

War Termination in Sri Lanka

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Abstract

This article has a central aim of explaining the catastrophic loss of civilian life in the last five months of the civil war in Sri Lanka. The article proposes that both the government of Sri Lanka (GoSL) and the LTTE are culpable for civilian deaths; the LTTE in an effort to stave off defeat so it might be able to re-constitute itself at a later time, and the GoSL in a determination not to allow the LTTE as an organization to survive the conflict. The article also argues that a preliminary explanation for the origins of the Sri Lankan civil war can be found in the GoSL program of transferring members of the Sinhalese population into the Northern and Eastern provinces of the country, regions held by the Tamil population to be their homeland territory.

Key words: Population; Tamil; Sinhalese insurgency; Civilian; Territory

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I. COMMUNAL VIOLENCE

Most observers have placed the start of the civil war in Sri Lanka as the summer of 1983, after a Sinhalese pogrom against the Tamil population occurred, mostly in the Colombo region. To some degree the anti-Tamil riots were seen as a response to the deaths of thirteen Sinhalese soldiers killed by LTTE ambush. The LTTE did exist prior to this event, having formed by at least 1976 under the leadership of Velupillai Prabhakaran (Ridenour,

2009). But the organization gained innumerable recruits as a consequence of the 1983 rioting, which destroyed hundreds of Tamil homes and businesses (ICG, 2010, p.29). Although estimates vary, the number of Tamils killed may have been as high as 4,000. Although there were periods of relative peace or low-level fighting between the government of Sri Lanka (GoSL) and the LTTE, the civil war did not conclude until May, 2009, twenty-six years later.

My argument offered as an explanation for the origins of the civil war in Sri Lanka is based on the expressed desire of a minority population to preserve their culture and distinctiveness as a people, in the face of efforts by the state to establish conditions degrading or suppressing that distinctiveness. Why a specific population retains this desire has been put in the following terms.

The people who inhabit a certain territory form a political community. Through custom and practice as well as by explicit political decision they create laws, establish individual or collective property rights, engage in public works, [and] shape the physical appearance of the territory. [...] All of these activities give them an attachment to the land that cannot be matched by any rival claimants. This in turn justifies their claim to exercise continuing political authority over that territory (emphasis in original) (Miller, 1998, p.68).

It is only through gaining political authority, i.e., achieving self-government, which has often been labeled “self-determination,” that the minority population has some assurance their nation will endure. Although it is an oversimplification, the initiation of a settler program inserted into the territory contested by the state and the minority population, could be seen as just cause for the commencement of an insurgency; that is, to negate an effort by the state to extinguish prior minority claims to the contested territory, and thus “suppress” the minority culture. The underlying theoretical question is whether self-determination can be separated from territory. In was the inability of the Tamil and Sinhalese peoples to resolve that question that brought about the civil war.

One means by which the state can attempt to accomplish this suppression is through the establishment of a “settler” program through which members of the majority population (nationally) are inserted into the territory claimed by the minority population as their “homeland.”

Although national governments have sometimes claimed the motivation for a settler program was to promote the economic development of a particular region, the authenticity of such claims is often contested by some portion of the region’s population. Insurgent groups have challenged the legitimacy of such programs on the grounds that the non-minority population settlers are generally granted “entitlements” to land not offered to minority population members, as was clearly the case in Sri Lanka (ICG, 2008b, p.4; Tigno, 2006, p.28). Even more fundamentally, however, is the challenge made to settler programs based on the unwillingness of the insurgents to recognize the right of the national government to institute a development program in the contested region of the state at all (Oberst, 1996, p.33-35).

Violence by Tamil insurgents was targeted explicitly toward Sinhalese settlers residing in a proclaimed Tamil homeland at least as early as the mid-1980s (Pfaffenberger, 1987, p.159). From the insurgent point of view such a campaign is meant to end or even reverse the settler program, thus strengthening the ratio of minority versus (national) majority population in the “homeland” region, turning the ratio more in the former’s favor.

The belief was that a turn in population ratio in favor of a minority population would buttress the insurgent argument for self-determination, due to the resulting increased homogeneity of the homeland resident population.

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 (Hellman-Rajanayagam, 1990, p.80) (emphasis added).

The following comment has been made regarding the movement of Sinhalese settlers into the Northeast part of the country:

When inter-ethnic violence increased in the 1980s, these settlement schemes became a theatre of inter-ethnic contestation and violence and became interwoven with military and political strategies of the major conflict parties. After the military contestation between the Sri Lankan army and the LTTE aggravated, some segments in the Sinhalese regime and the military used new ‘strategic’ settlement schemes to weaken the basis of Tamil claims to a Northeast homeland. LTTE attacks on Sinhalese settlers and army retaliation against Tamil villagers

were common practice during these early periods of heightened confrontation (Korf and Fünfgeld, 2006).

Demography in the Northeast

The land colonization policy of successive Sri Lankan governments has caused much resentment. It has been Sinhalese policy to establish ‘colonies’ of Sinhalese settlers (mostly farmers) in the Eastern province especially, an area traditionally viewed by Tamil nationalists as “theirs” (Lewer and William, 2002, p.3).

The Eastern province of Sri Lanka constitutes a part of what is called the “Dry Zone”, an area requiring extensive irrigation systems in order for agriculture to flourish. At independence the Sinhalese presence in the Dry Zone and in the Eastern province was quite small relative to the rest of the country, although there is belief among some Sinhalese that in past generations there was a much greater presence (Moore, 1985, p.45).

