

Double Speak: The permissive effects of Europe’s counterterrorism policy on its human rights diplomacy in Sri Lanka

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Abstract

Both the European Union and its member states have embraced a permissive counterterrorism policy that has been strengthened by security practices prevalent in military interventions in Afghanistan and Iraq, mass surveillance, torture allegations and extended detention of suspected extremists. This counterterrorism policy has strong permissive effects. Permissive effects “by serving as focal points, selectively divert our normative gaze”². By focusing international attention on the need to fight terrorism, the counterterrorism discourse diverts the attention away from its methods and human rights violations related to them. Europe’s human rights diplomacy was significantly constrained by these effects.

Europe’s engagement with the end of the conflict in Sri Lanka is a case in point. European member states, in particular the UK and France, found their diplomatic pressure to be highly ineffective. Shortly after the end of hostilities in May 2009, the EU championed a Special Session of the UN Human Rights Council on Sri Lanka, which then ended up congratulating the Sri Lankan government for ending the war as the EU’s draft was sidelined. Sri Lanka had skillfully exploited the permissive effects of the global counterterrorism discourse, entertained by European countries that had banned the Tamil Tigers as terrorist group in 2006, granted licenses for arms exports to the government until the end of the war, and joined its counterterrorism narrative in dialogue forums. The case of Sri Lanka questions the coherence of European crisis management more generally.

¹ I am grateful to Inga Nehlsen for research assistance in preparing this paper. The paper benefited from a larger research project on “global norm evolution and the responsibility to protect” funded by the Volkswagen foundation (for more on the project, see <http://www.globalnorms.net>).

² Nina Tannenwald, ‘The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use’, *International Organization* 53:3, 1999, 437.

Introduction

On 29 April 2009, David Miliband and Bernard Kouchner, the British and French foreign minister respectively, visited Sri Lanka. The final phase of the 26-year long civil war between the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan armed forces was at its height. Around a week earlier, the army had penetrated the LTTE’s last defense lines, prompting a large number of the more than 150,000 civilians still trapped in the conflict zone to escape within a few days. Amnesty International and Human Rights Watch as well as the UN Emergency Relief Coordinator John Holmes had been warning about an impending “bloodbath” on the shores of Northeastern Sri Lanka.³ In their meetings with President Mahinda Rajapaksa, Miliband and Kouchner pushed for assurances that the government would stand by its commitment not to use heavy weapons anymore, as LTTE fighters and civilians were densely mixed. As they received those assurances, they unloaded a French military hospital and left,⁴ but the fighting continued unabated, including with heavy weapons.

Many international actors tried to press both parties to the conflict to show restraint with regard to the situation of the civilian population in those months, including the US, the UN, civil society actors, Tamil diaspora and the Indian government.⁵ The European Union as well as individual member states called repeatedly on the government and the LTTE to agree to a ceasefire and comply with international humanitarian law.⁶ The moderating effect, if any, on the government and the LTTE was hardly recognizable. The overwhelming sentiment at the top floors in the UN as well as European member states was one of helplessness and tragic dilemma.⁷ A British minister at the time felt that the diplomatic situation was “absolute catastrophe....the Sri Lankans just kept going. So we pressed them to almost no avail.”⁸

This personal narrative by policymakers involved in the international response corresponds with how a number of analysts and scholars have framed the geopolitics of the “Eelam war IV”, the last phase of the civil war in Sri Lanka between 2006 and 2009. “Since the US and the European Commission had both declared the LTTE a terrorist group,” David Keen observed, “Colombo’s claim that it was fighting a ‘war on terror’ was often difficult to counter.”⁹ A meeting at the Humanitarian Policy Group noted that the “Sri Lankan government has been extremely adept at playing the “war on terror” card...the trajectory of Sri Lanka’s civil war has been fundamentally shaped by a wider international geostrategic conflict that has helped to de-legitimise one side in the war and correspondingly helped to legitimize the abuse of civilians associated with that group.”¹⁰

These comments underline the permissive effects of counterterrorism discourse. Permissive effects “by serving as focal points, selectively divert our normative gaze”¹¹ according to Tannenwald. She uses this category to describe the nuclear taboo, the informal ban on the use of nuclear weapons, which has, in her analysis, contributed to “shield non-nuclear weapons from normative opprobrium”.¹² Because the overwhelming objective during the Cold War was to prevent a nuclear war between the major powers, conventional warfare received far less attention. The “red line” of the

³ John Holmes, ‘Let them decide’, *The Guardian*,

<http://www.theguardian.com/commentisfree/2009/apr/08/tamil-protests-sri-lanka-john-holmes>, 8 April 2009, last accessed on 13.08.2014.

