE doesn't operate with the concept of a separate state . . . We operate with the concept of a homeland and self-determination. Homeland doesn't mean a separate state; it means an area where Tamils and Muslims live. Saying that the LTTE is fighting for independence has no relevance."⁹¹ This shift in position by the LTTE appeared to closely coincide or quickly follow an important gesture by the Sri Lankan government: a lifting of the ban on the LTTE on 4 September 2002.⁹² The Tigers had insisted on the government revoking the ban on their organization as a necessary precondition before formal negotiations could begin. Prior to this action the Tigers had officially been an "outlaw" organization since the mid-1980s. Preliminary talks at the "ministerial level" had only begun in late July 2002, which suggests that clandestine talks between the parties, brokered by the Norwegian government, had been on-going for some time prior to the September 2002 "breakthroughs."

It was in those "secret" talks that the Norwegian intermediaries⁹³ entered into "reflective behavior." It is proposed that the Norwegian mediators adopted this tack rather than a more forceful approach because of the risk involved when the latter approach is taken "prematurely," or "presumptively." The mediator may lose credibility and thus become an unacceptable intermediary if the parties believe they are being "pushed" too vigorously. Protracted communal conflicts have often had several prior mediation attempts; settlement of such conflicts is almost by definition a fragile process. The prudent approach would seem to advise the avoidance of presumptive behavior.

A mediation effort is helped greatly if material conditions have "matured," such that one or both of the parties have become more amenable to the notion of a negotiated settlement than was the case in previous mediation attempts. Two factors are prominent in the Sri Lankan case. First were two events which together comprised the first factor: the election of the United National Front government in December 2001, and the ascension of Ranil Wickremesinghe as prime minister. Wickremesinghe took a decidedly alternative view from his predecessor regarding the question of what the appropriate policy toward the Tigers should be. Wickramanayaka had stated in October 2000, that "the LTTE will

have to be eliminated if we are to live in the society.”⁹⁴ Wickremesinghe, on the other hand, took the view that the electorate had provided him with a “mandate” to end the war, and he had decided to take a “constructive” path toward that end.⁹⁵ One important step mentioned above was lifting the ban on the LTTE.

The second key factor was the decision by the LTTE leadership to publicly disavow their demand for nothing less than a separate state. For the Sri Lankan government this decision by the Tigers seemed to help open the path toward earnest discussions leading to a possible settlement. Gamini Peiris, a government spokesperson, stated “[n]ow that the Tigers have ruled out separatism, we are working on how to share power and yes, we fully agree to the federal status formula.”⁹⁶

The version of power sharing alluded to above, as it is applied in Sri Lanka, is generally referred to as “asymmetric devolution.”

Following the first round of peace talks, it is already quite clear that any final political settlement will be accompanied [by] institutional changes that devolve power asymmetrically to the Tamil areas. This means that instead of power being devolved equally to all provinces, as is the case in the United States, the Tamil provinces are likely to receive much greater administrative autonomy, as is the case with Catalonia in Spain. It is important to emphasize that any institutional model adopted may borrow features from existing federal systems but it is likely to be unique to Sri Lanka.⁹⁷

Asymmetric devolution in the Sri Lankan context carries the implication that the Tamil community should be granted a special measure of recognition as a nation “apart” in the Northern and Eastern provinces, distinct from the larger Sri Lankan society. The LTTE has recently demanded that it be given participation in some form of autonomous governance for this region. “Shared governance” or political devolution in the form demanded by the Tigers had been rejected by the People’s Alliance government of President Chandrika Kumaratunga and Prime Minister Wickramanayaka from the point of Kumaratunga’s first election in 1995 through her re-election in December 1999. With the election of a United National Front government in December 2001, the new Prime Minister Wickremesinghe appeared to be much more amenable to a version of power sharing that was closer in its shape to the vision held by the LTTE. Wickremesinghe had drawn attention to his views in his unsuccessful campaign in 1999, when he called for “unconditional talks” with the LTTE.⁹⁸

But reconciling the contending versions of power sharing has been at the base of previous failures to negotiate a settlement to the conflict, with the most significant earlier effort ending in 1995.⁹⁹ The Sinhalese are suspicious of the real goals which the Tamils (especially the LTTE) expect to draw from devolution. For example, to what institutions in the North and East will power actually devolve, is an issue in itself. More generally, “depending on which community

one belongs to, the public sees devolution as either the first step towards the disintegration of Sri Lanka, or as falling well short of minority aspirations.”¹⁰⁰

One of the factors leading to the failure of the 1995 negotiation effort was the government's determination that the Tamils were unwilling to negotiate “substantive issues.”¹⁰¹ The LTTE apparently is adopting a cautious approach, being wary of possible government accusations of not negotiating seriously, with the government then being able to say the LTTE was using the ceasefire as breathing space to re-organize; the government then would have a “justification” to initiate new offensives. Consequently, to date, the LTTE is unwilling to consider full “decommissioning,” or the disarming of their cadres until there is an agreement – the LTTE did carry out a very limited disarming of cadres in 2002 – and perhaps more than simply an “agreement in principle,” in place. But the fact that the LTTE is keeping its “power dry” has not posed an insurmountable barrier to progress in the Norwegian-mediated talks.

At the conclusion of the third round of negotiations in late 2002, a statement was issued by the parties which came to be called the Oslo Declaration. In that statement the parties “agreed to ‘explore’ a federal structure within a ‘united Sri Lanka,’ on the principle of ‘internal self-determination.’”¹⁰² But how committed the Tigers were to the language in the declaration has become a point of some controversy. Anton Balasingham, a spokesperson for the LTTE, stated unequivocally that the Tigers had not relinquished their “right to secede,” and had not categorically agreed to the notion of a federal state.¹⁰³ The government continues to insist that any re-opened negotiations must be based on the outline of talks shaped in the declaration, that is, the idea of a federal state.¹⁰⁴

Various obstacles have presented themselves at different times during the negotiations. In April 2003, the LTTE walked away from the discussions over a dispute regarding foreign aid dispensations. The Tigers believed they were being “marginalized” in this aspect of the “peace process” and reconstruction of the country.

In spite of our goodwill and trust, your government has opted to marginalize our organization in approaching the international community for economic assistance. We refer to the exclusion of the LTTE from the crucial international donor conference held in Washington on 14 April 2003 in preparation for the major donor conference to be held in Japan in June. We view the exclusion of the LTTE, the principle partner for peace and the authentic representatives of the Tamil people from discussions on critical matters affecting the economic and social welfare of the Tamil nation, as a grave breach of good faith.¹⁰⁵

Japan has become an integral part of the peace process largely because of that country's efforts in extending economic aid to Sri Lanka.

For its part the Colombo government suspended talks on 10 November 2003 after major internal political disputes within the government created too much policy uncertainty regarding government positions. As a consequence, the Norwegian government suspended its formal role as a mediator on 14 November 2003,¹⁰⁶ although informal efforts continued. President Kumaratunga had suspended parliament on 4 November 2003, but brought that body back into session on 19 November. These actions were taken primarily because of Kumaratunga's differences over the direction of the negotiations with the LTTE taken by Prime Minister Wickemesinghe. Kumaratunga had not decided to end the peace process, however.¹⁰⁷ Kumaratunga's opposition to the peace initiatives undertaken by Wickemesinghe remained in place, however, resulting in the dissolution of parliament in February 2004, and a call for new elections in April 2004, three years ahead of schedule.¹⁰⁸ The new elections were designed to form a new government replacing Wickemesinghe as prime minister, and a government that would adopt a different stance – more consonant with the views of Kumaratunga – toward negotiations with the LTTE.

SITUATION “ON THE GROUND”

It has been proposed here that one of the keys to mediation success in protracted communal conflict is the ability of the mediator to persuade the national authorities of the insurgent's ability to effectively administer the territory under the latter's control, to the point of establishing an “operative government,” and to abide by and enforce compliance with international humanitarian law, defined as a relative absence of coercion. In my view, an indicator of the level of coercion is the relative lack of human rights violations perpetrated by the insurgents against residents of the territory they control militarily. “Relative” in this instance means more the absence of rights abuses carried out against members of the insurgents' community, and less so the absence of such abuses perpetrated against members of the dominant community, which in the cases examined here, have control of the national government.