Sinhalese political leaders have invoked this belief and utilized it as a basis (in part) for the settler program of the post-independence period. “The colonization of the Dry Zone by landless peasant cultivators from the Wet Zone remained one of the highest policy priorities for all governments until 1970” (Peebles, 1990, p.37). LTTE apprehension regarding an alleged Sri Lankan government (GoSL) plan to “Sinhalese” the Eastern province has been persistent, and may have some justification.

Located at the intersection of the eastern and northern provinces, Tricomalee district has been the site of deliberate attempts by Sinhalese nationalists, with support from the government, to break the contiguity of a Tamil-speaking north east by settling additional Sinhalese. Due in large part to irrigation settlements, the ethnic balance shifted considerably over the last century, with Sinhalese increasing from 4 per cent of the population in 1911 to a high of 33 per cent in 1981 and to their current figure of roughly 24 per cent, (ICG, 2008b, p.23).

National governments have seized upon settler programs as a means of maintaining the territorial integrity of the state by choosing to define the state as a “*nation-state*”, utilizing the original definition of the latter, as a political entity enclosing a territory wherein resides a relatively homogenous (whether based on religious, ethnic, linguistic, or other grounds) population (Kelman, 1997, p.334). In most modern states of course, this condition is decidedly not the case, with most states anything but homogenous. By maintaining fidelity to this ideal, a national government can then go further and say that the nation-state’s territory must be defended by seeing to it that the territory encompassed by the state’s defined boundaries is populated, or re-populated, as it were, with members of the national majority population.

In Sri Lanka, the LTTE made it clear that Sinhalese enclaves in the Eastern province would not be made welcome. It is not clear how much, if any, of a Sinhalese presence would have been allowed in the LTTE proposed Interim Self-Governing Authority (ISGA) that was discussed in the 2004/2005 negotiations between the LTTE

and the Sri Lankan government (GoSL, 2005). Ultimately the GoSL determined there would be no recognition of an ISGA, ended the ceasefire and negotiations, and sought a military solution to the conflict in Sri Lanka.

This step was taken despite the urging of mediators to continue negotiations. Articulating their “strong concerns”—Japan, the U.S., the EU and Norway, the peace process co-chairs—repeated their conviction that “there is no military solution to the conflict in Sri Lanka and reiterate[d] their support for a negotiated settlement” (ICG, 2008a, p.3). A military “solution” to the conflict has in fact been attained in Sri Lanka in the sense that the LTTE has been defeated in the field. But the underlying causes of the conflict may not have been eradicated. “To date there is no decisive evidence of a government policy to bring in large numbers of new Sinhalese, just allegations and many worrying signs. Government officials have made no serious effort to respond to allegations of plans to Sinhalese the east, other than occasional pro forma denials” (ICG, 2008b, p.27).

The Concept of Self-Government

The LTTE offer of the ISGA received only a very guarded reception by the GoSL. Because the LTTE insisted that restarting negotiations in 2005 had to take up the question of an ISGA as the sole issue for discussion, the possibility of an ISGA actually coming to fruition never rose in a serious manner, in that the government refused to initiate talks solely on that basis (Chandrasekharan, 2004). The government was prepared to discuss the *concept* of an ISGA only in the context of a finding a ‘permanent settlement’ to the conflict .

[T]he government has agreed to the concept of setting up an Interim Authority within the context of negotiating a permanent settlement to the ethnic conflict, on the basis that an Interim Authority will be useful in a transitional period from a situation of conflict to one of democracy. Agreeing to negotiate an Interim Authority in such a context is very different from opening negotiation solely on the basis of the LTTE demand of the Interim Self-Governing Authority , which prevents the re-opening of direct negotiations (GoSL, 2005).

In the LTTE proposal for the ISGA, the only mention of the Sinhalese community in the Northern and Eastern provinces was under the heading “Composition of the ISGA” where it was noted that “the Muslim and Sinhala communities in the north-east shall have representation in the ISGA” (Chandrasekharan, 2004). The brevity of this notation suggests that the LTTE was only willing to tolerate the presence of Sinhalese settlers arriving prior to the onset of the insurgency, not those who chose to migrate to the Northern and the Eastern provinces after the LTTE had made it known they were not welcome.

In September, 2003, the GoSL tendered an offer for an “interim administration in the northeast” (which appeared to suggest the topic of an island wide federal structure was open for discussion) to allow negotiations for an

agreement on the final status for the Northern and Eastern provinces to go forward (Kronstadt & Vaughn, 2009, p.23). This offer was in part a response to a September, 2002, LTTE announcement that it would settle for *internal* self-determination in the areas of ‘historical habituation of the Tamil-speaking peoples’ (Waldman, 2002, p.2). But the internal self-determination concept was incorporated in the ISGA put forward in October, 2003, and thereby received minimal consideration.

After a Cease Fire Agreement (CFA) negotiated in Oslo was reached in February, 2002, a break in formal negotiations occurred from April, 2003 through February, 2006. But the signing of the CFA did provide a sufficient “interlude” such that LTTE political head and military commander Velupillai Prabhakaran and Anton Balasingham, the LTTE’s chief negotiator, could hold a press conference where they articulated the LTTE’s interpretation of some key terms. Prabhakaran stressed three fundamental concepts in his remarks: a Tamil homeland, Tamil nationality and a Tamil right to self-determination. “Once these fundamentals are accepted or a political solution is put forward by Sri Lanka recognizing these three fundamentals and if our people are satisfied with the framework of a solution that recognizes these core issues, then we will consider giving up the demand for Eelam” (Ganguly, 2004, p.908). Balasingham then elaborated on what the term self-determination meant for the LTTE leadership.