⁴ Gordon Weiss, *The Cage. The fight for Sri Lanka & the last days of the Tamil Tigers* (London: The Bodley Head, 2011), 200.

⁵ Cf. Sarah Brockmeier, Gerrit Kurtz, and Philipp Rotmann, *Schutz und Verantwortung: Über die US-Außenpolitik zur Verhinderung von Gräueltaten* (Berlin: Heinrich-Böll-Stiftung, 2013), 57-66.

⁶ Council of the European Union, ‘Council conclusions on Sri Lanka’ (Brussels, 23 February 2009).

⁷ United Nations, ‘Report of the Secretary-General’s internal review panel on United Nations action in Sri Lanka’ (New York: United Nations, 2012), John Holmes, *The politics of humanity. The reality of relief aid* (London: Head of Zeus, 2013).

⁸ Interview with former British minister, London, June 2013.

⁹ David Keen, ‘The camp’ and ‘the lesser evil’: humanitarianism in Sri Lanka’, *Conflict, Security & Development* 14:1, 2013, 24. See also Damien Kingsbury, ‘Sri Lanka’, in Jared M. Genser, et al., eds. *The Responsibility to Protect* (Oxford: Oxford University Press, 2011), 303.

¹⁰ Humanitarian Policy Group, ‘Humanitarian Space in Sri Lanka: what lessons can be learned? Meeting Summary’ (London: Overseas Development Institute, 2010), 1.

¹¹ Tannenwald, ‘The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use’, 437.

¹² Ibid.

use of chemical weapons by the US government in the war in Syria in 2013 functioned in a similar war: by outlawing a particular type of warfare, it implicitly accepted everything else.

Such permissive effects are a side product of the logic of securitization. It implies that an actor convinces a target audience, through a discourse of “existential threats” for a reference object, to elevate the goal of security beyond the normal political sphere and justify extraordinary measures.¹³ In securitization logic, a counterterrorism discourse may justify practices that were previously deemed beyond the law such as detention without trial, enhanced interrogation, and mass surveillance. This has the permissive effect of crowding out the attention for the implementation of the counterterrorism objective, and the political dimension of the violence perpetrated by delegitimizing the opponent and its objectives. In a civil war situation where the standards of proportionality and non-indiscrimination in international humanitarian law are difficult to enforce anyway, a counterterrorism discourse tilts the balance of consequences strongly in favor of the government.

While the EU and its member states continued to recall the importance of “respecting human rights” in the combat against terrorism,¹⁴ this commitment rang hollow in the face of revelations about Europe's active involvement in practices of “extraordinary rendition”, detention without trial and torture.¹⁵ In addition to the high levels of violence in the counterinsurgency operations in Iraq and Afghanistan, the focus on counterterrorism crowded out non-security related concerns in the perception of Europe's policy. The “double speak” between supporting the government of Sri Lanka's fight against the LTTE, including listing the LTTE as terror organization, and public and private pressure to abide by the principles of proportionality and discrimination between civilians and combatants turned out to be an ineffective diplomatic strategy.

Europe's human rights and peace diplomacy in Sri Lanka conflicted with its strong development, diplomatic and military support for the government during the peace process. The EU's role in the Sri Lankan conflict also had an important symbolic dimension. Many actors perceived the listing of the LTTE as a signal for a military resolution of the war by the Sri Lankan army. The US had a similar experience: “whilst the US felt it was sending a clear message that their military support to the government came with strings attached – notably an imperative to show restraint – others interpreted it as a green light to pursue the war.”¹⁶

The EU felt the effects of the counterterrorism discourse especially when it tried to exert diplomatic pressure on the Sri Lankan government to show restraint in the final months of the war. Notwithstanding other important factors such as Sri Lanka's new diplomatic partners and the logic of the conflict dynamic itself, the counterterrorism logic hampered the EU's human rights policy significantly. The EU's diplomacy failed spectacularly when the EU requested a special session of the UN Human Rights Council on Sri Lanka in May 2009, but instead of the Council adopting the EU's draft, Sri Lanka moved its own draft first and persuaded enough member states to pass it.¹⁷

Thus, when it came to the crunch, the EU's adherence to the Sri Lankan government's counterterrorism discourse, its previous support for the government's offensive against the LTTE as well as its own record of dubious human rights compliance in the context of the US-sponsored counterterrorism effort, made its late calls for restraint look superficial, hypocritical, and one-sided. The case of Sri Lanka adds to the considerable literature regarding the pernicious consequences of

¹³ Barry Buzan, Ole Wæver, and Jaap de Wilde, *Security: a new framework for analysis* (Boulder, CO: Lynne Rienner Pub., 1998).

