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The End Days of the Fourth Eelam War: Sri Lanka's Denialist Challenge to the Laws of War

Key words:

laws of war, legitimacy, representational strategies, civil war, Sri Lanka, the Liberation Tamil Tigers of Eelam.

Abstract

During the final months of their 2006-09 civil war, Sri Lankan armed forces engaged in a disproportionate and indiscriminate shelling campaign against the Liberation Tamil Tigers of Eelam (LTTE) which culminated in the deaths of tens of thousands of civilians. Conventional wisdom suggests that Sri Lanka undermined International Humanitarian Law (IHL). Significantly, however, Sri Lanka did not directly challenge these laws or attempt to justify their departure from them. Rather, they invented a new reality about their conduct to sidestep their legal obligations. Though indirect, this challenge was no less significant than had Sri Lanka explicitly rejected those obligations. Drawing on Clark et al's concept of denialism, this paper details the nature of Sri Lanka's challenge to the standing of IHL. At the core of their denialist move, Sri Lanka maintained that while the LTTE were using civilians as human shields, government forces were adhering to a zero-civilian casualty approach. With this claim, Sri Lanka absolved themselves of any responsibility for the toll inflicted on civilians and sealed their conduct off from the ambit of IHL. The case illustrates how actors can considerably undermine the law using strategies of contestation far more subtle than direct confrontation.

Introduction

In September 2008, following over two years of full-scale hostilities, the Sri Lankan government was closing in on a military victory over the Liberation Tamil Tigers of Eelam (LTTE). From that point until May 2009, government forces drove the LTTE into an ever-smaller patch of territory on the north-eastern coast of the island.¹ This was the most-deadly phase of the war.² Hundreds of thousands of civilians accompanied the LTTE leadership and surviving cadres until they were trapped on a narrow strip of land near the coastal city of Mullaitivu.³ Among the array of offenses committed at the time, the LTTE were prepared to shoot civilians as they fled while the government shelled the No Fire Zones⁴ and deliberately restricted the flow of aid.⁵

A considerable volume of work details these events.⁶ Advocates have used these accounts to

lobby for an independent international investigation⁷ and for UN reforms.⁸ Much of this existing work expresses the view that Sri Lanka violated the rules of proportionality and discrimination on a massive scale and thereby undermined the standing of IHL as well as the broader human rights regime itself.⁹ This perception is fuelled by a sense that upon flouting the laws of war, Sri Lanka largely evaded any immediate consequences.¹⁰ In late May 2009, the Sri Lankan government achieved a propaganda victory at the UN Human Rights Council where members voted to endorse Sri Lanka's own draft resolution praising government forces.¹¹

This article argues that Sri Lanka challenged IHL more indirectly and more acutely than other accounts have suggested. Sri Lanka's approach was indirect in that they did not openly reject an obligation to the law. Instead, they invented a new reality about their conduct to seal it off from the remit of the law. In this respect, Sri Lanka's approach conforms to Clark et al's concept of denialism.¹² In a denialist challenge to the law, actors invent a facet of reality about their conduct to curtail the reach of IHL's foundational principles.¹³ **This challenge was more *acute* than the act of non-compliance alone because it undermined the intersubjective standing of the legal regime. In its fundamental characteristics, this case also shares the company of other denialist challenges to IHL such as Russia's actions in Ukraine.**

To identify how Sri Lanka challenged the laws of war, this article broadens the focus of analysis from their conduct to the rationale they ascribed to it. During the final stages of the conflict, the government portrayed their campaign as an example of a successful 'hostage rescue'.¹⁴ At the heart of this narrative was a claim about the cause of civilian casualties. Referring to evidence that the LTTE had shot civilians attempting to flee, Sri Lanka maintained that the LTTE was responsible for all the civilian casualties.¹⁵ This claim went hand-in-hand with another government position; officials maintained that the military was pursuing a "zero-civilian casualty" approach.¹⁶ By the terms of IHL's foundational principles, Sri Lanka was obligated to enact certain restraints on their own conduct. In return, they gained the right to pursue a military victory and engage in a measure of force protection.¹⁷ In contemporary international law, these restraints are the rules of proportionality and discrimination. However, with their act of invention, Sri Lanka sidestepped these obligations. If their military operation had not caused *any* civilian casualties, the rules of proportionality and discrimination could not be made to assess their actions. This denialism turned Sri Lanka's non-compliance with the law into an acute, indirect challenge to the legitimacy of the law itself.

This article proceeds in four sections. First, I provide a brief outline of Sri Lanka's military campaign to eliminate the LTTE and show why it is typically understood as a notable example of

non-compliance with IHL. **Second, I sketch out the concept of denialism and situate it within constructivist debates on norm contestation.**¹⁸ **In the third section, I show how Sri Lanka's approach conforms to this concept of denialism and can be associated with a broader denialist attack on the law.** Fourth, I conclude my discussion. The article emphasizes the role of contestation in maintaining or subverting legal regimes. It also shows how indirect forms of contestation can considerably undermine the law's standing.