Although the LTTE has recently lost full military control of Jaffna city and the Jaffna peninsula, there are still large swaths of territory which remain under LTTE dominion in the Northern and Eastern provinces.¹⁰⁹ The ability of the Tigers to deliver services to the population in these areas has been hampered by government controls on the transport of a range of goods and raw materials into LTTE controlled areas. But there is little question that the majority of the populace in the north and east looks to the Tigers, and not to the regime in Colombo, for the provision of vital services. That populace also is able to rely on LTTE administrative structures for the maintenance of law and order in the Northern and Eastern provinces. These law and order “mechanisms” do not extend beyond the area of LTTE control but are quite active in those areas.¹¹⁰

It must be said that in the case of Sri Lanka there is evidence of LTTE human rights violations, even against the Tamil community. Particularly note-

worthy are the documented instances of child abductions, or as the Tigers would put it, the “recruitment” of children into the LTTE military wing. This recruitment of youth into the LTTE ranks apparently continues even beyond the current ceasefire.¹¹¹ At times during the more than 20 years of civil war, when the Tigers were suffering heavy losses on the battlefield, or shortly after the incursion of such losses, reports of child abductions occurred at endemic levels. In the early 1990s, when the LTTE had virtually total control of the city of Jaffna on the Jaffna peninsula, the sometimes brutal tactics applied by the LTTE to help maintain order in the city detracted from the allegiance toward the LTTE from the Tamil community.¹¹²

It is not completely clear to what level LTTE child abductions may have diminished in recent years, parallel with a decrease in hostilities with government forces during the run up to the February 2002 ceasefire.¹¹³ For that matter, it is obvious there has not been a cessation of the abduction practice even since the ceasefire. The Sri Lankan Monitoring Mission (SLMM),¹¹⁴ a ceasefire surveillance group composed of Scandinavian nationals established in March 2002, documented close to 300 cases of child “recruitment” from February to October 2002.¹¹⁵ This recruitment, the LTTE submits, may indeed be due to the excesses of their cadre, but that it is infrequent, and they indicate they are working to curb such activity. The LTTE has recently agreed to a partnership with the United Nations International Children’s Emergency Fund (UNICEF) to help restore “normalcy” to the lives of children.¹¹⁶

On the other hand, the Tigers have said that the bulk of the child recruitment is genuinely voluntary. The Tigers maintain there is a strong attraction to their movement exhibited by Tamil young people who believe in the LTTE mission. Further, the LTTE holds that their organization offers protection to Tamil youth from hostile Sinhalese and Muslim populations residing in the Northern and Eastern provinces. The evidence seems to indicate that, although still continuing, the incidence of forced child recruitment has decreased, with the decline beginning before the ceasefire, and accelerating after it.¹¹⁷ Support for this belief is not strong, however. For the period March through November of 2003, the incidence of child recruitment (the number of complaint cases ruled a violation of the Ceasefire Agreement) was still at an unconscionable level.¹¹⁸ Still, a report by a United Nations Working Group has stated that there was a “significant decrease,” in child recruitment during the second half of 2003.¹¹⁹

A question could be raised regarding whether this depiction of events, which I have alleged demonstrates “an absence of human rights violations,” is genuine, inasmuch as it appears to turn away from a whole category of offenses: violations committed against members of the opposing community, non-combatants as well as combatants. LTTE attacks against non-Tamil residents, particularly Sinhalese, of the Northern and Eastern provinces are amply documented. Starting at least as early as 1984, these attacks have taken the lives of hundreds of unarmed Sinhalese civilians, notably those Sinhalese regarded as “settlers.”

In 1985, during the peace conference in Thimpu, the united Tamil groups made it one of their four points to be acknowledged that because they were a nation of their own they had an exclusive right to their homeland in the North and East, where none but they should be entitled to settle. No new Sinhalese settlers should be allowed to cultivate the traditional Tamil areas, although those who were already there could remain. The militant groups underlined this demand with violent and bloody attacks on Sinhalese settlers in the Northeast who dared to defy their order to stay out.¹²⁰

The belief on the part of the Tigers that the Northern and Eastern provinces were the property of the Tamil community, the latter's "homeland," was (and continues to be) held with great conviction, to the point of prompting actions which by any standards would have to be regarded as barbarous. During the early years of the period, when the LTTE maintained control of the Jaffna peninsula, the willingness of the Tigers to commit human rights violations of an extreme nature was unmistakable.

Now that the Jaffna Peninsula has fallen under the control of the LTTE, the scene of military action has shifted to the Eastern province, where the brutality of both parties to the conflict – the Tamil militants and the Sri Lanka security forces – has become starkly apparent. The Tamil militant operations are designed to expel Sinhalese settlers from lands considered to lie within the "Tamil homeland." The first such incident was the brutal slaying in 1984 of 65 Sinhalese ex-convicts and members of their families, including children, who were settled in former Tamil refugee camps in the north Central province. Such attacks continued throughout 1985. In the opening months of 1986, more than 90 Eastern province civilians – again including children – were killed by Tamil militants' attacks or bombs.¹²¹

There should, of course, be explicit condemnation of such callous disregard for the lives of non-combatants. But the documented evidence of past LTTE excessive human rights violations notwithstanding, it should be pointed out that the violent acts against non-Tamils were designed to stress the central tenet of the LTTE program: the Northern and Eastern parts of the island were "Tamil" in character, and should be recognized by non-Tamils as such. On occasion, the Tigers perpetrated acts of violence even in Colombo, seemingly to simply demonstrate that the government could not prevent them from doing so.¹²² The campaign of violence carried out in the Northern and Eastern provinces were not random acts of savagery; reprehensible as they were, they served a political purpose. In the instance of violence against non-Tamil civilians, the purpose was to demonstrate a willingness to take extreme measures to establish LTTE control over a territory.

That is, after issuing an edict warning non-Tamils not to immigrate to the territory in question, to allow the immigration to occur in the face of that edict would devalue the authenticity of the LTTE claim to suzerainty over the “Tamil homeland.” Saying this should not be construed as taking the posture of an apologist for the LTTE. It is only intended to convey that it would not be helpful for the purpose of a settlement to deny the possibility of talks – on the part of the government and of a potential mediator – with the Tigers because of certain acts of admittedly extreme and abhorrent violence carried out by the latter.

It might also be submitted that an assessment of the LTTE’s human rights record should perhaps give more weight to the quality of that record relative to the Tamil community in the Tamil “homeland.” In that regard, the Sri Lanka Monitoring Mission put in place as part of the peace process in Sri Lanka,¹²³ has certainly been able to serve as a source of information for the Norwegian intervenors, on human rights and humanitarian conditions within the confines of Tamil-controlled territory. “The intention of the SLMM is to reduce the tension between the Parties by rapidly inquiring into any alleged Ceasefire violation. SLMM then tries to solve problems and disputes that arise through the SLMM Local Monitoring Committees in the districts and/or through direct contact between SLMM HQ and the top leadership of the Parties.”¹²⁴ Article 2.1 of the 2002 Ceasefire Agreement between the LTTE and the government stipulates that the SLMM is to monitor whether the two sides are complying with the Agreement by abstaining from acts “against the civilian population, including such acts as torture, intimidation, abduction, extortion and harassment.”¹²⁵

The SLMM has compiled data on “complaints” of alleged violations, as well as “ruled” (actual) violations of the ceasefire since mid-2002.¹²⁶ This information is a matter of public record and is posted on the SLMM’s official website. Although the SLMM does not participate directly in the mediation efforts of the Norwegian government, it is also a matter of public record that the Norwegian government and the SLMM have both had “seats at the table” during negotiation sessions between the LTTE and the Sri Lankan government.¹²⁷ Two actors seated at the same table during talks indicates information is being shared at some level. A close working relationship between the SLMM and the Norwegian government seems evident, although this does not mean that in the mediation the SLMM has a direct role.

What the “close relationship” does imply is that the SLMM could readily act as a repository of information on alleged human rights violations in the North and East, the areas where the LTTE is the administrative authority, not the Colombo government. There would be no need for a formal mechanism of transfer from the SLMM to the Norwegian mediating team of human rights data, the data is accessible by all. Because of the documented working relationship between the SLMM and the Norwegian government, it would seem reasonable to conclude that the Norwegian mediators would avail themselves of compiled

and collated information human rights data if that were of interest, and my contention is this would be likely.

This information may have been of a nature suggesting the *relative* absence of human rights violations against members of the Tamil community.¹²⁸ The information may then have enabled the latter to alter the perspective of the Sri Lankan government so that it has ceased to “discount” the validity of the LTTE claim of political legitimacy: that the Tigers “represent” the Tamil community. This would be so if the mediators were bent on laying the ground for the argument about overcoming government “discounting” put forward here.

There is reason to believe the Norwegian intervenors are indeed trying to overcome the “discounting” problem in my view. Commenting on the comportment of the Norwegians as mediators, President Kumaratunga has stated: “Obviously they have gone beyond their mandate. Not only them. Some other countries too were of the view that *there is no harm in creating a separate state in the northeast if it brings peace.*”¹²⁹ If this was indeed the view of the Norwegian mediators, it has been echoed by at least one close observer of the conflict:

The LTTE is in total control of two [of the eight northeastern districts], Killinochi and Mullaithivn and the Sri Lankan government has been shut out totally in the two districts. They have *their own policemen, courts, customs, judiciary sections*, their own banks and taxation systems. This is the reality. Any move towards a political solution will have to take into account this reality and it will take a long time [emphasis added]. That is why we had said repeatedly [. . .] that the Sri Lankan government should start the talks on the ISGA proposals and sooner the better.¹³⁰

If in the territory they control militarily, the LTTE has established an alternative judiciary, including courts and police, this at least implies that the organization has made a commitment to respect human rights, e.g., to limit “extra-judicial” detentions, executions and the like. Article 4 of the proposed ISGA explicitly voices such a commitment.¹³¹ It is my surmise that, much as the close observer quoted above urges the Sri Lanka government to re-open negotiations with the LTTE partially because of the latter’s commitment to human rights, the Norwegian mediators may also have done so.