¹⁴ Council of the European Union, ‘The European Union Counter-terrorism Strategy’ (Brussels, 30 November 2005).

¹⁵ Amnesty International, ‘Partners in crime: Europe's role in US renditions’ (2006), Dick Marty, ‘Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report’, Doc. 11302 rev. (11 June 2007).

¹⁶ Jonathan Goodhand and Oliver Walton, ‘The Limits of Liberal Peacebuilding? International Engagement in the Sri Lankan Peace Process’, *Journal of Intervention and Statebuilding* 3:3, 2009, 314.

¹⁷ Human Rights Watch, ‘Sri Lanka: UN Rights Council Fails Victims’, <http://www.hrw.org/news/2009/05/27/sri-lanka-un-rights-council-fails-victims>, 27.05. 2009, last accessed on 18.01.2013, UN Human Rights Council, ‘Assistance to Sri Lanka in the promotion and protection of human rights’, UN Doc. A/HRC/RES/S-11/1 (27.05. 2009).

counterterrorism.¹⁸ It demonstrates how the broad-ranging and permissive discourse of counterterrorism provides an opportunity for the justification of an “all-out war” counter-insurgency strategy,¹⁹ de-legitimizes the opponent and forestalls effective diplomacy for compliance with international law.

In the following, I will explore this dynamic between counterterrorism and international diplomacy further. I will first provide a brief background on Europe's counterterrorism policy and practice up to 2009. I will then show how specific practices of the EU and its member states supported Sri Lanka's permissive counterterrorism discourse in the context of the failure of the peace process in Sri Lanka. In a third step, I will illustrate how this policy provided the background for Sri Lanka's skillful diplomatic maneuvers in the final months of the war and the attendant diplomatic blunders by European actors. In conclusion, I discuss the wider implications of this phenomenon for European crisis management.

Europe's counterterrorism policy

European member states have a long history of domestic political violence. Groups such as the IRA, ETA, the Red Brigades or the Red Army Faction were responsible for a significant number of assassinations and attacks on civilian targets already in the 1970s. These experiences taught European governments that such violence cannot be prevented without trying to understand the, albeit extreme, political demands of such groups and why certain sections of their domestic societies were sympathetic to their goals, even if not necessarily their means.²⁰

After the attacks in New York and Washington, DC on 11 September 2001, the European member states introduced a number of counterterrorism policies, relating, for example, to the financing of sanctioned organizations, the criminalization of the membership in “terrorist organizations” and the broadening of the intelligence agencies competencies for surveillance. For the EU, the counterterrorism efforts provided a welcome opportunity to expand its role as foreign policy actor.²¹ This was all the more the case since the deep split between EU member states over the war against Iraq in 2003 and the dominance of NATO in the war in Afghanistan.

The global context of these policies was dominated by the US “Global War on Terror” that not only justified the wars in Afghanistan and Iraq, but also a number of highly controversial practices such as a secret program by the Central Intelligence Agency that captured suspected terrorists or their supporters, brought them to third countries and employed “enhanced interrogation techniques” like waterboarding and stress positions on them (“extraordinary rendition”). Protecting their population from terrorist attacks, the US government argued, could justify military intervention without UN Security Council mandate (in Iraq), indefinite detention and torture of suspected terrorists,²² as well as withholding the recognition of certain international rights to “unlawful combatants.”²³ This policy left an impression on those states that were faced with armed non-state groups themselves. Foot observed in 2005 that “governments appear to believe they have renewed license to abuse human rights in the name of fighting terrorism, on the grounds that this is deemed an acceptable form of behavior and, moreover, emulates the behavior of the most powerful state in the system.”²⁴

¹⁸ Cf. David Keen, *Useful Enemies. When waging wars is more important than winning them* (New Haven and London: Yale University Press, 2012), David Keen, *Endless War? Hidden Functions of the 'War on Terror'* (London: Pluto, 2006).

¹⁹ Fabio Andres Diaz and Syed Mansoob Murshed, ‘Give War a Chance’: All-Out War as a Means of Ending Conflict in the Cases of Sri Lanka and Colombia’, *Civil Wars* 15:3, 2013.