We mean the right of people to decide their own political destiny—it can also apply to autonomy and self-governance. If autonomy and self-governance is given to our people we can say that internal self-determination is to some extent met. But if the Sri Lankan government rejects our demand for autonomy and self-governance and continues with repression, then as a last resort we will opt for secession—that also comes under self-determination (Ganguly, 2004, p.908).

In early 2006, the newly elected (November, 2005) government, with Mahinda Rajapakse as President, began a “two-track” peace process, which included a more aggressive military strategy, as well as a narrowly conceived negotiating agenda; namely, how to more effectively implement the CFA (ICG, 2006, p.10). The February, 2006, discussions produced no new initiatives, and the last session, conducted with the urging of Norwegian mediators in October, 2006, in Geneva, failed in the face of the deteriorating ceasefire in the field (Ubayasiri, 2006, p.5).

Clearly, the GoSL’s “interim administration” proposal did not contain an acceptance of “interim self-rule” (effectively what the ISGA mandated) for the North and East. An April, 2007, Rajapakse government devolution proposal for the North and East did not produce a positive LTTE response. “Overall, the Rajapakse proposals encourage centralization (and continuance of unitary state structure) under the guise of a dubious devolutionary system,” (Devotta, 2007, p.51). The lack of congruence

in proposals helped produce the October, 2006, end to the formal peace process (Ubayasiri, 2006, p.1).

A Military Solution

The pivotal event in the eventual end to the peace process in Sri Lanka was the decision by the LTTE to close the Mavil Aru sluice gates in the Trincomalee district of the Eastern province, and the military response of the GoSL to this LTTE action of 22 July, 2006 (ICG, 2006, p.11; LankaNewspapers, 2006, p.1). Although there was some indication the LTTE took this action (producing a humanitarian emergency for farmers, *predominately Sinhalese*, in the region) because of a shortage of irrigation water available for Tamil farmers residing in the area, there is a lack of clarity about the LTTE motivation (Kronstadt & Vaughn, 2009, p.25; ICG, 2006, p.11). The SLMM noted the government response was severe: "Following the closure of the Mavil Aru sluice gates on 22 July, 2006, the government embarked on a major military offensive operation between the Parties in the Trincomalee area *severely endangering the civilian population*" (LankaNewspapers, 2006, p.1) (emphasis added).

Extensive government military operations were initiated, and continued past the point when the gates were re-opened, which in August resulted in a forceful transfer of territory from the LTTE to government forces on Sampoor peninsula. Such a transfer of territory by force was a violation of the CFA (LankaNewspapers, 2006, p.2). Still, the government pressed ahead with its offensive throughout 2007, to the point that it gained full control of the Eastern province by July, 2007 (UN Secretary General, 2011, p.12).

Despite purported government intimations it was open to resuming negotiations with the LTTE, a message that was transmitted to U.S. Secretary of State Condoleezza Rice (Kronstadt & Vaughn, 2009, p.28), the SLA began a major push into the Northern province in the latter half of 2007. This effort met with sufficient success such that the government unilaterally abrogated the CFA, and the Status of Mission Agreement (SOMA) establishing the Sri Lanka Monitoring Mission SLMM, in January, 2008, a step which ended the activities of the SLMM (ICG, 2010, p.3). By the summer, 2008, the SLA had advanced to a close proximity with an international humanitarian 'safe area' known as the "Kilinochchi box", within which the town of Kilinochchi served as the LTTE administrative headquarters.

In January, 2009, Kilinochchi was captured by the SLA, and the latter enclosed the remaining LTTE leadership, LTTE cadre, and a large number of civilians in an area of a few square kilometers along the shore of the Bay of Bengal (ICG, 2010, p.5). As the fighting continued, three progressively smaller "No Fire Zones"(NFZs) were established by the SLA, ostensibly to provide for the safety and well-being of the trapped civilians, although

there is evidence a significant number perished (UN Secretary-General, 2011, p.23). The LTTE reportedly forcibly detained many civilians from leaving the NFZ (ICG, 2010, p.5). The SLA finally converged on the remaining LTTE leadership in May, 2009, and announced the death of LTTE leader Prabhakaran, and the end of the war on 19 May, 2009.

In his 2005 inaugural address President Rajapaksa noted that his approach to the problem of the North and East would be to reach a national consensus wherein the sovereignty, territorial integrity, and the "*unitary structure of the State*, would be preserved" (Rajapaksa inaugural, 2005, p.32) (emphasis added). There is little evidence that the Rajapaksa government ever deviated from a belief in a unitary system for Sri Lanka; there is ample evidence that the LTTE never wavered from its insistence on a devolution of powers away from the center to the North and East, in order to gain self-determination. Despite years of effort, the peace process in Sri Lanka was unable to make Tamil self-determination compatible with a unitary national government.