SPLM/SPLA AND SUDAN

The political legitimacy of the SPLA in Sudan, in the sense of the organization being able to represent southern Sudan in negotiations with the Sudanese government, had been in some doubt in recent years, not least because of the presence of politically coherent rival insurgent groups, some of which had splintered from the SPLA earlier. This article will not attempt to trace all of the various factions in southern Sudan that have fought against the Khartoum regime;

they include the Southern Sudan People's Liberation Movement (SSPLM), also referred to as Anya Nya Two; the Southern Sudan Independent Movement/Army (SSIM/A); and the Patriotic Resistance Movement of Southern Sudan (PRMSS). But there is no question that currently the most important insurgent group is the SPLA and its political wing, the SPLM.¹³²

The SPLA/SPLM underwent a damaging – in terms of the overall rebellion against the Khartoum regime – split in 1991, when the two most influential leaders of organization, John Garang and Riek Machar, decided it was impossible to co-exist within the same association and formed separate political entities. A third faction, SPLA Bahr-al-Ghazal, was formed under the leadership of Carabino Kuany Bol, but it has never maintained the military competence of either of the other two groups. Garang's group was known as SPLA-Mainstream or SPLA-Torit, while Machar's group was known as SPLA-United or SPLA-Nasir.¹³³ The two factions engaged in serious hostilities with each inflicting significant casualties against the other. The rift between the two factions became so extreme that, after renaming his group the Southern Sudan Independence Movement (SSIM) with an attached military wing, the South Sudan Defence Force (SSDF) in 1997, Machar actually aligned the SSIM/SSDF with the Khartoum regime – this alliance ended in 2000 – for a limited period.¹³⁴

Political and military opposition against the government exists in the north as well with several groups amalgamated under the National Democratic Alliance (NDA). Technically, the SPLA/SPLM is part of the NDA, and the latter also includes, or did include among others, the Umma Party and the Democratic Unionist Party (DUP). There were reports, however, that the northern Umma Party became disaffected with the NDA in 2000 and abandoned the NDA, at least for a certain period.¹³⁵ The NDA has been a strong military and political ally of the SPLA/SPLM, although the NDA has always been hesitant to endorse wholeheartedly the notion of outright secession of southern Sudan from the rest of the country, which at one time was the favored "solution" of the SPLM/SPLA for Sudan. In early 2002, the split between SPLM-Torit and Machar's renamed Southern People's Defence Force (SPDF), came to an end.¹³⁶ The re-unification of the SPLM/SPLA apparently came about entirely from internal motivations, with the leadership interested in providing an integrated front to which the international community could provide support to the movement in the south; and the leadership indicated they believed they could present a stronger case after unification.¹³⁷

The Sudan government entered into talks only with the SPLM/SPLA (and peripherally with the NDA) within the context of the IGAD peace process; it is only the discussions between these two groups and the Sudan government to which this article will refer. There have been other resistance groups in the south that have argued for inclusion in the peace talks, but the government in Khartoum has thus far refused to widen the base of the negotiations. The US gov-

ernment tacitly recognized the prominence of the SPLM/SPLA as a legitimate representative of the southern population when on 6 September 2001, President George W. Bush appointed former Senator John Danforth as a “special envoy for peace” in Sudan.¹³⁸ The Danforth mission was to ascertain whether the two main adversaries in Sudan, the Khartoum government and the SPLM/SPLA, were prepared to engage in “serious” negotiations to end the civil war. The idea was that if Danforth found the parties were indeed serious about meaningful negotiations, then the US was prepared to step up its diplomatic efforts to assist in the peace process.¹³⁹ The attention level of the US toward Sudan has remained relatively high since the Danforth mission, with much of the US activity coordinated with the efforts of other members of the “quartet” of states (US, UK, Italy, and Norway), which have attempted to bolster the work of IGAD.

The 1994 Declaration of Principles (DOP)¹⁴⁰ issued through the IGAD talks remained the basic “single negotiating text” which the Sudan government and the SPLM/SPLA (aligned with the NDA) worked from in the discussions occurring since 1994. The DOP is widely regarded as having incorporated much of the agenda put forward by the various southern insurgencies, and particularly the SPLM/SPLA. Most of the international community, including NGOs and IGOs, as well as United States and the UN, endorsed the DOP. The fact that the Khartoum government signed the DOP in 1994 was regarded by most observers as a validation of the demands made by the SPLM/SPLA. The government side, however, when signing the document only after much hesitation, insisted the DOP was not a legally binding instrument.¹⁴¹

Key provisions of the DOP provided that the right of self-determination of the people of South Sudan to determine their future status through a referendum should be affirmed, and stipulated that maintaining the unity of the Sudan must be given priority by all the parties, provided that the “following principles are established in the political, legal, economic and social framework of the country.”¹⁴² The “principles” alluded to in the previous statement are wide ranging and only the principal ones are provided here. First, Sudan is a multi-racial, multi-ethnic, multi-religious, and multi-cultural society. Full recognition and accommodation of these diversities must be affirmed. Second, the complete political and social equalities of all peoples in the Sudan must be guaranteed by law. Third, extensive rights of self-administration on the basis of federation, autonomy, etc., to the various peoples of the Sudan must be granted to and affirmed by all parties. Fourth, a secular and democratic state must be established in the Sudan. Freedom of belief and worship and religious practices shall be guaranteed in full to all Sudanese citizens. State and religion shall be separated, but the basis of personal and family laws can be religion and custom. Fifth, an interim arrangement (leading to a referendum to decide the final status of the south) shall be agreed upon, the duration and the tasks of which shall be negotiated by the parties.¹⁴³

But the DOP did not bring a significant reduction in military hostilities of any duration in the succeeding years. In fact, the first genuine ceasefire between the SPLM/SPLA did not occur until October 2002 (Memorandum of Understanding [MOU] on Cessation of Hostilities Agreement)¹⁴⁴ as part, and an extension of, the negotiation process which took place at Machakos, Kenya. The discussions at Machakos were a phase of the Sudan peace process that occurred at certain intervals during 2002. On occasion the talks would be interrupted by events on the battlefield; one such suspension of the talks occurred in September 2002, after the SPLM/SPLA captured Torit, a key town in the South. The Sudan government suspended the talks in September, but after the government regained control of Torit later in the year the talks were reconvened in October 2002.¹⁴⁵

In an earlier period the government in Sudan had experienced a rift between the two principals in the regime, President Umar Hasan Ahmad al-Bashir, head of the National Command Council (NCC), and Dr. Hassan al-Turabi, founder and head of the National Islamic Front (NIF), an Islamist political party. Al-Turabi, who had become Speaker of the National Assembly in 1996, was removed from that position by Bashir in December 1998, after the NIF had renamed itself the National Congress Party (NCP). Then, in May 2000, Bashir removed al-Turabi from a second position of authority, secretary-general of the National Congress – Bashir went so far as to actually imprison al-Turabi for a period – and declared that certain political activities carried out by al-Turabi and his associates were prohibited. Whether these steps by Bashir ultimately moderated the Sudan government's position in the IGAD sponsored negotiations regarding the sanctity of the shari'a laws' application in the South is not certain. The 15 October 2002 ceasefire was violated most notably by a government offensive beginning in December 2002, fought in large part by government sponsored militias supported by regular troops. These events followed the consummation of the Machakos Protocol which had been reached in July 2002.¹⁴⁶

Established under the auspices of IGAD, the protocol established a broad "Draft Framework" which "sets forth the principles of governance, the general procedures to be followed during the transitional process and the structures of government to be created under legal and constitutional arrangement to be established."¹⁴⁷ The protocol contains an Agreed Text on the "transition" from civil war to a comprehensive peace, an Agreed Text on State and Religion, and an Agreed Text on the Right to Self-Determination for the People of South Sudan. Because the negotiations between the Sudanese government and the SPLM/SPLA were for the most part "proximity" talks, with each side offering proposals to the mediating team – which then passed on the proposal to the other side – the protocol was open to some variation in interpretation.¹⁴⁸

An issue of particular note was whether the three geographical areas of Abeyi, the Nuba Mountains, and the Southern Blue Nile region were to be regarded as part of the South in terms of the self-determination issue, or whether

they were to be understood as part of the country under the political control of Khartoum. Because the Nuba Mountains and Southern Blue Nile regions are – in the judgement of the SPLM/SPLM – contiguous with the rest of Southern Sudan, the case for their inclusion as part of the South within the context of the negotiations has a strong geographic underpinning. In early 2003, the SPLM/SPLA and the Sudan government held talks outside the formal IGAD framework, regarding the status of the three disputed areas. The Sudan government relied on 1956 colonial demarcations to claim that the three contested areas were geographically part of the North. The SPLM/SPLA continued to regard the “marginal” areas as residing beyond the bounds of central government control. It has been necessary to draft MOUs to clarify positions regarding the protocol and the peace process itself. The ceasefire agreement was issued as an MOU, and another was issued in November 2002, addressing questions of government structures during an interim period.¹⁴⁹

The protocol brought agreement on the two most divisive issues between the two parties: the relationship between state and religion, and the possibility of self-determination for the South. Certain provisions of the Agreed Text on State and Religion specify “there shall be freedom of belief, worship and conscience for followers of all religions or beliefs or customs and no one shall be discriminated against on such grounds.”¹⁵⁰ Moreover, the rights to worship or assemble in connection with a religion or belief; write, issue, and disseminate relevant publications related to the rites or customs of a religion or belief; teach religion or belief in places suitable for these purposes; and to observe days of rest and celebrate holidays and ceremonies in accordance with the precepts of one’s religious beliefs, shall be respected.¹⁵¹

Regarding self-determination for the South, the Protocol stipulates there will be an internationally monitored referendum held in the South after an interim period of six years, for the purpose of deciding whether the South will remain part of Sudan after the adoption of a decentralized mode of government, with an agreed measure of autonomy afforded to the South, or if the South will opt for secession from Sudan for the purpose of forming an independent sovereign entity. The South shall not be subject to legislation based on the *shari’a* laws during the interim period. The six year interim period is to be preceded by a pre-interim period of six months. An independent Assessment and Evaluation Commission will be established during the pre-interim period to monitor the implementation of the overall peace agreement. The latter commission is composed of representatives from the Sudan government, the SPLM/SPLA, the IGAD Sub-Committee on Sudan states (Djibouti, Eritrea, Kenya, Uganda), and four observer states (Italy, Norway, UK, US).