²⁰ Daniel Keohane, ‘The absent friend: EU foreign policy and counter-terrorism’, *Journal of Common Market Studies* 46:1, 2008, 135.

²¹ Erik Brattberg and Mark Rhinard, ‘The EU as a global counter-terrorism actor in the making’, *European Security* 21:4, 2012.

²² Andrea Liese, ‘Exceptional Necessity. How Liberal Democracies Contest the Prohibition of Torture and Ill-Treatment when Countering Terrorism’, *Journal of International Law and International Relations* 5:1, 2009.

²³ Marco Sassoli, ‘Use and Abuse of the Laws of War in the “War on Terrorism”’, *Law and Inequality* 22:2, 2004.

²⁴ Rosemary Foot, ‘Human Rights and Counterterrorism in Global Governance: Reputation and Resistance’, *Global Governance* 11:3, 2005, 302.

The EU saw its approach to counterterrorism as distinctively different from the US. In 2006, the EU counterterrorism coordinator de Vries argued:

The struggle against terrorism is first and foremost a conflict over values. To win the battle for hearts and minds our policies to combat terrorism must respect the rights and values we have pledged to defend, including the rights of prisoners. Abu Ghraib, Guantanamo and CIA renditions have damaged America’s standing in the world and have compromised our common struggle against terrorism. Credibility matters. The European Union continues to believe that in this battle we should be guided by established international legal standards, including international human rights law.²⁵

Following the bombings in Madrid in March 2004, the EU’s adopted a counterterrorism that stresses the EU’s “strategic commitment” to respect human rights in the fight against terrorism and lays out four areas of cooperation: prevention of radicalization and recruitment, border security, law enforcement measures and the European arrest warrant, and crisis coordination in response to attacks.²⁶ As part of the first area, the strategy expressively lists the need for the EU to “promote even more vigorously good governance, human rights, democracy as well as education and economic prosperity”,²⁷ the tenets of liberal peacebuilding.

These objectives reflect how the EU’s comparative foreign policy advantage has often been described: as “normative power” or “civilian power” that prioritizes civilian conflict management over military approaches, and that, as a regional integration project, transcends traditional notions of state sovereignty making it a force for peace.²⁸ In this tradition, Manners argues that the EU should apply its “normative principles” in the fight against terrorism without falling into the trap of a seeming dilemma between those democratic standards and the security objective.²⁹

This self-depiction was a sharp contrast to the complicity of European states in the US rendition program as well as allegations against the UK of torture and detention without trial during its occupation of Iraq after the war in 2003. After public reports and some investigations in the UK itself, a public interest group eventually filed a complaint against the UK government with the International Criminal Court in 2014, based on the testimony of more than 400 Iraqi prisoners.³⁰ In 2006, Amnesty International alleged the complicity of European governments in the US rendition program in a number of specific cases of individuals that were abducted and tortured by the Central Intelligence Agency. Similarly, Dick Marty from Switzerland compiled investigation reports as special rapporteur for the Parliamentary Assembly of the Council of Europe where he laid out the cooperation by German, Italian, Bosnian, Polish and Romanian authorities with the rendition program.³¹ Partly based on these reports, in July 2014 the European Court of Human Rights ruled that Poland had been complicit in two cases of rendition at a CIA “black site” in Poland, where both men were subjected to mock executions, stress positions and threats against their families. Both ended up at the US base in Guantanamo Bay.³²

²⁵ Gijs de Vries, ‘The Fight Against Terrorism - Five Years After 9/11’, Annual European Foreign Policy Conference London School of Economics & King’s College <https://www.consilium.europa.eu/uedocs/cmsUpload/060630LondonSchoolEconomics.pdf>, 30 June 2006, last accessed on 3 November 2014.

²⁶ Council of the European Union, ‘The European Union Counter-terrorism Strategy’.

²⁷ Ibid.

²⁸ Ian Manners, ‘Normative Power Europe: A Contradiction in Terms?’, *Journal of Common Market Studies* 40:2, 2002, Ian Manners, ‘Normative power Europe reconsidered: beyond the crossroads’, *Journal of European Public Policy* 13:2, 2006, Francois Duchêne, ‘Europe’s role in world peace’, in Richard Mayne, ed. *Europe Tomorrow: Sixteen Europeans Look Ahead* (London: Fontana, 1972).

²⁹ Ian Manners, ‘European Union ‘Normative Power’ and the Security Challenge’, *European Security* 15:4, 2007.