II. WAR END

The capture of the LTTE administrative capital Kilinochchi, in January, 2009, demarcated the beginning of the war's final chapter. The period from January to May, 2009, reflected the strong military advantage gained by the SLA over the LTTE by that time, and this advantage culminated in the events which took place in Mullivaikal, a predominately Tamil village in the Vanni region of the Northern province. In the view put forward here, this advantage came about due to three factors: The first issue was the defection of Vinayagamoorthy Muralitharan ("Colonel Karuna") ultimately to the GoSL and then into an alliance with the SLA. Karuna is a more than capable military leader, and had held high rank within the LTTE. He was able to draw support from the Tamil population, and provide intelligence and additional forces to the SLA (ICG, 2006, p.9). Secondly, the SLA had become far more proficient in battlefield tactics, and had acquired more modern weaponry, particularly air power. The latter became particularly effective as the territory still under LTTE control began to shrink rapidly in the last five months of the war (UN Secretary General, 2011, p.15).

Thirdly, and critically, as the No Fire Zone (NFZ) in the conflict area became successively smaller in the last months, the SLA made an apparent crucial determination: if the loss of civilian life (especially Tamil civilians) had to occur in order to vanquish the LTTE completely, then so be it. That is to say, the rules in warfare that hostilities must be conducted "with distinction" or in a discriminatory manner (all efforts must be made not to harm non-combatants), and in accordance with proportionality (attacks causing "incidental" loss of life

is prohibited), were abandoned (Geneva Conventions, 1949, Art. 3). Crucially, this means that in addition to the prohibition against targeting civilians deliberately, hostilities must not be conducted in a “reckless” manner, which is to say in a manner which would place non-combatants “in harm’s way”. There are reports from international aid agencies that both prohibitions were violated (Amnesty International, 2009a, p.1).

The end of the war came at Mullivaykkal, a small town in the Vanni region of the Northern province. There was a series of militarily strategic events (all SLA victories) which occurred leading up to the fall of Mullivaykkal.

Then on 9 January 2009, the 57th and 58th Divisions of the SLA captured Kilinochchi. Both the President and the international community urged the LTTE to lay down its arms. On 9 January, the SLA 53rd and 55th Divisions captured Elephant Pass and freed the A9, bringing the entire highway under Government control for the first time in 23 years. Later that month, on 25 January, the 59th Division captured Mullaittivu, another important base. These events marked a new stage in the ...armed conflict... in which the ultimate defeat of the LTTE was imminent (U.N. Secretary General, 2011, p.21).

The GoSL declared the first NFZ on 20 January, 2009, the second on 12 February, 2009, and the third on 8 May, 2009. The stated intent of NFZs was to provide protection for civilians fleeing the fighting, and civilians were instructed by the GoSL to seek shelter in the zones. But there are well documented accounts indicating that the GoSL, despite public pronouncements to the contrary (GoSL, 2009), deliberately and repeatedly targeted the NFZs with heavy artillery, including Multiple Barrel Rocket Launchers (MBRLS) and air strikes from aircraft, and the use of Unmanned Aerial Vehicles (UAVs) for reconnaissance (ICG, 2010, p.13-14). As unguided missile launchers, MBRLs are unable to discriminate effectively between combatants and non-combatants. It should be noted that the LTTE did not believe themselves to be bound by the NFZ boundaries.

The SLA use of UAVs was apparently militarily very effective. “Throughout the Humanitarian Operations we gave this facility [UAVs] to the Ground Commanders. Therefore, when they were planning and executing the operations it was very helpful for the ground Commanders to see in front; to see where the enemy concentrations were, to see and locate where the fire was coming from, to neutralize and act accordingly,” (Amarrasinghe & Kahandawaarachchi, 2009). But this disclosure, by Defense Secretary Gothabaya Rajapaksa, strengthens the argument that the SLA had full knowledge of non-military targets, i.e., hospitals, as well as LTTE troop concentrations, prior to shelling and aerial bombardment in the conflict zone.

By April, 2009, the SLA approached Puthukkudiyiruppu, a community which the LTTE considered a “strategic stronghold,” with a major hospital, and the LTTE fought vigorously to hold the site against the SLA advance (U.N.

Secretary-General, 2011, p.26). Puthukkudiyiruppu was taken by the SLA on 5 April, 2009, and in the fighting to take the area, the hospital located there (where wounded LTTE cadres had been taken) was shelled multiple times over a period of weeks, apparently not inadvertently (ICRC, 2009, No. 09/29; ICG, 2010, p.16). The GoSL issued press releases on 25 February and 27 April (GoSL, 2009, Archives, p.27, February, and 27 April, 2009) indicating that the use of heavy artillery and combat aircraft had been suspended in the second and third NFZs, but there are credible reports this did not in fact occur (U.N. Secretary General, 2011, p.29).

Despite their dire circumstances, the LTTE continued to fight, to the extent their dwindling military resources and supplies allowed. There are credible reports the LTTE used Tamil civilians as “buffers” or “shields” against SLA attacks, although the issue of “shielding” in the context of the civil war in Sri Lanka is not entirely straight forward.

The LTTE wanted to keep the civilian population in the Vanni as long as possible...because they knew the security forces would continue to advance without regard to civilian casualties. Their calculation, ultimately an incorrect one, was that escalating civilian casualties would eventually get the attention of the international community to broker a ceasefire so the LTTE could regroup or perhaps enter negotiations (ICG, 2010, p.25).