AN ACCORD

The profound importance of reaching agreement on the right of self-determination for the South, and that the *shari'a* laws would not apply in the South, cannot be overstated. These issues had been obstructions in the path to progress on all the other critical issues, e.g., power sharing, wealth sharing, and southern development. The critical nature of these breakthroughs was noted by the Norwegian government: "this is an historical breakthrough in the peace negotiations for Sudan."¹⁵²

These breakthroughs set the stage for the eventual agreement to end the fighting between the government of Sudan and the SPLM/SPLA, which was marked by the Nairobi Declaration of June 2004.¹⁵³ In November 2004, an unusual special session of the UN Security Council was held in Nairobi where the major order of business was the filing of pledges by the Sudanese government and the SPLM/SPLA with the Council that the two parties would formally end the civil war by the end of the year. Noteworthy in this meeting was the expressed hope by Council members that a "North-South" peace agreement could "serve as a blueprint for Darfur."¹⁵⁴

The Nairobi Agreement had been preceded by the realization of six protocols which defined the terms of agreement on those issues that had still been outstanding at the time of the Machakos Agreement. These were an MOU on Structures of Government (November 2002), Agreement on Security Arrangements (September 2003), Agreement on Distribution of Wealth (January 2004), and a Protocol on Power Sharing, a Protocol on the Resolution of Abeyi Conflict, and a Protocol on the Resolution of Conflict in Southern Kordofan/Nuba Mountains and Blue Nile States, with the three latter agreements all being signed in May 2004.¹⁵⁵ The last protocol listed pertaining to the Nuba Mountains and Southern Blue Nile states assigns representation in the two states' executive and legislative branches of government in a 55 to 45 percent ratio in favor of the National Congress Party (controlling the Khartoum government) with the SPLM/SPLA receiving the smaller proportion.¹⁵⁶ The protocol pertaining to the Abeyi conflict specifies that residents will be "citizens" of both the North and South. After an interim period residents of Abeyi will vote on whether to keep an administrative status within the North or join with Bahr el Ghazal, a province of the South.¹⁵⁷

The Agreement on Security Arrangements provides for two separate armies, the Sudanese Armed Forces or SAF, and the SPLA, during the six year interim period – which follows a six month pre-interim period designated to follow the final agreement. The permanent ceasefire which began in January 2005, will be monitored by a UN peacekeeping contingent, the United Nations Mission in Sudan (UNMIS).¹⁵⁸ The Protocol on Power Sharing provides that the seats in the national legislature will be split between the NCP with 52 percent, the SPLM with 28 percent, other northern parties with 14 percent, and other southern par-

ties with 6 percent. The SPLM chairman, John Garang, will be first vice-president at the national level. There will be a northern regional government with the NCP holding 70 percent of the representation in both the executive and legislature, with the SPLM allocated 10 percent, and other southern parties 20 percent. There will also be a southern regional government where the SPLM will have 70 percent of the seats in both the executive and legislative branches. The NCP will be allocated 15 percent of the seats, as will other southern parties.¹⁵⁹ The Protocol on Wealth Sharing divides oil revenues equally between the two regional governments.¹⁶⁰

Finally, on 9 January 2005, a formal signing of the Comprehensive Peace Agreement Between the Government of Sudan and the Sudan People's Liberation Movement took place in Nairobi. At the signing, then US Secretary of State Colin Powell commented that the world community expected to "see rapid negotiation in the crisis in Darfur," but this does not appear to have occurred.¹⁶¹

SITUATION "ON THE GROUND"

Multiple rounds of negotiations took place after mid-2002, including the talks that brought the signing of the Machakos Protocol, culminating in the January 2005 Comprehensive Ceasefire Agreement (sometimes known as the Naivasha Agreement). The round which commenced in early November 2003 had to be placed on hiatus for several weeks to allow for Muslim negotiators to perform the obligatory *hajj*, the Islamic pilgrimage to holy sites in Saudi Arabia. The major contentious issues have now been resolved at least sufficiently to allow agreement on the matters of revenue sharing – prominent within this issue has been the distribution of oil revenues – the judiciary (structures of government), power sharing, and reaching a comprehensive and durable ceasefire.

In July 2003, the IGAD mediators in a draft framework proposed that oil revenues be divided evenly between the North and the South, and that 38 percent of a proposed council of state, as well as a third of the seats in a future national parliament be "set aside" for the South during the six year interim period. In the end the 28 percent of the seats set aside for the SPLM in the national legislature was very close to the earlier proposal. As has been noted above, oil revenues were indeed divided evenly between the two regional governments which the Comprehensive Agreement created. In addition, the IGAD proposal which allowed the southern entity to maintain its own armed forces during the interim, apart from Khartoum ultimately found its way into the final agreement. This framework proposal was initially rejected by the Sudanese government on the grounds that the proposed revenue sharing was disproportionate to the size of the southern region's population relative to the country as a whole, and that allowing a separate army in the South was tantamount to creating "two Sudans" before the referendum took place. Ultimately, the Khartoum government relented on this question.

Thus, it is clear that for the most part the agreement that was actually reached, and frameworks for agreement that were *projected* at Machakos, became the bedrock for the Comprehensive Agreement in early 2005. What is of primary interest in this article is the mediation efforts mostly carried out by the Norwegian government, in the time frame between the Machakos Protocol and the eventual Comprehensive Agreement some months later.

In January 2002, the US Congress passed the Sudan Peace Act.¹⁶² Section 4 of this legislation explicitly condemns “violations of human rights on all sides of the conflict in Sudan.” The record in Sudan seems to indicate that both the Sudan government and the SPLM/SPLA have committed serious human rights violations against non-combatants, the category of violation of most interest in this article. Our interest is based on the supposition that a relative lack of such violations, and the concurrent ability on the part of the insurgency to administer (free of coercion) the territory under their control, would be evidence of an insurgency having acquired belligerency status, inasmuch as a belligerency is generally understood to possess the attribute of coercion free administration.¹⁶³

The SPLA and associated militias have targeted relief operations and civilian targets. But most accounts of the Sudanese civil war, while not condoning human rights violations by the SPLM/SPLA and other insurgent groups, attribute the overwhelming preponderance of human rights violations in Sudan, especially in the South, to the government of Sudan. US President Bush attested publicly to this view in May 2001.

Such crimes [as a 1903 Russian pogrom] are being committed today by the government of Sudan, which is waging war against that country’s traditionalist and Christian peoples. Some 2 million Sudanese have lost their lives; 4 million more have lost their homes. Hospitals, schools, churches and international relief stations have often been bombed by government warplanes over the 18 years of Sudan’s civil war. The government claims to have halted air attacks. But they continue.¹⁶⁴

In Sec. 4, the US Sudan Peace Act explicitly “condemns the Government of Sudan’s overall human rights record, with regard to both the prosecution of the war and the denial of basic human and political rights to all Sudanese.” The US legislation negatively represents the behavior of the Sudan government in its prosecution of the war in the strongest possible terms. “The acts of the Government of Sudan, including the acts described in this section, constitute genocide as defined by the Convention on the Prevention and Punishment of the Crime of Genocide.”¹⁶⁵

The question being pursued is how the IGAD mediators were able to overcome the propensity of the Sudan government to derogate, or in the context of this article “discount,” the value of direct talks with the SPLM/SPLM even after

the signing of the DOP in 1994. The road from the DOP to the Machakos Protocol was a difficult one. It is put forth here that the mediators may have been able to do this by presenting evidence to the Sudan government of the ability of the SPLM/SPLA to administer the areas under its control without resort to the coercive tactics and policies utilized by the Sudan government's military forces. Such evidence would lend support to the contention that the SPLM/SPLA had attained the status of a belligerent, and as such, must be brought into negotiation process in a serious vein (absent "discounting").

One distinction that can be fairly drawn between government human rights abuses and those committed by the SPLM/SPLA and the NDA, according to people on the ground in southern Sudan and especially in eastern Sudan, is that government forces appeared to purposefully target civilian populations on occasion, while the insurgent organizations carried out activities which, although negatively impacting civilians, appears to have been a *by-product* of insurgent military action, and not the direct intention of that action. Abusive activities of the SPLM/SPLA included:

the persistent stealing of food and cattle from civilians, forced unpaid civilian labor on SPLA farms, taxation forcibly levied on civilian goods (including relief supplies) and cattle, diversion of humanitarian relief supplies to the military, and the displacement of civilian populations in vulnerable locations in order to draw more relief supplies. Abuses of humanitarian assistance have been less frequent in recent years, but the insurgents regularly tax relief supplies in the areas they control.¹⁶⁶

Although difficult to quantify, it would also appear to be the case that the human rights abuses perpetrated by the SPLM/SPLA have resulted in fewer civilian casualties of war relative to the abuses perpetrated by the Khartoum government; that is, injuries or deaths to the civilian population produced directly or indirectly by military hostilities.

AN ESTIMATION

Broadly

We can examine the human rights record of both the LTTE and the SPLM/SPLA for an approximate two year period prior to the February 2002 Ceasefire Agreement in Sri Lanka and the July 2002 Machakos Agreement to find evidence that either or both insurgencies were able to administer the territories they controlled, absent an indefensible level of coercion imposed against the populations each insurgency claims to represent. At a minimum we can try to ascertain if the two insurgent groups were moving in the direction of achieving a decrease in human rights violations in the period immediately prior to the respective "breakthrough" agreements.