³⁰ European Center for Constitutional and Human Rights, ‘Vorermittlungen des Internationalen Strafgerichtshofs gegen britische Militärs wegen Folter von Gefangenen im Irak’, <http://www.ecchr.de/grossbritannien.html>, 13 May 2014, last accessed on 4 November 2014.

³¹ Marty, ‘Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report’.

³² European Court of Human Rights, ‘Secret rendition and detention by the CIA in Poland of two men suspected of terrorist acts’, Press Release ECHR 231, [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4832205-5894802#{%22itemid%22:\[%22003-4832205-5894802%22\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4832205-5894802#{%22itemid%22:[%22003-4832205-5894802%22]}), 24 July 2014, last accessed on 4 November 2014.

Instead of preventing such practices of pre-emption and rights violations in favor of an overarching security imperative, it may be “Europe’s cosmopolitan image, and especially its perceived opposition to a politics of preemption, that stifles broad public debate about precautionary security practice in the European Union”, as de Goede observed.³³ This underlines the pervasive effects of securitization and of counterterrorism discourse in particular. It delegitimizes the opponent and frames actions against it as law enforcement instead of as a counter-insurgency operation (or indeed a civil war). It takes away the political nature of violence and reduces it to an evil that must be destroyed. In the extreme, it allows a government combating “terrorists” to identify its critics as potential supporters of terrorism, disregarding any criticism against the means to fight the opponent as apologetic justification of its practices.

Supporting a military approach in Sri Lanka

The European Union was involved substantially in the Sri Lankan peace process. It supported the ceasefire agreement of 2002 and the Norwegian mediation diplomatically (one of the six LTTE-government meetings even took place in Berlin). The Nordic member states of the European Union (Denmark, Sweden, and Finland) joined the civilian Sri Lanka Monitoring Mission (SLMM) that was tasked to monitor the implementation of the ceasefire between the LTTE and the Sri Lankan army and resolve complaints by the parties. The actual peace negotiations only lasted between February 2002 and April 2003, when the LTTE suspended its participant in the peace talks, citing its lack of invitation to the donor conference in Washington because it was still listed as terrorist organization there.

The EU and its member states were also one of the most important donors during that time. The EU became one of the “co-chairs” of the Tokyo donor conference in June 2003 (together with Japan, Norway and the US), a group that would coordinate policies and statements on Sri Lanka until the end of the war). The Tokyo conference linked the 4.5 billion US-Dollar of aid pledged over four years to concrete progress in the peace process. With the LTTE not having attended the conference and suspended the peace process, the implementation of this conditionality became increasingly difficult. After the Boxing Day Tsunami struck Sri Lanka in December 2004, the amount of unconditional public and private aid flowing into the country “liberated [the government] from any remaining need to attend to donor demands.”³⁴

Maintaining an even-handed approach in the peace process became increasingly difficult for the EU. In August 2005, the Sri Lankan foreign minister Lakshman Kadirgamar was assassinated, allegedly by the LTTE. In reaction, the European Union declared that “delegations from the LTTE will no longer be received in any of the EU Member States” and that it was “actively considering the Listing of the LTTE”.³⁵ In February 2006, the LTTE and the government of Sri Lanka met for another round of talks in Geneva, agreeing to continue the ceasefire agreement, but just two months later the LTTE withdrew from the peace negotiations indefinitely. On 29 May 2006, the European Union announced that the LTTE would be added to its autonomous sanctions list. Although it also called on the government to curb violence and rein in the Karuna group, which had split from the LTTE in 2004 and aligned with the government,³⁶ many observers perceived the listing as biased and problematic. The Swedish head of the SLMM at the time said that the EU should rather have listed both the LTTE and the government of Sri Lanka.³⁷ As a direct consequence of the listing, the LTTE

³³ Marieke de Goede, ‘The Politics of Preemption and the War on Terror in Europe’, *European Journal of International Relations* 14:1, 2008, 176.

³⁴ Adam Burke and Anthea Mulaka, ‘An insider’s view of donor support for the Sri Lankan peace process, 2000-2005’, in Jonathan Goodhand, Benedikt Korf, and Jonathan Spencer, eds. *Conflict and peacebuilding in Sri Lanka. Caught in the peace trap?* (London and New York: Routledge, 2011), 161.

³⁵ Council of the European Union, ‘Declaration by the Presidency on behalf of the European Union condemning the actions of the Liberation Tigers of Tamil Eelam (LTTE)’, 12669/1/05 REV 1 (Presse 248) (Brussels, 29 September 2005).