Context

The Fourth Eelam war (2006-09) was the last iteration of full-scale hostilities between the LTTE and the Sri Lankan government. In this ethnonationalist civil war, the LTTE strove to carve out a separate Tamil state on the Sinhalese majority island.¹⁹ Prior to the outbreak of the 2006 conflict, the LTTE controlled a de-facto state in the North and Eastern Provinces and was party to a Norwegian brokered ceasefire agreement.²⁰ This agreement was technically still in place until January 2008, although the monitors acknowledged that by 2007, it was already all-out war.²¹

Where previous iterations of the conflict had ground to a stalemate, this time the government possessed a stronger hand. The LTTE's reliance on terrorist tactics created a host of international enemies. India proscribed them in 1992 and the leadership remained wanted in India over the murder of Rajiv Gandhi.²² The LTTE was later proscribed in the US (1997), the UK (2001), Canada (2006) and the EU (2006).²³ These proscriptions were significant in that they instigated law enforcement action such as the freezing of financial assets.²⁴ **It is also likely that because the international community viewed the LTTE through the terror lens, the government were more confident they could characterise the final onslaught as a "hostage rescue".**

The LTTE were further weakened by the 2004 defection of the Karuna Faction.²⁵ In contrast, the government received a steady supply of military equipment from China and Pakistan and vital maritime intelligence from India and the US.²⁶ In July 2007, Sri Lanka claimed they had recaptured the Eastern Province and they declared an intention to defeat the LTTE in the north.²⁷ In late 2008, government forces advanced on the LTTE capital of Kilinochchi and the conflict entered its most deadly phase.²⁸ The fighting culminated in the death of LTTE leader Velupillai Prabhakarran and the decimation of his remaining cadres.²⁹ This section of the article provides a brief summary of these final months of the conflict. Existing accounts express a common theme—that Sri Lanka's actions and the absence of consequences have been detrimental to IHL.³⁰

As the Sri Lankan armed forces approached Kilinochchi in September 2008, there was a marked decline in international oversight of the conflict. The government announced it could no longer ensure the safety of humanitarian workers in the region and they instructed UN and INGO staff to leave their Kilinochchi offices. Later that month, the UN relocated its offices to the city of Vavuniya in government-held territory. Many other international organizations also withdrew their staff.³¹ From that juncture onwards, there were virtually no international observers able to report to the wider world on what was happening in the conflict zone.³² **As I show in the subsequent section, the decrease in transparency corresponds to a series of denials about factors such as the casualty rate.** By early January 2009, government soldiers had marched into Kilinochchi.³³ By the 25th of January, they had captured Mullaitivu just south of where the conflict would draw to a close.

One of the distinguishing features of this phase of the conflict is the number of civilians that were at risk. As the international observers left and the government forces advanced, hundreds of thousands of civilians were caught up in the LTTE's retreat.³⁴ There are a number of explanations for why civilians felt compelled to accompany the LTTE. Tamil civilians in the Northern Province feared what would happen if they went to government-controlled areas and the LTTE's forced recruitment policy meant many of these civilians would have had relatives among the combatants.³⁵ Weiss suggests that many civilians believed the LTTE would mount a successful counterattack, enabling them to return to the normalcy of life in LTTE-held territory.³⁶ DeVotta maintains that the LTTE usually forced civilians to accompany them whenever they retreated.³⁷ Finally, to cross to government held territory, the civilians often needed to move in the direction of the artillery fire, combat and minefields.³⁸

The retreat brought LTTE and the civilians to a narrow strip of land between a lagoon, the Indian Ocean and government held Mullaitivu.³⁹ In three days alone in late April, 100 000 civilians escaped across the lagoon (Weiss 2012: 187). When the LTTE leadership were killed in May 2009, another 290 000 civilians emerged.⁴⁰ The sheer number of internally displaced people created a humanitarian crisis of its own. The army struggled to provide adequate shelter, food, clothes and medical care for the escaping civilians, but they reportedly resisted UN requests for full access to the IDP camps.⁴¹ Between January and May 2009 alone, as many as 40 000 civilians died.⁴² The scale of the crisis is one of the reasons that observers expressed concern about the ramifications of Sri Lanka's actions.⁴³

While there was limited access to the conflict zone, both during and soon after the fighting, a range of actors moved to detail the alleged abuses. In April 2009, the US National Geospatial-

Intelligence Agency released images of the conflict zone. These images buttressed claims that Sri Lanka was deliberately underestimating the number of trapped civilians.⁴⁴ In response, the US Congress requested a report from the US Office for the Investigation of War Crimes.⁴⁵ In June 2010, UN Secretary General Ban Ki Moon appointed a Panel of Experts to examine the nature and scope of alleged violations in the “final stages of the war”.⁴⁶ Non-government accounts did much to raise the profile of the allegations⁴⁷ while more recent UN Human Rights Council proceedings have centred on Sri Lanka’s domestic accountability processes.⁴⁸ In sum, there is a considerable volume of work establishing the nature of the offenses in the final stages of the conflict.

While both belligerents committed an array of offenses, the government’s win-at-all costs approach was the primary cause of civilian suffering.⁴⁹ The UN Panel of Experts gave this account of the government’s shelling practices:

With respect to the Government, credible allegations point to these violations of international humanitarian law: Common Article 3 of the Geneva Conventions; the requirement of distinction between combatants and civilians; the ban on attacks on civilians or civilian objects; the ban on indiscriminate or disproportionate attacks against civilians; the requirement for precautions before and during attacks.⁵⁰

Moreover, the Panel alleged that this shelling had caused the *majority* of civilian casualties.⁵¹ The authors did also provide this account of the LTTE’s conduct:

The Panel’s determination of credible allegations against the LTTE associated with the final stages of the war reveal six core categories of potential serious violations: (i) using civilians as a human buffer; (ii) killing civilians attempting to flee LTTE control; (iii) using military equipment in the proximity of civilians; iv) forced recruitment of children; (v) forced labour; and (vi) killing of civilians through suicide attacks.⁵²

As I will show in the final section of this paper, the government cited credible evidence of LTTE crimes in a bid to absolve themselves of any responsibility for the scale of civilian suffering. Nevertheless, Sri Lanka had violated the rules of proportionality and discrimination on a significant scale.