At the end of the day there is little doubt that both the SPLM/SPLA and the LTTE have engaged in sometimes egregious human rights violations. Many of these violations have been well documented for both insurgent groups. In 2000, reports circulated that the SPLM/SPLA continued to violate citizens' rights, despite its claim that it was implementing a 1994 decision to assert civil authority in areas that it controlled, and in many cases has controlled for years. During the year 2000, the SPLM/SPLA was responsible for extrajudicial killings, beatings, rape, arbitrary detention, and the forced military conscription of underage men, i.e., the "recruitment" of child soldiers.¹⁶⁷ However, in 2001 there were reports that the SPLA had "begun to observe some basic laws of war; it takes prisoners on the battlefield and permits ICRC [International Committee of the Red Cross] visits to some of them."¹⁶⁸ These reports of limited human rights observance continued in 2002. "The SPLM/A observed some of the basic laws of war; it took prisoners on the battlefield and permitted ICRC visits to some of them."¹⁶⁹ There were reports in 2002, however, that the SPLM/SPLA continued to carry out extrajudicial executions.¹⁷⁰

In the case of Sri Lanka, recent serious abuses of human rights by the LTTE are similarly well documented. One of the most serious charges leveled against the LTTE during 2000 was the practice of child recruitment. LTTE engagement in this practice appeared to heighten during 2000.¹⁷¹ In 2001, the LTTE

regularly committed extrajudicial killings, including killing prisoners taken on the battlefield, and also was responsible for disappearances, torture, arbitrary arrest, detentions, and extortion . . . The LTTE *did not release military personnel* in its custody during the year. The LTTE continued to control large sections of the north and east of the country. The LTTE denied those under its control the right to change their government, infringed on property rights, did not provide for fair trials, restricted freedom of movement, used child soldiers, and severely discriminated against ethnic and religious minorities.¹⁷² [emphasis added].

In 2002, "the LTTE reportedly committed several unlawful killings, and was responsible for disappearances, torture, arbitrary arrest, detentions, and extortion . . . The LTTE continued to control large sections of the north and east of the country. The LTTE [again] denied those under its control the right to change their government, [again] did not provide for fair trials, infringed on privacy rights, somewhat restricted freedom of movement, [continued to use] child soldiers, and [continued to discriminate] against ethnic and religious minorities."¹⁷³ However, "the LTTE released all of the military personnel it reportedly held in its custody during the year."¹⁷⁴ The release of military personnel in 2002 by the LTTE was an improvement from its performance in that regard in 2001.

By Specific Category

If we examine, in summary fashion, the behavior of the LTTE, and the SPLM/SPLA across four categories of possible human rights abuses (unlawful deprivation of life, disappearances, torture, and treatment of POWs) over a two year period (2000-01) we find at best a mixed record. Between the two insurgent groups, the LTTE has had the poorer record of adhering to internationally recognized human rights standards. In 2000, in the category of unlawful deprivation of life, the LTTE did commit extrajudicial killings.¹⁷⁵ The exact number and type of killing was not known because the LTTE prevents outside investigation of the area it controls. The LTTE bombed civilian targets, killing and injuring civilians, and took civilians hostage.¹⁷⁶ In 2001, there were reports that the LTTE continued to commit extra-judicial killings.¹⁷⁷ There are accounts indicating that LTTE attacks against *civilians* decreased significantly during 2001,¹⁷⁸ while the level of killings was drastically reduced during the following year of 2002, the year the ceasefire agreement was reached.¹⁷⁹

In the disappearance category for both 2000 and 2001, the LTTE was responsible for an “undetermined” number of disappearances in the North and East. The LTTE was known to be holding the crew members of several vessels it had hijacked since 1995, but released no prisoners it was holding during the year.¹⁸⁰ The ICRC was allowed to visit a number of detainees held by the LTTE during the year and subsequently obtained the release of a small number of those same detainees.¹⁸¹ In 2002, there were again an unknown number of civilian disappearances attributed to the LTTE in the areas under its control. The LTTE did release a number of detainees (non-uniformed personnel) during the year, and by year’s end was believed to be holding significantly fewer detainees.¹⁸² This accounting raises the question as to whether the improvement in behavior by the LTTE in the disappearance category over the 2001-02 period, was a *cause* (at least in part) of the February 2002 negotiation “breakthrough,” or a *consequence* of that breakthrough. Because there were only a relatively few weeks in 2002 prior to the ceasefire agreement between the Colombo government and the LTTE, it is more likely the improved behavior of the LTTE (at least for the greater part of 2002) in the disappearances category was a consequence of the February agreement.

Under the category of torture for 2000, the LTTE reportedly routinely engaged in torture. Released prisoners returned by government forces gave accounts of having been tortured by the LTTE.¹⁸³ These accounts also surfaced in 2001, and were described by government security forces released by the Tigers as an apparently not uncommon practice in prior years.¹⁸⁴ The routine practice of torture by the LTTE was again reported in 2002, but because of the release of all uniformed prisoners during the year, the incidence of this practice presumably decreased.¹⁸⁵ There was virtually no information on the practice of torture by the LTTE provided by either the ICRC or Amnesty International.

In the treatment of POWs category, the LTTE has conceded that it has often killed government forces rather than take them prisoner. In prior years the Tigers are believed to have killed most of the police and government security personnel they had captured.¹⁸⁶ However, in 2000 the ICRC was allowed to organize family visits to a number of POWs for the first time in several years, with a few of those same POWs subsequently being released.¹⁸⁷ In 2001, the LTTE was believed to have again killed most of the government security forces personnel it had captured, and often killed injured enemy soldiers on the battlefield rather than take them hostage.¹⁸⁸ It should be noted that the same behavior of refusing to take prisoners has been ascribed to government forces that had captured LTTE fighters.¹⁸⁹ In 2002, the LTTE apparently killed a number of POWs it was holding, but then released all enemy forces later in the year.¹⁹⁰ Again, the improved behavior of the LTTE in this category over the 2001-02 span was likely a consequence of the February 2002 agreement, rather than a contributing cause.

In the case of Sudan, in examining the SPLM/SPLA's human rights record for 2000-01, the record is mixed. For the category of unlawful deprivation of life, in 2000 the SPLM/SPLA was reported to have committed "political and extra-judicial" killings in areas of active conflict.¹⁹¹ For 2001, in the same category of unlawful deprivation of life, evidence was produced indicating that SPLA forces were responsible for the summary execution of a number of civilian citizens.¹⁹² There was no indication of an attempt to apprehend the parties responsible.¹⁹³ In 2002, rebel forces, possibly including but not limited to SPLM/SPLA fighters, were reported to have committed extra-judicial killings, particularly in the area of the Nuba mountains and northern Bahr el-Ghazal, areas of active conflict.¹⁹⁴

In the disappearance category in 2000, the SPLM/SPLA was reported to have carried out abductions of women and children, apparently mostly occurring during intra-ethnic fighting rather than while fighting against government forces.¹⁹⁵ In 2001, there were further reports of abductions of women and children.¹⁹⁶ These reports continued in 2002, including the abduction of some NGO health workers and some adolescents, although at least some of the civilians were later released.¹⁹⁷ Because the Machakos Protocol was only achieved in July 2002, the release of abducted persons during that year could be significant. This is so at least in the sense that a modification in SPLM/SPLA behavior in the direction of a greater adherence to international human rights law in the first half of 2002 could be pointed to by the IGAD mediators as an attribute exhibited by a belligerency.

Under the torture category for 2000, there were credible reports by government security force personnel of their being beaten and subjected to other forms of severe corporal punishment. Accounts of rape by SPLM/SPLA personnel also circulated.¹⁹⁸ In 2001, incidents of rape by SPLA personnel were again reported.¹⁹⁹ Unlike in previous years, however, there were no reports of beatings or other inhumane treatment during the year.²⁰⁰ In 2002, reports of rape by

SPLM/SPLA personnel continued, as well as other unexplained injuries to civilians.²⁰¹ The SPLM/SPLA did continue, as in previous years, to allow ICRC personnel to assess conditions in a number of SPLM/SPLA prisons and medical facilities.²⁰²

Finally, in the treatment of POWs category, in 2000 the SPLM/SPLA continued to take prisoners, releasing a number of them and allowing ICRC visits to others. However, some POWs reportedly died in SPLM/SPLA prison facilities due to poor conditions.²⁰³ In 2001, the SPLM/SPLA allowed some access to prisoners, though not always freely. Although prison conditions for POWs are reputedly very poor and have led to prisoner deaths in the past, during 2001 there were no reports of POW deaths under SPLA custody.²⁰⁴ In 2002, it was reported that captured government soldiers were summarily executed by, or on the orders of, SPLM/SPLA officers after the battle of Torit.²⁰⁵ However, in 2002, the SPLM/SPLA also allowed regular visits to POW camps by the ICRC. On occasion the ICRC terminology for these camps is “detention facilities,” apparently because the camps hold both POWs and civilian personnel.²⁰⁶ The SPLA also released a number of POWs during the year.²⁰⁷

A TALLY

My thesis has been that the mediators in both the Sri Lanka and Sudanese negotiations to end the respective civil wars gained a measure of success as a result of being able to prevent government negotiators from engaging in “discounting.” That is, the mediators were able to persuade the government side in each dispute that their adversary had attained attributes of belligerency; and that proof of having attained these attributes was forthcoming from evidence of a lack of coercion by the insurgent groups, measured by an absence of human right violations by the latter. The two negotiation breakthroughs examined here clearly differ in one major respect. While the Machakos protocol in Sudan did create a peace process that led to a formal ceasefire agreement (the October, 2002 MOU), the protocol also brought accord on major divisive issues, namely the right of self-determination for the South (a referendum) and the role of Islamic law in the South (no forcible application).