It should be noted what is being said here. The LTTE was not putting Tamil individuals in the line of fire because of an expectation this would deter enemy fire (shielding); the LTTE put civilians in the line of fire *expecting* the enemy to fire upon them, causing casualties, which would bring international condemnation, and calls for a truce. This suggests the LTTE had placed a greater value on the survival of the organization, rather than on the lives of persons the organization purported to represent and defend.

On 19 April, 2009, the second NFZ was penetrated by the SLA as far as the coastal area, and this action severed the NFZ into two sections, with the Northern half held by the SLA (U.N. Secretary General, 2011, p.33). The situation for the LTTE became increasingly desperate, as the organization, in addition to the already severe imbalance in weaponry, was by this time increasingly outmanned. The latter condition led to an accelerated program of child recruitment by the LTTE (U.S. Dept. of State, 2009, p.48). In addition to the raised level of child recruitment, the LTTE by this time had become more draconian in its determination to keep the Tamil population in the NFZ from escaping the SLA attacks. Individuals and groups caught attempting to escape were often shot and killed (U.N. Secretary General, 2011, p.34; U.S. Dept. of State, 2009, p.43).

At the end of April, 2009, international relief agencies began to describe the situation for civilians in the Vanni region, and in the second NFZ in particular, as catastrophic. In February the International Committee of the Red Cross (ICRC) had begun to evacuate the sick

and wounded among the trapped civilians by boat, and this effort continued into May (ICRC, 2009, No. 09/03). Also at the end of April, the GoSL Presidential Secretariat conceded the use of heavy caliber artillery and combat aircraft in the NFZ; prior to this admission the GoSL had denied the use of such weapons in the NFZ (Human Rights Watch, 2009a, News, 27 April; U.S. Dept. of State, 2009, p.39).

As the war neared its end in May, the actions of the LTTE became increasingly desperate. LTTE cadre were sent on numerous suicide mission, civilians attempting to flee were shot and killed with high frequency, and child recruitment to replenish the ranks of the LTTE cadre was intensified (U.N. Secretary-General, 2011, p.34-36; U.S. Dept. of State, 2009, p.43). The SLA reportedly raised the intensity of its shelling directed at the third and final NFZ, an extremely constricted area, where large numbers of civilians had congregated (ICG, 2010, p.5; ICRC, 2009, No. 09/03; U.S. Dept. of State, 2009, p.44). There were reports the LTTE shelled from positions it had taken in close proximity to civilian camps within the NFZ, which may have drawn targeted SLA shelling in response (U.S. Dept. of State, 2009, p.43).

ICRC rescue of civilians by boat ended on 9 May, 2009. There may have been 100,000 civilians confined to a three square kilometer area of the final NFZ by this time (U.N. Secretary-General, 2011, p.35). In spite of the close proximity of civilians to LTTE positions, the shelling of the NFZ by the SLA intensified in the second week of May. On 15 May, 2009, the 58th and 59th divisions of the SLA (the 58th had been moving roughly southward and the 59th northward along the coast) linked on the coastline, leaving the LTTE leadership and the organization's most hardened cadres enclosed in a small area of three square kilometers around Mullivaikkal. The majority of the LTTE top leadership was killed, including Prabhakaran, in an apparent last ditch attempt to break through SLA lines, on 18 May, 2009 (U.N. Secretary-General, 2011, p.36). Summary evaluations for the last days of the civil war in Sri Lanka comment that the final days brought "unimaginable humanitarian catastrophe," (ICRC, 2009, No. 09/103), and "[b]y any standard, it was one of the worst and most concentrated acts of killing in the post-World War II era" (Sivanendran, 2011, p.2).

Acts Attributed to the SLA

Certain actions alleged to have been taken by the SLA during the last five months of the war (January, 2009 to May, 2009) led directly to the deaths of tens of thousands of Tamil civilians. By "direct" I mean to convey the thought that after the SLA took the steps presented below, no other actor took any *subsequent* action which additionally facilitated the deaths of the civilians targeted by the SLA. As articulated by the Secretary-General, and U.S. State Dept. reports, each of which drew on information provided by credible sources, these actions

were the following:

- 1) the SLA killed of civilians through widespread shelling in the Vanni, and particularly in the successive NFZs, using heavy artillery, and the use of combat aircraft.

- 2) the SLA deliberately shelled all hospitals in the Vanni, although there is credible evidence the SLA was in possession of the field coordinates for these hospitals.

- 3) the SLA willfully denied provision of food and medical supplies to the sick and wounded in the conflict zone.

Acts Attributed to the LTTE

Drawn from the U.N. Secretary-General and U.S. State Dept. reports, these acts were the following:

- 1) the LTTE use of Tamil civilians to obstruct enemy fire in order to increase the ability of LTTE cadre, and particularly the top leadership, to survive.

- 2) the LTTE shot and killed Tamil civilians attempting to flee the combat zone.

- 3) the LTTE killed civilians through the use of suicide attacks.

As in the case with the actions perpetrated by the SLA above, the actions taken by the LTTE led directly to the deaths of civilians. In the last months of the war the LTTE also engaged heavily in the practice of recruiting child soldiers, a practice which likely resulted in the deaths of hundreds of children. These children ultimately died in combat against the SLA. Though the SLA killed the children placed in combat, ultimate responsibility for their death resides with the LTTE.