The relative absence of any immediate consequences is a defining feature of this historical episode. China and Russia supported Sri Lanka at the UN Security Council where the crisis did not become the subject of a formal agenda.⁵³ The Responsibility to Protect remained effectively unused as the permanent members continued to dispute its meaning and application.⁵⁴ At the

UN Human Rights Council, Sri Lanka and its supporters blocked the passage of a resolution calling for an independent investigation.⁵⁵ Instead, the Council passed Sri Lanka's draft resolution which welcomed "the liberation by the Government of Sri Lanka of tens of thousands of its citizens that were kept by the Liberation Tigers of Tamil Eelam against their will as hostages".⁵⁶ In this context, the EU's decision to revoke Sri Lanka's trading privileges is an exception to a general pattern of inaction.⁵⁷ **In the short term, the Sri Lankan government did not encounter the degree of reputational or material costs they could well have borne.**

Nor has there been significant progress on accountability in the years since the end of the conflict. The Sri Lankan political landscape remains dominated by the same actors responsible for prosecuting the war. Most visibly, the former defence secretary Gotabaya Rajapaksa is the current President while his brother Mahinda Rajapaksa (the former President) is the current Prime Minister. A 2021 Office of the UN Human Rights Commission Report instead details six trends which characterise Sri Lanka's domestic political order since the war. These are militarization of civilian government functions, a reversal of Constitutional safeguards, political obstruction of accountability, majoritarian and exclusionary rhetoric, a shrinking of democratic space, and new and exacerbated human rights concerns.⁵⁸ This report preceded the most recent UN Human Rights Council resolution providing the Human Rights Commissioner with additional funding to collect information and evidence with a view to facilitating future accountability processes.⁵⁹ While the latest UN Human Rights Council Resolution is evidence that Sri Lanka has not been able to escape international scrutiny, it is also symptomatic of the fact that these international processes have struggled to meaningfully change the course of domestic politics in Sri Lanka itself.

Many commentators have viewed Sri Lanka's actions as an attack on IHL and the broader human rights regime. Former Finish President and international mediator Martti Ahtisaari suggested that "[c]ountries operating outside international norms" would be "taking courage from Sri Lanka's apparent success at avoiding international reproach".⁶⁰ Steven Ratner⁶¹ placed an emphasis on the scale of the crisis and the absence of an international response:

Just as the international attitude while the war waged was a significant blow to the responsibility to protect, the reaction after the war was a setback in the uneven progress made since the early 1990s with respect to accountability. This selectivity is more alarming when we consider that the final stage of the Sri Lankan civil war involved many multiples of increased casualties compared to other ongoing wars.

For Ratner, the size of the protection failure and the muted response had compromised the principle of accountability. The International Crisis Group came to a similar conclusion:

The eventual destruction of the LTTE military came at the cost of immense civilian suffering and an acute challenge to the laws of war. It also undermined the credibility of the United Nations and further entrenched a bitterness among Tamils in Sri Lanka and elsewhere which may make a durable peace elusive.⁶²

These accounts convey a sense that Sri Lanka had flouted IHL on an enormous scale and that by escaping any serious or immediate international pushback, the episode had instead weakened IHL and the human rights regime. In the wake of the conflict, the international community could expect more non-compliance with the law. This article accepts the proposition that Sri Lanka challenged the legitimacy of IHL. Undoubtedly, the muted international response also enhanced the effect. However, I suggest that by adopting a conceptual account of what it means for the law to lose standing, we can show that Sri Lanka's approach was both more subtle and more detrimental to the law than many of the preceding accounts have intimated.

My account can also be differentiated from Gordon and Perugini's work on Sri Lanka's use of legal experts. After the UN Secretary General's Panel of Experts published their report on the conflict in 2011, Sri Lanka hired a series of IHL experts to vindicate their actions.⁶³ As this article will show, Sri Lanka's performative challenge to the law starts earlier than the period under examination in Gordon and Perugini and it is functionally different from the tactics they observe. Sri Lanka denied they were killing civilians during and immediately after the conflict. However, after the 2011 Panel of Experts published their report, they attempted to fit the highest civilian casualty estimates under the umbrella of proportionality.⁶⁴ In this sense, Gordon and Perugini help us to identify where Sri Lanka's denialist challenge is supplanted by another form of contestation.

Conceptualising norm contestation

To understand how Sri Lanka launched an indirect, acute challenge to IHL, we need to address a conceptual question. How does IHL or any legal institution come to lose standing? This section answers this question by engaging two constructivist debates. The first concerns the role of compliance in relation to norm strength. In contrast to approaches which view norm strength in terms of the rate of compliance, this article treats norm strength as a function of legitimacy or standing. The second concerns the question of whether challenges to the scope of a norm can erode its legitimacy. This article accepts that attacks on a norm's validity or righteousness can corrode its

standing. However, where they diminish collective expectations that actors must conform to a norm, attacks on a norm's scope can also undermine its standing.

Assessing compliance is an obvious way to examine norm health. In his work on legal regimes, Glennon advances just this formulation:

When deviant behaviour reaches the point that the first violation has been emulated by a sufficient number of states, the conduct in question ceases to be a violation.

The former rule has then been supplanted either by no rule or by international law's default rule, the so-called freedom principle.⁶⁵

For Glennon, a low rate of compliance is a good indication that a norm is ailing. By this view, to the extent that Sri Lanka's bombing campaign is part of a broader pattern of non-compliance, we can say the IHL regime is unhealthy.