The September 2002 breakthrough in Sri Lanka was for the most part only a ceasefire, with an agreement to enter into meaningful negotiations. These negotiations have led to significant progress in some areas, such as the “commitment” – unfortunately not yet fulfilled – by the Tigers to eradicate child abduction. Ceasefires are significant because the incidence of fatalities, major injury, and mistreatment inflicted on the parties generally declines significantly after a ceasefire is achieved. But one must fully recognize the limitations that are attached to ceasefires, particularly to protracted conflict. “Cease fires are a necessary *beginning*, but long-term solutions require commitment to change and a political process that supports change.”²⁰⁸

In this article I have not been directly concerned with assessing the prospects for the respective ceasefires in Sudan and Sri Lanka being able to evolve into conditions where “peace” is more than simply the absence of war. It does appear to be the case that qualitative aspects of a ceasefire can help predict the likelihood that the armistice will persist, with qualitative aspects referring to elements such as demilitarized zones, international observers, and third party guarantees. The pre-existing conditions before a ceasefire is established, which would include such factors as the parties’ respective military capabilities, economic costs of the fighting, and the issues provoking the fighting, that is, the nature of the dispute itself (the “stakes”), must of course be recognized. The political processes supporting change are continuing in both of the cases examined here. But given this recognition, then it has been shown that “the content of agreements does indeed matter in the construction of durable peace. All else being equal, peace lasts longer when stronger agreements are in place.”²⁰⁹ In this sense, because the ceasefire agreement in Sudan includes a prescription for maintaining the ceasefire in an interim period, the prospects for an enduring peace (absence of widespread civil war) are probably better in Sudan than in Sri Lanka.

In an action of some note in November 2003, after six rounds of negotiations, the LTTE for the first time put on the table a “concrete” proposal for the political administration of the Northern and Eastern sections of the island controlled by the Tigers. The Tigers’ proposal calls for the LTTE to have an absolute majority in an “interim” (until a referendum on the LTTE controlled areas could be held) self-governing authority (ISGA) for the Tamil dominated areas.²¹⁰ The LTTE proposal would give to the LTTE controlled authority, among other things, the power to tax, administer justice, control the police, and secure “homeland” territory. The LTTE proposal was partly a response to an earlier July 2003 government proposal which would only give the LTTE power over “development” issues, and would not give to the Tigers power over security, police, or taxation.²¹¹ Discussion of these two opposing proposals was placed on hold until formal talks could recommence (after their suspension by the government in November 2003). Most observers believed direct talks would re-start after the “snap” elections called by President Kumuratunga were held in April 2004.²¹² But why the post-election period has not produced a re-institution of talks, is explained, in part, below.

Those election results cannot be regarded as conducive to a resumption of active negotiations between the government and the LTTE. The Wickremasinghe government, the United National Front (UNP), was toppled, winning only 82 of 225 parliamentary seats. A new coalition government was formed, entitled the United People’s Freedom Alliance, with the majority party in the coalition being the SLFP (winning 57 seats), and the principle minority party (the *Janatha Vimukthi Peramuna* or JVP) winning 40 seats.²¹³ The new government does not hold a majority in Parliament, holding only 105 seats of the 225. The major minority partner in the coalition, the JVP, is a hardline Sinhala party, which will

brook only the most minor concessions to the LTTE. Moreover, an extremist Sinhala party dominated by radical Buddhist clerics, the *Jathika Hela Urumaya* (JHU), which basically rejects the idea of negotiating with the LTTE over the latter's claims to part of the island's territory, won nine seats. At the same time an LTTE supported party, the Tamil National Alliance (TNA) won 22 seats.²¹⁴ Clearly, the electorate in Sri Lanka remains "deeply divided."

These results do not bode well for the possibility of the Colombo government being receptive to the latest LTTE negotiating proposal: that upon the future resumption of talks, the sole agenda item for the first round of discussions be directed toward the implementation of the Interim Self-Governing Authority, referred to above, for the North and East of the country.²¹⁵ In their proposal the LTTE calls for "political autonomy and administrative independence" for eight districts in the North and East with Tamil majority populations.²¹⁶ The ISGA, in which the LTTE would hold the majority representation, would govern these eight districts. After an interim period of possibly five years, the proposal calls for a referendum to decide on a solution to the "homeland" issue, if a settlement has not been arrived at through negotiations. There are notable parallels which can be drawn between the LTTE proposal and elements of the January 2005 Sudan peace agreement.

One such parallel is the apparent desire of the Tigers to "institutionalize" the ISGA, such that the latter would become the recognized governing authority in the North and the East of the country, similar to what has been agreed to in Sudan for the SPLM/SPLA's authority in southern Sudan during the designated six year interim period.²¹⁷ The US State Department, as an interested third party, has strongly criticized the LTTE proposal as something "aimed to create a *de facto* separate state."²¹⁸ In the view of this article, of course, what the Tigers are proposing is only to have formal recognition granted to what is already in place in that portion of Sri Lanka controlled by the LTTE. To date, neither the Colombo government, nor the US, are prepared to grant that recognition.

An additional development that could have a detrimental effect on the possibility of talks in Sri Lanka recommencing in the near future, is the split between an "eastern-Tamil" based faction of the LTTE, led by Vinayagamoorthy Muralitharan, and the "mainstream" faction in the North led by Prabhakaran.²¹⁹ Claiming discriminatory treatment of eastern Tamils by the Prabhakaran leadership, Vibayagamoorthy, in March 2004, declared a separate LTTE administration for the East. Not unexpectedly, this step met with a harsh response by the mainstream LTTE regime. In March 2004, Prabhakaran sent troops into battle with the breakaway faction.²²⁰ The mainstream faction won a decisive victory, but not without both political and military costs. Prabhakaran's mainstream LTTE may now be perceived by the government as having been weakened by the internal strife, and this may reduce the government's motivation to re-open negotiations.²²¹

A development that may further reduce the government's incentive to resume negotiations is the apparent increasing dissatisfaction in recent months by both of the major parties in the current Colombo governing coalition with Norway's role as a mediator to the conflict. This dissatisfaction is not altogether new. In late 2002, President Kumaratunga, head of the SLFP, the party forming the largest component in the governing coalition, stated she did "not agree with the way the Norwegians handle the peace process. Obviously they have gone beyond their mandate."²²²

More recently, the expressed discontent with Norway's mediating role has continued. The JVP, coalition partner with the SLFP, has indicated the desire to have India replace Norway as mediator to the conflict. The primary criticism from both the JVP and the SLFP of the Norwegian efforts is the alleged failure of the mediators to remain impartial; "in many instances they have taken the LTTE's side . . ."²²³ There have been charges from the government that the Sri Lanka Monitoring Mission has been "lethargic" in investigating allegations of LTTE violations of the ceasefire.²²⁴ Given this expressed discontent with recent mediation efforts, the judgement might be made that the Norwegian intermediaries may have slipped away from the "reflective" behavior referred to earlier, and have become somewhat too assertive in their efforts, at least in the view of one of the parties.²²⁵ Although the Norwegian government has been sensitive to these charges, to date the mediation effort continues.²²⁶

CONCLUSIONS

Support for the "lack of coercion as evidence of belligerency status" thesis is limited at best. In the LTTE case there appeared to have been little improvement in the human rights record regarding the treatment of POWs over the 2000-01 period. There was discernible improvement only in 2002, which means, for the most part, after the ceasefire agreement had been reached. The SPLM/SPLA had a more consistent record of improvement in this category over the 2000-01 period and into 2002. Regarding the unlawful deprivation of life category, the record shows that the LTTE seemed to reduce the level of extrajudicial killing in 2002 from 2001, while there was little clear evidence that the SPLM/SPLA had reduced the level of such killings in the same time frame. The 2002 improvement in this category by the LTTE again appears to have occurred only after the February ceasefire agreement.

Under the disappearances category neither the LTTE nor the SPLM/SPLA had what could be pointed to as an enviable record in the 2000-01 period. Abductions, particularly of children, have apparently continued, although both the LTTE and the SPLM/SPLA made attempts to reduce the number of prisoners they held during 2002. But this seems to have been particularly true with the SPLM/SPLA, where civilians were abducted, but later released on several occasions in mid-2002.²²⁷ In the category of torture, both the LTTE and the

SPLM/SPLA appeared to make significant progress in reducing the incidence of this practice in 2002. But this result is certainly confounded by the occurrence in Sri Lanka of the breakthrough agreement in early 2002, thus presenting the “cause or consequence” problem identified earlier. In Sudan there was evidence of a reduced practice of torture in 2001, although accounts of rape continued in 2002.

We can contrast then, all four specific categories for the years 2000-01, but also take note of unfolding events in 2002. The improved treatment of POWs by the LTTE came about only in 2002, when it is likely this improvement occurred as a consequence of the ceasefire agreement rather than serving as a cause of that agreement. In the case of the SPLM/SPLA for this category there is a discernible improvement in the treatment of POWs prior to the July 2002 Protocol. The reduction in the number of disappearances attributed to either the LTTE or the SPLA/SPLM is not significant for the years 2000-01. In 2002, there was a noticeable decrease in abductions by the SPLM/SPLA. A noticeable decrease in the incidence of torture partially came about in the case of the LTTE only after the release of prisoners in 2002. For the SPLM/SPLA, however, the record shows that the incidence of torture decreased significantly in 2001, well before the Machakos Protocol. The incidence of unlawful deprivation of life was reduced significantly in Sri Lanka, but the evidence indicates this occurred only in 2002, not before. Because the ceasefire agreement was reached early in 2002 (February), it would be difficult to believe that LTTE improvement in 2002 for this category was much of a factor in reaching the ceasefire. There appeared to be no discernible reduction in the category of unlawful deprivation of life by the SPLM/SPLA for the years 2000-01.

Overall then, there is modest support for the thesis of this article in the Sudan case, but little support indeed in the case of Sri Lanka. In two of the four categories for Sudan (treatment of POWs and the incidence of torture) there was a discernible improvement in the treatment of POWs, and a noticeable decrease in the incidence of torture, particularly of POWs. In a third category, abductions of persons, there is a qualified measure of support for my thesis. Although there were reports of abductions by the SPLM/SPLA in the 2000-01 period, the number of abducted persons released by mid-2002 was significant, at least in the sense that the length of time abducted persons were being held was reduced. The fourth category (unlawful deprivation of life by the SPLM/SPLA) provided no support for this article’s thesis.