These acts constituted either war crimes or crimes against humanity, contingent on the interpretation of the definition of each of these terms provided in relevant international legal documents, i.e., the Charter of the Nuremberg Tribunal and Judgment of the Tribunal (1950), the Rome Statute of the International Criminal Court (1998), and Common Article 3 of the Geneva Conventions of 1949 (ICRC, 2011, IHL; ICRC, Rome statute, 1998; ICRC, Geneva Conventions, 1949). The U.S. State Dept. Report on the Sri Lanka conflict, for example, notes: "a determination about whether particular conduct would amount to a crime against humanity requires an assessment of the purpose and intent of government sponsored or sanctioned actions," (2009, p.10). For the purposes of this article, however, it is enough to note that the actions of the GoSL and SLA contributed greatly to, if they did not directly bring about, the deaths of many thousands of Tamil civilians. But a similar charge must be brought against the LTTE; the evidence of LTTE brutality and callousness against the Tamil people is indisputable (Amnesty International, 5 Feb., 2009b, p.4).

Reliable figures estimating the total number of deaths in Sri Lanka during the last five months of the war are difficult to come by. The inherent difficulty is obvious: many individuals that died violently in the war have not

been found. The U.N. Secretary – General’s Report states “even today no figure has been accurately determined,” (2011, p.1). One of the best efforts to estimate the number of deaths in the January, 2009-May, 2009, period has been produced by the ICG.

Crisis Group has credible evidence that there were 330,000 displaced civilians in the second NFZ and adjacent areas as of mid-to-late-February. At that same time, according to the government, there were between 33,000 and 38,000 internally displaced persons (IDPs) from the Vanni already in the camps in government held areas. That brings the total of known civilians to about 365,000. By the end of the fighting, the highest number of survivors registered in government-run camps was 290,000 as of 26 May, 2009... Accepting these uncertainties, there is a plausible case that as many as 75,000 persons remain unaccounted for. Even if the figure of 330,000 is reduced by as many as 30,000, or some adjustment to the difference between 330,00 and 290,000 is made to account for civilians who may have been killed lawfully because they were directly participating in hostilities at the time they were targeted-a number Crisis Group believes is very low-or to account for some number that may have avoided government camps, it is still difficult to arrive at a figure for the killed or missing that is lower than 30,000 (ICG, 2010, p.6)

It should be stressed that “[t]he majority of civilian casualties in the final phases of the war were caused by Government shelling,” (U.N. Secretary-General, 2011, p.49). International court or tribunal decisions have stated that the failure to recognize the likelihood of civilian deaths due to indiscriminate shelling may be characterized as murder. A Judgment from an International Criminal Tribunal for Yugoslavia (ICTY) case makes this clear, as cited by the U.N. Secretary-General’s Report (ICTY Trial, 2005, Case No. IT-01-42-T). These estimated figures, along with the allegations attributing the civilian deaths to the SLA and the LTTE, are extremely disturbing. The balance of my effort in this article is to examine the possible motivation of the respective perpetrators. As much as possible, it is important to grasp how and why the two organizations brought these events about.

Motivation

There is no attempt in this article to establish individual culpability for the actions outlined above, and alleged to have been perpetrated by the SLA and the LTTE, a number of which may rise to the level of war crimes, or crimes against humanity, as provided by Common Article 3 of the 1949 Geneva Conventions, and Articles 7 and 8 of the Rome Statute of the International Criminal Court (Geneva Conventions, 1949, Art. 3; Rome Statute, 1997, Arts. 7, 8). But the allegations enumerated in the U.N. Secretary-General’s Report are accepted as credible and deserving of further investigation.

In terms of bringing charges in an international court or tribunal, e.g., the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), it remains to be seen if the U.N. Security Council which established the both the

ICTY and the ICTR, after a thorough examination of the evidence, will take the step of establishing a similar tribunal for Sri Lanka (ICTY, 1993; ICTR, 1994). Sri Lanka is not a party to the Rome Statute of the ICC. ICC jurisdiction for Sri Lanka will likely not occur because the exercise of [ICC] jurisdiction is limited to cases in which the conduct in question occurred on the territory of, or the person accused is a national of, either a state party, or “*a state not a party ...that accept[s] the exercise of jurisdiction by the Court with respect to the crime in question,*” (Rome Statute, 1998, arts. 12-14) (emphasis added). But my objective at this juncture is to set forth certain propositions regarding the events in Sri Lanka, in an effort to explain why those events occurred.

What follows is a presentation of propositions regarding the motivations of the SLA and the LTTE in taking actions which led directly to the death of civilians. There is no claim made here that these propositions adequately explain SLA and LTTE actions during the last five months of the war, only that these propositions could serve as pathways to necessary and sufficient explanations.

LTTE Actions Causing Civilian Deaths

1) Firing on civilians to prevent their leaving the conflict zone would keep others from attempting to flee, and thus demonstrate to the outside world the LTTE retained substantial support from the Tamil population in the Northern province, even until the final battle.

Support:

Particularly by the time the second NFZ was declared, the LTTE was increasingly in need of demonstrating solidarity amongst the population for the cause of Eelam. One way to show this was the case was by maintaining a minimal flow of new recruits from the population. Thus, the LTTE would on occasion fire upon Tamil civilians indiscriminately (killing women and children) to stem the outward general flow. (Amnesty International, 2009c, p.4; U.N. Secretary-General, 2011, p.34). This practice would provide at least a minimum recruitment “pool” from which the LTTE could draw upon.