Yet while compliance is an intuitively appealing way to measure norm health, it is also problematic. There are at least two reasons this is the case. First, the concept of compliance is descriptive. It tells us nothing about why actors comply with the norm in the first place.⁶⁶ If widespread compliance is a product of convergent interests, it is a leap to say the norm is healthy. Second, the compliance approach cannot make sense of circumstances where a norm is both widely accepted *and* frequently violated. The norm against murder is an example. By the terms of the compliance approach, we would be led to conclude that the norm is weak. After all, murder happens every day. However, this seems like an unsatisfactory finding.⁶⁷ If compliance is a poor indicator of norm health, what should analysts look for?

In place of a focus on compliance, others have displayed a broad interest in legitimacy. We can find variations on this interest in an array of constructivist accounts.⁶⁸ For instance, Ben-Joseph Hirsch and Dixon examine the extent of collective *expectations* that the norm matters.⁶⁹ Similarly, Clarke et al call for a focus on the *intersubjective standing* of the norm.⁷⁰ Deitelhoff and Zimmerman do take compliance seriously. However, with their concept of *facticity*, they are also interested in establishing whether a given norm is guiding action. *Facticity* is complimented by *validity* which refers to the degree of verbal acceptance of the norm.⁷¹ The advantage of these approaches is that they do not conflate behaviour with the question of whether actors collectively expect compliance. If we return to the norm against murder, this opens up the possibility of

achieving an arguably more satisfactory account of the norm's health. Murder occurs every day but because the norm against murder enjoys legitimacy, it continues to exert a compliance pull on other actors.

If a norm's health is contingent upon its intersubjective standing, then reason-giving matters. Consider Sandholtz's discussion of justificatory strategies:

The effect of a rule violation depends crucially on the justifications offered by the violator and the reactions of other states. If the violating state justifies its conduct as a permissible exception to a general rule, the effect is generally to strengthen the norm.⁷²

In an appeal to exceptional circumstances, the actor implicitly acknowledges the legitimacy of the norm in question. Whatever the nature of an actor's behaviour, they have left the standing of the norm in-tact. Consequently, we can expect that the norm in question will continue to guide the behaviour and claim-making of other actors.

Constructivists do not agree on which claims are likely to harm norms. One key debate concerns the effects of what Deitelhoff and Zimmerman call *applicatory* and *validity* contestation.⁷³ To use their illustrative examples, we can see *applicatory* contestation in debates about *when* it is appropriate to protect intellectual property. Within these public debates, the validity of intellectual property is not in question. By contrast, in the 1980s, activists contested the *validity* of granting political amnesty to war criminals after violent conflict. They argued that granting amnesty was immoral. Deitelhoff and Zimmerman argue that validity contestation can precipitate norm weakness, but applicatory contestation is likely to strengthen norms.⁷⁴ Indeed, the argument makes a good deal of sense. An attack on a norm's validity is almost certainly an attack on its legitimacy. Meanwhile, other accounts have empirically shown how applicatory or procedural contestation has clarified a norm's scope and specificity.⁷⁵ But is it correct to say that there are no circumstances in which applicatory contestation presents a challenge to norms?

Elsewhere, theorists have shown how certain forms of applicatory contestation are indirect pathways to norm weakness. For instance, Panke and Petersohn argue that if actors make claims which limit the scope of a norm, then over time they can render it obsolete.⁷⁶ By this account of contestation, Búzás' concept of norm *evasion* is also bad for

norm health. In norm evasion, actors legally institutionalise norms in a way that allows them to sidestep the very purpose of the norm itself.⁷⁷ Using Panke and Petersohn's interpretation, if a practice like norm evasion occurs over time, actors will come to expect that they have no obligation to the norm. In other words, the norm loses standing because actors cease to collectively believe that it must be followed.

At this point, it is possible to introduce Clark et al's *rejectionist*, *revisionist*, and *denialist* challenges. Where the *rejectionist* challenge can be understood as validity contestation, the *revisionist* and *denialist* challenges are forms of applicatory contestation.

Importantly, and against Deitelhoff and Zimmerman, all three challenges are acute in the sense that they undermine the standing of IHL's core principles or 'bargain'.

Bargains are agreements about the foundations of a legal regime. They concern "the nature of the governance domain, who the legitimate actors are and how rights and responsibilities are distributed".⁷⁸ Consider this account of IHL's bargain:

Underlying them (the laws of war) is a grand bargain in which states, working with a common conception of war, accept humanitarian constraints in return for the legalization of war as a practice and the legitimation of all non-prohibited means.⁷⁹

Here, we can see the legitimate actors (combatants), the domain (war as opposed to other forms of violence), the rights (a right to pursue a military victory and to engage in a measure of force protection) and obligations (an obligation to enact humanitarian restraints).⁸⁰ If a bargain enjoys legitimacy, it exerts a compliance pull. However, *rejectionist*, *revisionist*, and *denialist* challenges can all undermine this standing and the corresponding compliance pull.

In a *rejectionist* challenge, actors directly attack the foundations or bargain of a legal regime. Here, Clark et al cite ISIL's prisoner beheadings. By killing prisoners, ISIL is breaking the laws of war. In disseminating graphic videos of the process, they are publicly celebrating their act of non-compliance. They present audiences with a war where IHL's central principles have no standing.⁸¹ This is a validity challenge insofar as ISIL presents their own ideology as the only legitimate source of norms.