But there was very little support, if any, across the four categories in the Sri Lanka case for my basic contention. That is, for the time span in question, in none of the four categories did the LTTE exhibit behavior in a “positive” direction, i.e., there was not a decreased incidence of torture, no less frequent extra-judicial killings (deprivation of life), no fewer abductions of persons, nor was there an observed improved treatment of POWs. My thesis has been that the

mediators in the respective negotiations might have pointed to adherence to the human rights record of the insurgencies, and thereby suggested to the governing authorities in each instance that they were confronted by a belligerency, and as such the adversary of the central authorities had to be taken seriously, i.e., could not be “discounted.” What has been proposed here could conceivably have happened in the Sudan case, but is unlikely to have occurred in the case of Sri Lanka.

It is not possible to point to any clear indication that the intervenors in the IGAD negotiations for Sudan pointed to the information outlined and used that information to “move” the Sudanese government to end their discounting of the other side, and to take the negotiating process more seriously. It can only be suggested that this may be part of the answer to the question of why the negotiations to end the civil war in Sudan began to move closer to a settlement, after so many years of fruitless efforts.

Endnotes

1. Helena Cobban, *The Syrian-Israeli Peace Talks* (Washington, DC: US Institute of Peace Press, 1999), p. 67.
2. Ibid.
3. Ibid., p. 69.
4. John Agnew, “Ethnic Conflicts,” in Louis J. Kriesberg, Terrell A. Northrup, and Stuart J. Thorson, eds., *Intractable Conflicts and Their Transformation* (Syracuse, NY: Syracuse University Press, 1989).
5. Terrell Northrup, “The Dynamic of Identity in Personal and Social Conflict,” in Louis Kriegsborg, et. al., *Intractable Conflicts and Their Transformation*, p. 62.
6. James D. Fearon and David Laitin, “Ethnicity, Insurgency, and Civil War,” *American Political Science Review* 97, no. 1 (February, 2003), p. 79.
7. Norman J. Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (New York: MacMillan, 1939), pp. 7-23.
8. Jorge L. Esquirol, “Can International Law Help? An Analysis of the Columbian Peace Process,” *Connecticut Journal of International Law* 16, no. 23 (Fall 2000), p. 45. Esquirol cites Hersch Lauterpacht, *Recognition in International Law* (Cambridge, UK: Cambridge University Press, 1947) pp. 247-48; and Padelford, *International Law and Diplomacy in the Spanish Civil Strife*, pp. 7-23, to bolster his claim that belligerent forces are likely not responsible for the acts of insurgents not under the control of the belligerent’s forces.
9. Arturo Carrillo-Suarez, “Hors de Logique: Contemporary Issues in International Humanitarian Law As Applied to Internal Armed Conflict,” *American University International Law Review* 15, no. 1 (1992), pp. 90-97.
10. Esquirol, “Can International Law Help?” pp. 30-31.
11. Ibid., p. 46.
12. Richard Falk, “Janus Tormented: The International Law of Internal War,” in James Rosenau, ed., *International Aspects of Civil Strife* (Princeton, NJ: Princeton University Press, 1964), p. 205.
13. Monty G. Marshall and Ted Robert Gurr, *Peace and Conflict* (College Park, MD: Center for International Development and Conflict Management, 2003), p. 28.

14. See in general the United Nations, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, (hereinafter United Nations, *Darfur Report*) available at <<http://www.africafocus.org>>, last visited 25 April 2005.
15. *Ibid.*, pp. 41-51.
16. *Ibid.*, pp. 31-36.
17. Douglas H. Johnson, *The Root Causes of Sudan's Civil Wars* (Bloomington, IN: Indiana University Press, 2004), p. 221.
18. United Nations, *Darfur Report*, p. 34.
19. Johnson, *The Root Causes of Sudan's Civil Wars*, p. 82-83. The PDF has a legislative "mandate" through the 1989 Popular Defence Forces Act. This legislation defined the mission of the PDF as assisting the People's Armed Forces (PAF), the regular forces, help defend the nation, respond to crises, and perform tasks assigned to the PDF by the PAF Commander-in-Chief. United Nations, *Darfur Report*, p. 28.
20. United Nations, *Darfur Report*, p. 33.
21. Johnson, *Root Causes of Sudan's Civil Wars*, pp. 138-39.
22. *Ibid.*, p. 140. The term Zuruq is one employed by Johnson.
23. *Ibid.*, p. 140.
24. In addition to the Fur, other non-Arab populations that have come under attack by the Janjaweed, include the Masaalit, Zaghawa, Birgit, Aranga, Jebel, and the Tama. United Nations, *Darfur Report*, p. 60.
25. Marshall and Gurr, *Peace and Conflict*, p. 29.
26. Lootsteen, "The Concept of Belligerency in International Law," p. 134.
27. How this assertion is made can be seen on an LTTE web page, "A Struggle for Justice," at <<http://www.eelamweb.com/publication>>, last visited 4 March 2003.
28. Dietrich Schindler, "State of War, Belligerency, Armed Conflict," in Antonio Cassese, ed., *The New Humanitarian Law of Armed Conflict* (Naples: Editoriale Scientifica, 1979), p. 3.
29. See, for example, the following observation made by Albin regarding the Palestinian-Israeli Interim Agreements. "The fact that both Israel and the PLO needed the peace process and would suffer substantially from its collapse meant that neither side could merely dictate the terms at the expense of the other." Cecilia Albin, *Justice and Fairness in International Negotiations* (Cambridge, UK: Cambridge University Press, 2001), p. 178.
30. See Ted Robert Gurr and Barbara Harff, *Ethnic Conflict in World Politics* (Boulder, CO: Westview, 1994), pp. 6-7; Alexis Heraclides, *The Self-Determination of Minorities* (London: Frank Cass, 1991), pp. 8-18; Viva Ona Bartkus, *The Dynamics of Secession* (Cambridge, UK: Cambridge University Press, 1999), pp. 10-15.
31. Gurr and Harff, *Ethnic Conflict in World Politics*, p. 5; Walker Connor, "Beyond Reason: The Nature of the Ethnonational Bond," *Ethnic and Racial Studies* 16, no. 3 (1993), p. 377.
32. Anthony Smith, "The Origin of Nations," in John Hutchinson and Anthony D. Smith, eds., *Nationalism* (Oxford, UK: Oxford University Press, 1994), pp. 150-51.
33. Milton J. Esman, "Political and Psychological Factors in Ethnic Conflict," in Joseph Montville, ed., *Conflict and Peacekeeping in Multiethnic Societies* (Lexington, MA: Lexington Books), pp. 54-57.
34. Ted Robert Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflict* (Washington, DC: US Institute of Peace Press, 1993), p. 6.
35. Esman, "Political and Psychological Factors in Ethnic Conflict," p. 482.
36. Bartkus, *The Dynamics of Secession*, p. 144.

37. James Crawford, *The Creation of States in International Law* (Oxford, UK: Clarendon Press, 1979), p. 211.
38. In this article I will not be concerned with personal (sometimes referred to as cultural) autonomy. Personal autonomy applies to individuals who can choose to belong to a particular minority group, regardless of their place of residence. I am far more concerned with what is termed territorial autonomy which applies to all inhabitants of a region, even if they are not a member of the minority group. Territorial autonomy can apply to more spheres of activity (economic, social, political, and cultural) whereas personal autonomy generally applies only to cultural matters. See Ruth Lapidoth, *Autonomy* (Washington, DC: US Institute of Peace Press, 1997), pp. 37-40.
39. Hurst Hannum, *Autonomy, Sovereignty, and Self-determination* (Philadelphia, PA: University of Pennsylvania Press, 1990), p. 4.
40. Sonya Ross, "Sri Lankan Prime Minister Decries Abrupt Dismantling of His Government," *Associated Press Mainstream*, 4 November 2003, at <http://www.web.lexis-nexis.com/universe/doc...b&_md5=9fa4e55afffd9c6f2ace9a7b010d1aae>, last visited 24 January 2005.
41. See a statement by US Special Envoy John Danforth in a Report to the President. "The Outlook for Peace in the Sudan," *Report to the President of the United States on the Outlook for Peace in Sudan*, 26 April 2002, at <<http://www.whitehouse.gov/news/releases/2002/05/print/20020514-11.html>>, last visited 25 April 2005.
42. Norwegian Ministry of Foreign Affairs, "Important Breakthrough in the Sudan Negotiations," Press Release, 7 July 2002, at <<http://odin.dep.no/ud/engel/aktuelt/pressem/032091-070194/index-dok000-b-n-a.html>>, last visited 11 February 2005.
43. Ted Robert Gurr, *Peoples Versus States* (Washington, DC: US Institute of Peace Press, 2000), p. 17.
44. Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, CO: Westview, 1991), pp. 18-21. See also Bartkus, *The Dynamics of Secession*, pp. 10-18.
45. To a certain extent the status of a belligerency is something that is granted to an insurgent group by third parties. It is a recognition that hostilities between the insurgent community and the national state against which it is rebelling have risen to a level equivalent to that of international war between two sovereign states. "Belligerency exists when a portion of the state's territory is under the control of an insurgent community seeking to establish a separate state and the insurgents are in *de facto* control of a portion of the state's territory and population, have a political organization able to exert such control and maintain some degree of popular support, and conduct themselves according to the laws of war." Robert L. Bledsoe and Boleslaw A. Boczek, *The International Law Dictionary* (Oxford, UK: Clio Press, 1987), p. 46.
46. As much as I can determine, one way in which an insurgency may be judged to have acquired the status of "belligerent community" is the judgement as to whether the insurgency has managed to put in place a "government" with valid claims to legitimacy. That is, whether the population over which the insurgency claims some authority recognizes the authenticity of that claim.
47. Robert W. Gomulkiewicz, "International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency," *Washington Law Review* 63, no. 43 (January 1988), p. 47; Yair M. Lootsteen, "The Concept of Belligerency in International Law," *Military Law Review* 166, no. 109 (December 2000), p. 114-15.
48. Lootsteen, "The Concept of Belligerency in International Law," p. 115.
49. Kenneth D. Heath, "Could We Have Armed the Kosovo Liberation Army? The New Norms Governing Intervention in Civil War," *UCLA Journal of International and Foreign Affairs* 4 (Fall, Winter, 1999/2000), pp. 259-68; David Wippman, "Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict," *Columbia Human Rights Law Review* 27 (Spring 1996), pp. 455-59.