2) Using civilians as a “buffer” would demonstrate to the outside world that the SLA was deliberately raising civilian casualty numbers, was cognizant of the result, and was unmoved by this truth. The unflinching continued offensive by the SLA could in turn prompt international intervention. Such an intervention, if brought about, might then create a “space” for another round of negotiations.

Support:

There are credible reports the LTTE did forcibly prevent Tamil civilians (even if injured) from leaving the conflict zone seeking safer areas and medical treatment. These reports indicate the LTTE did use civilians as a buffer against SLA firing (Amnesty International, 2009a; Amnesty International 2009d). It seems apparent the LTTE knew the SLA would use indiscriminate

weapons against the former's cadres, which would in turn injure and kill the civilians the LTTE was holding in close proximity. There was an outcry by international humanitarian organizations, but the SLA did not relent. In point of fact, the GoSL Ministry of Defense issued the following statement in February, 2009.

While the Security forces accept all responsibility to ensure the safety and protection of civilians in the Safety Zones, they are unable to give such an assurance to those who remain outside these zones. Therefore, the government, with full responsibility, urges all civilians to come to the safety Zones; and also states that as civilians who do not heed this call will be among LTTE cadres, the Security forces will not be able to accept responsibility for their safety (Human Rights Watch, 2009b).

SLA Actions Causing Civilian Deaths

1) The SLA was intent on gaining retribution against the LTTE for costly prior defeats. These defeats had been delivered on both a physical and on a reputational basis. Thus, the retribution was generated from two levels: one, to avenge prior physical damage to the SLA, in personnel and in military armaments; second, to redress past reputational damage brought upon the SLA, due to the latter's inability to defeat a twenty-seven year insurgency.

Support:

On at least two distinct occasions in the conflict, the SLA gained a clear military advantage over the LTTE, and seemingly was on the verge of defeating the insurgents. The first came in 1987, when the SLA mounted Operation Vadamarachchi (Operation Liberation) in an attempt to regain control of the Jaffna peninsula in the Northern Province (Sri Lankan Guardian, 2003). This offensive amounted to full blown conventional warfare, and there were reports that Prahabakaran was nearly captured. Partly due to Indian intervention, which ultimately resulted in the Indo-Sri Lankan Peace Accord, and the dispatching of the Indian Peace Keeping force (IPKF) to the island, the LTTE and the leadership survived. Because the LTTE cadres refused to give up their arms, the IPKF actually took action against the LTTE in the late 1980s, but eventually left the country in March, 1990. Even though the SLA made deep inroads into the Jaffna region, the LTTE was able to re-constitute itself. Current GoSL defense Secretary Gotabaya Rajapaksa attributes the survival of the LTTE in 1987-8 to the Indian intervention (Sri Lankan Foundation, 2011).

The second key episode occurred as part of the GoSL's "war for peace" campaign in 1994-5. In Operation Riviresa (Operation Sunrays) the objective was once again the Jaffna peninsula. After months of fighting the SLA succeeded in capturing the former Dutch fort in Jaffna, thereby regaining control of the Jaffna region for the first time in close to a decade. The GoSL held a solemn ceremony to mark the occasion (CNN World News, 1995). However, in mid-1996 the LTTE regrouped and defeated the SLA in a battle for Mullaitivu along the eastern coast as part of Operation Unceasing Waves I. In

1998, after launching Operation Unceasing waves II, the LTTE captured Kilinochchi, followed by the taking of Elephant Pass (separating the Jaffna peninsula from the Vanni region) in April, 2000, during Operation Unceasing Waves III (UNHCR, 2001). Despite at times being visibly damaged by the SLA, the LTTE had demonstrated an ability to recoup, to the detriment of the SLA's military stockpile and professional competency.

2) The SLA indiscriminate shelling of civilians in the NFZs, apparent intentional shelling of hospitals in the conflict zone, and the denial of medical treatment and supplies to persons in hospitals where wounded LTTE cadres were receiving treatment, was an attempt to minimize the likelihood that the LTTE could be re-constituted at a future date, which could have occurred through the recruitment of known or suspected LTTE sympathizers who were able to survive the war.

Support:

On occasion the SLA would announce publicly their belief that hospitals were being used by the LTTE not just for medical treatment but also as communication centers, and as sites from which LTTE artillery would fire (U.S. Dept. of State, 2009, p.29). Such a belief could provide justification for the targeting of hospitals to kill wounded LTTE cadres. The SLA would utilize drone surveillance to monitor hospitals, followed shortly thereafter by shelling or aerial bombardment. The humanitarian agency Human Rights Watch reported to the U.S. State Dept. that "each time a hospital was established in a new location, GPS coordinates of the facility were transmitted to the Sri Lankan government to ensure that the facility would be protected from attack." Witnesses said that on several occasions, attacks occurred on the day after the coordinates had been transmitted" (U.S. Dept. of State, 2009, p.40).

The last permanent medical facility in the Vanni was Puthukkudiyiruppu hospital, a facility whose GPS coordinates were "well known" to the SLA (U.N. Secretary General, 2011, p.26) A special ward for wounded LTTE cadres had been established in the hospital, and although it is difficult to prove, if the SLA had knowledge of this separate ward, it might account for the periodic shelling of the hospital, especially during the weeks between 9 January and 4 February, 2009, which otherwise would be difficult to explain, since the hospital was marked with emblems easily visible by UAVs (U.N. Secretary-General, 2011, p.26). In response to questions regarding the shelling of the PTK hospital, Defense Secretary Gotabaya Rajapaksa (brother of the GoSL President) remarked "... to crush the terrorists, there is nothing called *unproportionate*" (U.N. Secretary-General, 2011, p.26; citing Skynews, 2009) (emphasis added).