Second, in the *revisionist* challenge, actors set out to radically redefine the meaning of the law's foundational categories. For instance, in the war on terror, US lawyers coined the term "unlawful combatants" as opposed to "former combatants".⁸² They were trying

to revise the meaning of an entire category of IHL to avoid their legal obligations under the Geneva Conventions.⁸³ Another potential example (though not identified by Clark et al) is Israel's use of the term "administer" in place of "occupy" following the 1967 Six Day War. Israel was granting itself the leeway to militarily control Gaza and the West Bank while avoiding its obligations as an occupying power under the Fourth Geneva Convention of 1949.⁸⁴ The examples are applicatory in that they alter the norm's scope through an act of revision.

Lastly, and of most relevance for our purposes, there is the denialist challenge. Here, Clark et al provide the example of Russia's approach to IHL. Russian foreign policy officials portray their state as the chief defender of international law. By contrast, Human Rights Watch allege that Russian-backed rebels in Ukraine are behind a series of IHL violations.⁸⁵ Russia counters this criticism by simply denying that it is involved in the conflict. In the reality that Russia invents, there are no opportunities for the international community to assess its conduct by the terms of IHL. This brings us to the essential quality of a denialist move. Actors invent a new facet of reality to limit the reach of the legal regime's central principles.

This section positioned the article's approach to norm contestation with respect to two key debates in the literature. First, against the temptation to conflate norm strength with compliance, this article treats norm strength as a function of legitimacy. Second, against the view that applicatory contestation cannot undermine a norm, the article sides with those accounts which argue there are instances in which applicatory contestation can render a norm obsolete. It positions denialism as an example of such contestation. At this point, it is possible to explore how Sri Lanka mounted this kind of attack on the IHL regime.

[Sri Lanka's denialist move](#)

Sri Lanka's denialist challenge to IHL encompasses more than just their conduct. It also includes their efforts to invent a new reality about the conflict's close. During the final months of the Fourth Eelam War, the Sri Lankan government described its military operation as a 'hostage rescue'.⁸⁶ Over the course of this military operation, they contested criticism and pressured potential critics into withholding information.⁸⁷ Sri Lanka's approach to explaining the civilian casualty rate tied these strategies into a denialist challenge because it curtailed the reach of IHL's central bargain. Sri Lanka maintained that while the LTTE were using civilians as "human

shields”,⁸⁸ Sri Lankan armed forces were pursuing a “zero-civilian casualty” approach.⁸⁹ With this move, Sri Lanka was shifting the responsibility for the deaths of the civilians onto the LTTE. In turn, they were absolving themselves from their legal obligations; in return for killing enemy combatants, they had an obligation to enact restraints in the form of proportionality and discrimination. This section provides an account of Sri Lanka’s narrative of a ‘hostage rescue’ and its attempts to deny any responsibility for the deaths of civilians. I show how this representational strategy constitutes a denialist challenge to IHL.

When the Sri Lankan armed forces and the LTTE resumed full-scale hostilities in May 2006, the government framed their military operation as an effort to ensure civilian access to water and then as an attempt to pressure the LTTE back to the negotiating table.⁹⁰ The government’s justificatory strategy began to change when they declared a military victory over the Eastern Province in July 2007.⁹¹ At this juncture in the conflict, Sri Lankan officials felt ready to assert that their military operation could “liberate” the remaining LTTE-held territory.⁹² In January 2008, Sri Lanka abandoned the ceasefire process.⁹³ They would continue to develop their narrative of liberation for the remainder of the conflict.

In his speech to the UN General Assembly in September 2008, Sri Lankan President Mahinda Rajapaksa supplied his audience with the metaphor of a ‘hostage’ scenario.⁹⁴ At that time, government forces were advancing towards the LTTE’s de-facto capital of Kilinochchi⁹⁵ and they had already instructed the UN to leave the city.⁹⁶ Hundreds of thousands of civilians were on the move.⁹⁷ Rajapaksa drew on the LTTE’s reputation as a terrorist organisation to present his government’s action as a matter of duty:

[W]hat the Government of Sri Lanka would not and could not do is to let an illegal and armed terrorist group, the LTTE, hold a fraction of our population, a part of the Tamil community, hostage to such terror in the Northern part of Sri Lanka and deny those people their democratic rights of dissent and free elections.⁹⁸

Other Sri Lankan administration officials treated the President’s statement as the default account of the government’s rationale. Indeed, in front their respective foreign audiences in Europe and Australia, the ambassador to the EU and the Foreign Minister directly quoted this passage from the President.⁹⁹ As Gordon Weiss remarked, Sri Lankan officials were doing their best “sell” the concept of the hostage rescue to the international community.¹⁰⁰ Of course, many civilians were accompanying the LTTE because they feared what would happen to them in government-held territory.¹⁰¹ Nonetheless, the government would ultimately celebrate what it described as a successful ‘rescue’ mission.

On the death of the LTTE leadership, Sri Lankan officials took on a triumphant note. While giving an address to the diplomatic community in Colombo in May 2009, Rajapaksa offered this appraisal of the military operation:

The manner of rescuing the hostages would indeed be an example to others engaged in military operations. It may also be one of the greatest rescue operations in the world. I am glad that over 200,000 persons have been able to escape from the LTTE, due to the meticulous operations of the Armed Forces.¹⁰²

The President was depicting a near-perfect 'hostage rescue'. Speaking at the Shangri-La Dialogue in late May, Foreign Minister Rohitha Bogollagama also called on his audience to celebrate the Sri Lankan military operation:

Sri Lanka will no doubt enter the annals of history as a classic example of a country that successfully prevailed over the scourge of terrorism, while tenaciously upholding the cherished values of democracy and human rights that have been deeply engrained in the psyche of our people.¹⁰³

In this narrative of a triumphant 'hostage rescue', we can already see part of the logic of Sri Lanka's denialist move. The Sri Lankan government had liberated the trapped civilians while the LTTE had endangered them. The 'hostage rescue' could not be evaluated by the criteria of proportionality and discrimination because the LTTE were responsible for the casualties. As discussed in the first section of the article, the UN Human Rights Council then effectively endorsed Sri Lanka's account. In the government's narrative, the final months of the conflict entailed a delicate and successful 'hostage rescue'. This was the icing on the cake in a war of 'liberation'.