50. This organization which began its existence as the Intergovernmental Authority on Drought and Desertification (IGADD) in 1993 established a Standing Committee on Peace in Sudan as a means to offer itself as a mediator. This decision was a response to the failure of negotiations between the SPLA and the Khartoum government at Abuja in May 1993. The organization was renamed the Intergovernmental Authority on Development (IGAD) in 1996. In this article I will refer to the organization solely by the latter title.
51. Celia Dugger, "Sri Lanka and Rebels Sign Cease-Fire Agreement," *New York Times*, 22 February 2002, at <<http://www.nytimes.com/2002/02/22/international>>, last visited 10 February 2004. No less than the Norwegian foreign minister at the time, Mr. Jan Petersen, was the person who announced on 23 February 2002, that a truce between the LTTE and the Colombo government had been reached. This is a strong indication that the mediation team dispatched to Sri Lanka had a fairly high diplomatic rank. The full text of the Ceasefire Agreement can be found at <http://www.usip.org/library/pa/sri_lanka/pa_sri_lanka_02222002.html> last visited 16 February 2005.
52. Seth Mydans, "Sri Lankan Rebels Say Autonomy is Not Linked to Separate State," *New York Times*, 19 September 2002, at <<http://www.nytimes.com/2002...9LANK.html>>, last visited 20 March 2005; Norwegian support Group, *Declaration of Principles*, 1994 at <<http://www.norway.org.uk/Home/>>, last visited 7 November 2004.
53. Statement by Gamini Peiris, in "Sri Lanka Accepts Formula to End Civil War," *Ananova*, 9 December 2002, at <http://www.ananova.com/news/story/sm_724316.html>, last visited 23 October 2003.
54. Statement by Ratnasiri Wickramanayaka in "Sri Lanka Rules Out Peace Talks with Tamil Rebels," CNN ASIANOW, 5 October 2000 at <<http://edition.cnn.com/2000/ASIANOW/south/10/04/srilanka.civilwar.ap/>>, last visited 23 February 2005.
55. Both Abuja I and Abuja II were negotiations mediated by the government of Nigeria. They were conducted in 1992 and 1993 respectively.
56. The SPLM/SPLA has been split into different factions numerous times during the last two decades. At the time of the Abuja II talks, the majority faction headed by John Garang had taken up the label "mainstream" to distinguish itself from other SPLM factions
57. A statement by General Bashir in Ann Mosely Lesch, *The Sudan - Contested National Identities* (Bloomington, IN: Indiana University Press, 1998).
58. Vincent Mayanija, "Sudan's President, rebel leader vow to enhance peace efforts," *Agence France-Presse*, 27 July 2002, at <<http://www.web.lexis-nexis.com/universe>>, last visited 29 October 2003.
59. Gleen Kessler, "Sudan, Southern Rebels Sign Accord to End Decades of War," *Washington Post*, 10 January 2005, at <<http://www.washingtonpost.com/ao2hup-dyn/A60373-2005Jan9>>, last visited 2 April 2005.
60. Majorie M. Whiteman, *Digest of International Law* (Washington, DC: US Government Printing Office, 1973), pp. 930-46.
61. Hersh Lauterpacht, *Recognition in International Law* (London, UK: Cambridge University Press, 1947), p. 176.
62. Lootsteen, "The Concept of Belligerency in International Law," pp. 111-12.
63. Gomulkiewicz, "International Law Governing Aid to Opposition Groups in Civil War," p. 66.
64. Lassa Oppenheim, *International Law: A Treatise*, v. 2, in Hersh Lauterpacht, ed., *Disputes, War, and Neutrality* (Cambridge, UK: Cambridge University Press, 1952), pp. 249-50.
65. Rosalyn Higgins, "International Law and Civil Conflict," in Evan Luard, ed., *The International Regulation of Civil Wars* (New York, NY: New York University Press, 1972), pp. 169-71.
66. Heath, "Could We Have Armed the Kosovo Liberation Army?" p. 279, citing the UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation

- Among States in Accordance with the Charter of the United Nations, G. A. Res. 2625, UN GAOR, 25th Sess., UN Doc. A/RES/2625 (1970).
67. International Court of Justice. *Military and Paramilitary Activities* (Nicar. v. US), 1986 I.C.J. 14, 14 (June 27).
 68. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, reprinted the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2625 (1970), in 9 I.L.M. 1292 (1970).
 69. Louise Doswald-Beck, "The Legal Validity of Multilateral Intervention by Invitation of the Government," *British Yearbook of International Law* 56 (1985), p.188.
 70. This is as specified in the Geneva Conventions of 1949. See *Geneva Convention Relative to the Protection of Prisoners of War*, 12 August 1949, 75 *United Nations Treaty Series*, p. 135; *Geneva Convention Relative to the Protection of Civilian Prisoners in Time of War*, 12 August 1949, 75 *United Nations Treaty Series*, p. 287. See also, *Protocol II, Additional to the Geneva Convention of Aug. 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, *International Legal Materials*, 16, p. 1442.
 71. Lootsteen, "The Concept of Belligerency in International Law," pp. 124-25.
 72. Carrillo-Suarez, "Hors de Logique," p. 92. The full title of Protocol II is Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Protocol II, opened for signature 12 December 1977, UN Doc. A/32/144, Annexes I & II, 1977, reprinted in 16 I.L.M., 1442. Carrillo-Suarez cites Alejandro Valencia Villa, *La Humanizacion de la Guerra* (Bogota, Colombia: Elektra, 1991), pp. 77-80.
 73. Carrillo-Suarez, "Hors de Logique," p. 93.
 74. Gomulkiewicz, "International Law Governing Aid to Opposition Groups in Civil War," p. 61.
 75. See, for example, the proximity talks hosted by the UN Secretary-General regarding the situation on Cyprus. United Nations Information Service, "Secretary-General Says Proximity Talks On Cyprus Will Start 3 December," Press Release, UNIS/SG/2443 16 November 1999, at <<http://www.unis.unvienna.org/unis/pressrels/1999/sg2443.html>>, last visited 11 April 2005; see also the proximity talks hosted by Algerian President Abdelaziz Bouteflika in April 2000, in Algiers, regarding the conflict between Ethiopia and Eritrea. University of Pennsylvania African Studies Center, "UNDP-EUE: Recent Developments and Events in Ethiopia," 9 May 2000, at <http://www.sas.upenn.edu/African_Studies/Hornet/update0905.html>, last visited 14 April 2005.
 76. Africa Action, "Sudan: Peace Press Update," at <<http://www.africaaction.org/docs02/sudo2211.htm>>, last visited 14 April 2005; see also Associated Press Worldstream, "Top Norwegian Envoy and Rebel Leader Discuss Revival of Peace Talks," at <<http://web.lexis-nexis.com/universe>>, last visited 24 February 2004.
 77. Kenneth Kressel, *Labor Mediation: An Exploratory Survey* (Albany, NY: Association of Labor Mediation Agencies, 1992), p. 13.
 78. Jacob Bercovitch, *Social Conflicts and Third Parties: Strategies of Conflict Resolution* (Boulder, CO: Westview, 1984), p. 98.
 79. P. Hare, "Informal Mediation by Private Individuals," in Jacob Bercovitch and Jeffrey Z. Rubin, *Mediation in International Relations: Multiple Approaches to Conflict Management* (New York: St. Martin's, 1992), p. 58.
 80. Sadia Touval, *The Peace Brokers: Mediators in the Arab-Israeli Conflict, 1948-1979* (Princeton, NJ: Princeton University Press, 1982), pp. 9-12.
 81. Gomulkiewicz, "International Law Governing Aid to Opposition Groups in Civil War," p. 58.
 82. Particular legal scholars have held that an "unbounded" ascension to belligerency status by an insurgent group can only occur when the national authorities against whom the insurgents are fighting decide to publicly recognize the latter as a belligerency. Such a standard is adhered to

- by Oppenheim in L. Oppenheim, *International Law: A Treatise* Vol. 2. 7th ed. (Hersh Lauterpacht, 1952).
83. Hersh Lauterpacht, *Recognition in International Law* (London, UK: Cambridge University Press, 1948), p. 176.
84. Prize Cases, 67 US (2 Black) 635 (1862) (emphasis added).
85. Bryan Pfaffenberger, "Sri Lanka in 1986: A Nation at the Crossroads," *Asian Survey* 4, no. 2 (February 1987), p. 157.
86. Dagmar Hellman-Rajanayagam, "The Concept of a 'Tamil Homeland' in Sri Lanka - Its Meaning and Development," *South Asia* 13, no. 2 (1990), p. 80.
87. Pfaffenberger, "Sri Lanka in 1986," p. 156.
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