By March, 2009, the absence of medical supplies in the conflict zone was causing great loss of life.

Most of the hospital deaths could have been prevented if basic infrastructure facilities and essential medicines were made

available...We have been supplied with no antibiotics, no anesthetics and not even a single bottle of IV fluid, leaving us in a desperate situation of not being able to provide even lifesaving emergency surgery (U.N. Secretary-General, 201, p.38).

By mid-April, conditions had worsened. “Embassy Colombo was briefed regarding the severe shortage within the NFZ of medical supplies, including anesthesia, dressings, and injection pain relief medication. Organizations estimated that only 5% of needed supplies were being received, and avoidable deaths were occurring as a result,” (U.S. Dept. of State, 2002, p.56).

The GoSL response to pleas from hospital medical personnel for increased medical supplies (for surgical purposes particularly) to treat increasing numbers of wounded, was to issue warnings. “You should bear in mind that in the event of your giving wrong information to any sources especially in regard to IDPs figures, [the] government will be reluctantly compelled to take disciplinary actions against you,” (ICG, 2010, p.22). It is difficult to comprehend this response to a medical plea, given the repeated public assurances from the GoSL of their concern for the safety of civilians, including a publicly stated policy of “zero civilian casualties,” (U.N. Secretary-General, 2011, p.48). A plausible explanation is that the GoSL believed medical treatment centers in the conflict zone housed wounded LTTE cadres. The GoSL apparently had the intention of reducing the likelihood these cadres would recover, and be able to return to the front, or to re-group at a later date and begin work to re-constitute the LTTE.

CONCLUSIONS

In the instance of civil war with one protagonist a territorially based insurgency, the argument between the national government and the insurgency is one where the latter seeks self-determination in part based on the concept of a homeland having a distinct demographic quality. The state, on the other hand, insists on maintaining national territorial integrity in part based on an achieved, or created, demographic character. Within the contested “homeland” region the insurgency seeks minority population primacy. The state wants a contiguous presence of the majority population across the expanse of national territory. But it is not clear whether homeland self-determination can be achieved within, or along side of, national majority population contiguity.

In terms of gauging the likelihood of successful negotiations, it matters whether, and if so, how “hard” the state has pushed for majority population demographic dominance (a population density ratio in its favor) in the homeland area. In this inquiry, a minority population has sought to reverse the state’s decision to “embark on or (continue) all-too-familiar ‘nation-building’ programs designed to obliterate minority group identities” (Buchanan, 1997, p.55). In the case considered here, the

state has worked quite diligently to alter the demographic circumstances “on the ground.” In Sri Lanka, the Tamil population advantage in the Eastern province had been reduced to roughly two-to-one by the time the LTTE insurgency had gained a foothold.

The issue of intent must be addressed here. One can argue that the SLA did not *intend* to cause the death of thousands of Tamil civilians. If we accept GoSL public statements regarding the government’s concern for the safety of civilians, then the civilian deaths brought about by the SLA were inadvertent; they were ancillary to SLA efforts to defeat the LTTE. The SLA then, did not hold Tamil civilians within the conflict zone in the Northern province to be *complicit* in the LTTE resistance (Rothbart and Korostelina, 2011, p.30). But it was the GoSL’s view that civilians compressed into successively smaller NFZs could not be allowed to hinder the SLA’s final offensive against the LTTE. This was made evident by the Ministry of Defense statement (reported above) urging “all civilians to come to the safety Zones” and then the government statement, “as civilians who do not heed this call will be among LTTE cadres, the Security Forces will not be able to accept full responsibility for their safety” (Human Rights Watch, 2009b).

Embedded in this statement is a war strategy which explicitly would not forego or delay defeat of the LTTE simply to save civilian lives; the GoSL *could* have accepted responsibility for the safety of civilians in the shrinking NFZ, but chose not to do so. This war fighting strategy demeans the value of civilian lives. “In this form of thinking, civilian suffering is *unintended*, unavoidable, unsystematic, and consistent with humanitarian laws of war,” (Rothbart and Korostelina, 2011, p.183) (emphasis added). But it is also true that by using civilians as “buffers” and shooting civilians attempting to flee the conflict zone, the LTTE obviously had intended to bring about the deaths of civilians (U.S. Dept. of State, 2009, p.23; ICG, 2010, p.25). The LTTE *could* have abstained from using civilians as shields, or firing upon civilians attempting to escape the conflict zone, but chose to commit these acts. Bringing about the loss of life from these acts was clearly *intentional* on the part of the LTTE.

The SLA strategy, and the tactics of the LTTE resulted in an inexcusable loss of life. While the SLA did not intend to produce this loss of life, it did little to minimize it, while the LTTE did have this intention. SLA actions were meant to produce a military victory, while the LTTE actions were meant to avoid defeat. The LTTE leadership effectively no longer exists, but the group of key GoSL governing decision makers, which implemented the war fighting strategy described herein, remains in place. In rendering a judgment on what occurred in the last five months of the Sri Lankan civil war, and determining culpability of the adversaries in that war, no distinction should be made regarding whether the deplorable loss of civilian life was intentional, or not.

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