Sri Lankan officials robustly contested any evidence that could unsettle their 'hostage rescue' narrative.¹⁰⁴ There were four particularly pertinent issues; the number of trapped civilians, the nature of the bombing tactics, the civilian casualty rate and the lastly the question of how civilians were being endangered. I argue that Sri Lanka's answer to this fourth question ties their approach into a denialist challenge to IHL.

While the President ultimately took credit for 'rescuing' 200 000 people, Sri Lanka's original approach involved *underestimating* the number of civilians caught up in the LTTE's retreat.¹⁰⁵ At the beginning of April 2009, the government maintained that there were only 10 000 trapped civilians. By contrast, drawing on satellite imagery, the UN believed that at the end of April the figure was actually 127 177.¹⁰⁶ The disparity between UN and government figures was allegedly a deliberate part of Sri Lanka's strategy. It allowed them to restrict the volume of aid and enhance

the severity of the siege.¹⁰⁷ Additionally, the approach protected Sri Lanka's narrative of a hostage rescue. The more civilians were trapped, the more civilians the government was endangering by seeking to eliminate the LTTE.

Sri Lankan officials repeatedly challenged assertions that they were shelling the conflict zone in an indiscriminate fashion. On the 24th of February, the government announced it was no longer using heavy weaponry.¹⁰⁸ In a May press release from the Ministry of Foreign Affairs, Rohitha Bogollagama also dismissed suggestions that the Sri Lankan Army had shelled the No Fire Zones.¹⁰⁹ During his interview with the BBC in March, the Minister of Disaster Management and Human Rights Mahinda Samarasinghe instead gave this account of how the government forces were fighting:

There is absolutely no justification to use heavy weapons and, in fact, about ten days ago, the Armed Forces took a conscious decision not to use any heavy weapons. We have not been using heavy weapons; we are fighting man to man, door to door and street to street.¹¹⁰

In this account, Sri Lankan military personnel were accepting a high level of personal risk in order to root out the LTTE from the civilian population. In fact, successive reports have concluded that throughout the hostilities of 2009, the Sri Lankan Army was shelling in all three of the No Fire Zones.¹¹¹ As noted, of everything that occurred in the final months of the conflict, government shelling killed the largest number of civilians.¹¹² Moreover, by encouraging civilians to move to the No Fires Zones and then shelling them anyway, government forces were not only failing to take precautionary measures, they were cynically manipulating the requirement for precaution.¹¹³ However, Sri Lankan officials were prepared to issue a series of statements defending a 'clean' account of conduct.

The civilian casualty rate was also a sensitive issue. The UN Secretary-General's Internal Review Panel gives a telling insight the relationship between UN agencies and the Sri Lankan government on this topic.¹¹⁴ The authors note that the "Government's harsh reaction to even the suggestion that there were civilian casualties led the UN in Colombo to limit the sharing of information on the casualties".¹¹⁵ Indeed, by early 2009, UN officials were withholding what they regarded as conservative casualty estimates.¹¹⁶ UN High Commissioner for Human Rights Navanethem Pillay broke the pattern in March and said that "more than 2, 800 civilians" had been killed.¹¹⁷ In response, Sri Lanka simply told the EU Sub-Committee on Human Rights that the figure could not be substantiated.¹¹⁸ Much like their efforts to underestimate the number of

trapped civilians, by challenging any disconcerting civilian casualty estimate, the government was protecting its narrative of a “hostage rescue”.

So far, this account of Sri Lanka’s actions has not necessarily demonstrated how they produced an *acute* attack on the legitimacy of IHL. Based on the preceding evidence, Sri Lanka’s actions and rhetoric look more like a troubling example of non-compliance than an acute challenge to the laws of war. However, this article submits that the preceding actions and representational strategies were tied together by Sri Lanka’s account of *how* civilians were being killed. The result is a denialist challenge to IHL.

By the government’s account, to the extent that civilians were in danger, it was because the LTTE were exploiting the government’s diligence. Officials repeatedly admonished the LTTE for using civilians as ‘human shields’.¹¹⁹ As Bogollagama told his audience at the Shangri-La Dialogue in Singapore:

All men and women, with their children were fleeing the city, while the LTTE cadres were shooting at them to prevent their escape... It was against this backdrop that we witnessed the exodus of these people into the safety of areas controlled by the government.¹²⁰

By this account, the government played the role of the valiant rescuer while the LTTE were deliberately targeting civilians in a bid to avoid military defeat. As discussed, there was credible evidence that the LTTE had put civilians in danger or directly targeted them.¹²¹ However, Sri Lankan officials were not even prepared to countenance the suggestion that civilians could have died because of government action.

The fate of Convoy 11 provides the clearest example of this strategy of denial. Between October 2008 and January 2009, the UN was able to deliver 11 convoys of humanitarian aid to the conflict zone by road.¹²² However, this practice ceased in late January when the 11th convoy was shelled from government positions.¹²³ Unlike much of the shelling during the final stages of the conflict, two international UN officers were eyewitnesses to the incident¹²⁴ and they provided testimony to the UN headquarters in Colombo.¹²⁵ The UN staff had transmitted their positions to the Sri Lankan government before and during the shelling, they were inside the first No Fire Zone and they were surrounded by civilians.¹²⁶ In response to this testimony, the government maintained that if the convoy and the safe zone had been attacked, it was LTTE fire.¹²⁷ In the Convoy 11 incident, the government dismissed the eye-witness testimony of UN officials and replaced it with a version of events in which the LTTE were responsible.

Alongside this discussion of the LTTE's tactics, Sri Lankan officials went as far as suggesting that their own military operation was designed to avoid civilian casualties altogether. While briefing the Diplomatic Community in May 2009, Rajapaksa introduced the "zero civilian casualty" claim:

On my instructions, due to the priority given to the policy of zero civilian casualties the security forces are limiting themselves to rescue operations of the entrapped civilians held hostage as a human shield by the LTTE.¹²⁸

Like the concept of the 'hostage rescue', this account became a standard government and military position.¹²⁹ The ubiquity of the claim led Gordon Weiss to make this observation;

Until the very end of the war, the government and its spokespeople parroted a so-called Zero Civilian Casualty policy in answer to any suggestion by journalists, statesmen, the UN Secretary General or the president of the United States that its forces were responsible for civilian deaths.¹³⁰

The concept of a "zero civilian casualty" approach is arguably the starkest point of contrast between Sri Lanka's indiscriminate bombing of civilians and its rhetoric at the time. Importantly, the 'human shield' argument and the 'zero civilian casualty' claim are two sides of the same coin. Sri Lanka was attempting to shift all the blame for civilian casualties onto the LTTE. If Russia's denialist strategy in Ukraine was to say 'it's not us, we're not there', Sri Lanka's denialist strategy was to say 'it's not us, it's them.'

It was only much later that Sri Lanka acknowledged that its shelling strategy could have resulted in a high number of civilian casualties. After the UN Panel of Experts published their 2011 report, the Sri Lankan government commissioned a string of lawyers to provide opinions on the case. At this point, Sri Lanka's strategy shifted to what Gordon and Perugini have described as an act of "computational acrobatics". By the terms of its newly sought out legal opinions, if Sri Lanka had killed as many as 40,000 civilians this was proportionate to the 295,000 civilians "saved". Because the LTTE had used civilians as shields, Sri Lanka was entitled to adjust the ratio of acceptable civilian casualties. The legal opinions made no mention of the conditions which awaited the displaced civilians or the fact that many of them hoped to never encounter government forces at all. The shift in strategy is remarkable given that at the start of the onslaught, Sri Lankan officials had deliberately underestimated the number of trapped civilians and maintained their strategy was one of "zero civilian casualties".¹³¹ The change in justificatory strategy also marks the end point for Sri Lanka's denialist challenge to the laws of war. They went

from inventing a new reality about the civilian casualty rate to attempting to stretch the criteria of proportionality to account for it.

Having outlined the features of Sri Lanka's denialist move, we should contend with some alternate ways of conceptualising their approach. I group these alternatives into two categories: *rejection* and the "war as hell" doctrine. First, as noted, the rejectionist challenge is an overt attack on the law. If Sri Lanka had engaged in such a challenge, their approach would be one of boastful non-compliance. Yet Sri Lanka did not celebrate *violating* the law. They celebrated the so-called success of their "hostage rescue" and then they celebrated publishing this narrative in a UN Human Rights Council resolution.¹³² Sri Lanka did not make their action appear consistent with the law, but they did not provide an outright rejection either.

The 'war is hell' doctrine is the second alternate conceptualisation of Sri Lanka's approach. Michael Walzer associates this kind of logic with General Sherman's campaign in the US Civil War.¹³³ While fighting Confederate forces in the south, Sherman forcibly evacuated the city of Atlanta and then destroyed it. In response to protests from another Union general, he noted that the leaders of the Confederacy had created the war. On this basis, he reasoned that the Confederacy leaders were responsible for bringing "hell" to Atlanta.¹³⁴ On the face of it, this conceptualisation is a promising alternate avenue for thinking about how Sri Lanka framed their "human shield" problem. By using civilians as human shields, the LTTE alone had created "hell". However, again, when we compare this conceptualisation to Sri Lanka's representational strategy, we can see a crucial point of divergence. Unlike Sherman, Sri Lanka never accepted anything other than their "hostage rescue" account. The analogy of "war is hell" does not offer a convincing alternate account of how Sri Lanka engaged with the laws of war because Sri Lanka invented a narrative where the civilians had been saved.

In describing the Sri Lankan justificatory strategy as denialist, this article places the final stages of the conflict among a broader denialist attack on the law. In outlining the concept of denialism, this article has already touched on Russia's efforts to prevent the laws of war from applying to the Ukrainian conflict. Russia's support for the Syrian regime is also characterised by invention. For instance, when the UN Security Council met to discuss the 2016 bombardment of Aleppo, the Russian Ambassador Vitaly Churkin dismissed accusations of indiscriminate bombing as "fake news".¹³⁵ Similarly, following the emergence of allegations of a chemical weapons attack on the town of Douma, Russia Foreign Minister Sergey Lavrov claimed his government had "irrefutable" evidence the events were staged.¹³⁶ Like the Sri Lankan case, these

statements invent a reality which seals military practices off from the remit of IHL. Collectively these practices indicate a decline in the health of the laws of war.

In Sri Lanka's narrative, the military operation was a "hostage rescue" which brought democracy to an area long under the control of a terrorist organisation.¹³⁷ As part of this portrayal of events, they underestimated the number of trapped civilians, refuted allegations they were using heavy weaponry, and contested casualty estimates.¹³⁸ Sri Lanka also engaged in a concerted effort to prevent independent access to the region and they used the imperative of aid delivery to wedge the UN on the topic of casualty estimates.¹³⁹ Crucially, Sri Lanka's efforts to control the narrative were tied together by one important claim - that to the extent that civilians were being harmed, this was because of the LTTE.¹⁴⁰ With this move, Sri Lanka attempted to prevent their actions from being assessed by the criteria of proportionality and discrimination. As a result, they sealed the military operation off from the central bargain of IHL.

Conclusion

This article set out to demonstrate how Sri Lanka's final military offensive constituted an indirect but acute challenge to the legitimacy of International Humanitarian Law. Drawing on Clark et al's work on legitimacy crises, I argued that Sri Lanka's approach could be understood as a *denialist* move. They presented their shelling campaign using the narrative of the "hostage rescue" and when it came to the question of how so many civilians could have died, Sri Lanka shifted the blame *entirely* onto the LTTE.¹⁴¹ In effect, they cut off opportunities for critics to assess their actions by the central bargain of IHL. Because of these fundamental characteristics, this stage of the conflict can be situated within a broader denialist attack on the laws of war typified by Russia's actions in Ukraine.

To identify how Sri Lanka launched an acute attack on IHL, this article broadened the focus of analysis from their actions to their representational strategies. The purpose of this article was not to diminish the significance of Sri Lanka's actions vis-a-vis their rhetoric. The contents of Sri Lanka's justificatory strategy were no doubt of little consequence to their victims. However, this article should provide rights advocates and analysts with an example of *how* actors undermine humanitarian principles. Furthermore, while acts of boastful non-compliance are obvious affronts to the law, it is possible for actors to subvert IHL in more subtle but equally destructive ways. These approaches are difficult to identify but by knowing how they operate, we are in a better position to challenge them as they arise.

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- ¹¹⁶ UN POE, “Panel of Experts on Accountability,” 40.
- ¹¹⁷ Petri 2012, “UN Internal Review Panel,” 67.
- ¹¹⁸ MoFA Sri Lanka, “Sri Lanka Statement at the Sub-committee on Human Rights”.
- ¹¹⁹ Bogollagama, “FM hails victory at Human Rights Council”; Bogollagama, “Winning counter-insurgency campaigns”; Rajapaksa, “Address to the Diplomatic Community”; Rajapaksa, “ ‘I return to my country freed of LTTE barbarism’ ”.
- ¹²⁰ Bogollagama, “Winning counter-insurgency campaigns”.
- ¹²¹ UN POE, “Panel of Experts on Accountability,” iii-iv.
- ¹²² ICG, “War Crimes in Sri Lanka,” 11.
- ¹²³ The Petri Report provides a detailed account of the Convoy 11 incident. “UN Internal Review Panel,” 57-62.
- ¹²⁴ For instance, satellite imagery was a particularly important source of evidence for many of the other incidents. UN POE, “Panel of Experts on Accountability,” 799.
- ¹²⁵ Petri, “UN Internal Review Panel,” 10.
- ¹²⁶ *Ibid.*, 59.
- ¹²⁷ ICG, “War Crimes in Sri Lanka,” 13; Somini Sengupta “U.N. Staff and Hospital Come Under Shelling as Sri Lanka Fights Cornered Rebels,” *The New York Times*, January 28, 2009, 13; Weiss, *The Cage*, 87.
- ¹²⁸ Rajapaksa, “Address to the Diplomatic Community”.
- ¹²⁹ OHCHR, “Investigation on Sri Lanka,” 146; UN POE, “Panel of Experts on Accountability,” 48.
- ¹³⁰ Weiss, *The Cage*, 87.
- ¹³¹ Gordon and Perugini, *Human Shields*, 149.
- ¹³² Bogollagama, “FM hails victory at Human Rights Council”; Bogollagama, “Winning counter-insurgency campaigns”.
- ¹³³ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2015), 32.
- ¹³⁴ *Ibid.*, 32.
- ¹³⁵ Luke Glanville, “The limits of rhetorical entrapment in a post-truth age,” *Critical Studies on Security* 7, no. 2 (2019): 2.
- ¹³⁶ Alastair Jemieson, “Russia’s Lavrov says Syria chemical weapons attack was ‘staged’” *NBC News*, April 13, 2018, [Russia's Lavrov says Syria chemical weapons attack was 'staged' \(nbcnews.com\)](https://www.nbcnews.com/news/international/russia-lavrov-says-syria-chemical-weapons-attack-was-staged-11cn120184).
- ¹³⁷ Aryasinha, “Time to Act,” 8; Bogollagama, “Foreign Minister calls for LTTE listing as terrorist group”; MoFA Sri Lanka, “Sri Lanka Statement at the Sub-committee on Human Rights”; Rajapaksa, “Address to General Assembly,”
- ¹³⁸ BBC, “HARDtalk”; Bogollagama, “FM hails victory at Human Rights Council”; MoFA Sri Lanka, “Sri Lanka Statement at the Sub-committee on Human Rights”; UN POE, “Panel of Experts on Accountability,” 34.

¹³⁹ Petri, “UN Internal Review Panel,” 65.

¹⁴⁰ Bogollagama, “FM hails victory at Human Rights Council”; Bogollagama, “Winning counter-insurgency campaigns”; Rajapaksa, “Address to the Diplomatic Community”; Rajapaksa, “‘I return to my country freed of LTTE barbarism’”.

¹⁴¹ OHCHR, “Investigation on Sri Lanka,” 146; Rajapaksa, “Address to the Diplomatic Community”; UN POE, “Panel of Experts on Accountability,” 48.