³⁶ Council of the European Union, ‘Declaration by the Presidency on behalf of the European Union concerning listing of the LTTE as a terrorist organisation’ (Brussels, 31 May 2006).

³⁷ Lisbeth Kirk, ‘Swedish general slams EU for terror listing Tamil Tigers’, euobserver, <http://euobserver.com/defence/22264>, 25 August 2006, last accessed on 4 November 2014.

asked all SLMM monitors from EU member states to leave, which resulted in halving the staff available to the mission (monitors from Norway and Iceland remained).³⁸ The listing effectively ended the EU's engagement in the peace process in Sri Lanka, making it difficult to appear impartial thereafter.

The listing decision also had a symbolic consequence. It reinforced the government of Sri Lanka's narrative of counterterrorism and its military approach to the conflict. This discourse made it harder for the SLMM and civil society groups to lobby Western diplomats to exert pressure on the government. A former member of the SLMM remembered:

I certainly think that there was a sense that the West was just interested in getting this over with and then deal with the fallout afterwards. But it's a speculation that you will find among many people. The people who were there what they based it on was the same thing that I did when I was there in 2004: going to speak to embassies and asking them to exert influence and just getting a sense that there was this "well, it's a legitimate counterterrorism effort by the government" and questioning [...] your 'evidence' when it comes to things the government did, whereas evidence was very easily accepted when it was something the LTTE did. So there was this generally held opinion that the LTTE, being this terrorist organization, does all this bad things, although there have been three decades of reports documenting violence by the government that's worse – I would say – than what the LTTE was responsible for.³⁹

Shortly after the listing, open fighting broke out between the LTTE and the Sri Lankan army, as the LTTE blocked a sluice gate that delivered water to farmers. In the midst of these clashes, the worst since the announcement of the ceasefire four years earlier, 17 national aid workers from the French NGO Action Contre le Faim (ACF) were killed on 6 August 2006 in Muttur near Trincomalee. The SLMM accused the government's security forces of responsibility for the massacre.⁴⁰ During the same month, President Rajapaksa made an unannounced visit to the UK, where Prime Minister Tony Blair interrupted his vacation and met the President at his country residence Chequers.⁴¹ There were no reports that Blair discussed the incident with Rajapaksa.

There were more mixed messages by European member states. While the UK reduced its bilateral aid to Sri Lanka in 2007 (from 10.3 m US-Dollar in 2006 to 1.68 m US-Dollar)⁴² in response to the renewed outbreak of high-intensity violence in the summer of 2006, it continued its arms exports until the government officially abrogated the ceasefire agreement in January 2008.⁴³ It rejected any notion that its rhetoric of emphasizing the need for a political solution to the conflict would be contradicted by its arms exports, which amounted to 47.5 m US-Dollar between 2001 and 2008.⁴⁴ There were arms exports from other European member states to Sri Lanka as well, notwithstanding the EU Code of Conduct on arms exports from 1998 which includes the following criterion: "Member States will not allow exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination."⁴⁵ EU member states continued to grant export licenses even after the official abrogation of the ceasefire agreement in 2008, with total arms exports to Sri Lanka from EU member states totaling almost 15 million Euro in

³⁸ Sri Lanka Monitoring Mission, *The SLMM report 2002-2008* (Oslo: Ministry of Foreign Affairs of Norway, 2010), 123.

³⁹ Phone interview, former SLMM monitor, July 2014.

⁴⁰ Justin Huggler, 'Europe accuses Sri Lankan army of assassinating aid workers', *The Independent*, <http://www.independent.co.uk/news/world/asia/europe-accuses-sri-lankan-army-of-assassinating-aid-workers-414060.html>, 31 August 2006, last accessed on 5 November 2014.

⁴¹ B. Muralidhar Reddy, 'Colombo, London to pursue peace plan', *The Hindu*, <http://www.thehindu.com/todays-paper/tp-international/colombo-london-to-pursue-peace-plan/article3069352.ece>, 2 September 2006, last accessed on 5 November 2014.

⁴² OECD-DAC

⁴³ Jonas Lindberg et al., *Arms trade with Sri Lanka - global business, local costs* (Stockholm: Pax editors, 2011), 75-77.

⁴⁴ Ibid.

⁴⁵ Council of the European Union, 'European Union Code of Conduct on arms exports' (Brussels, 5 June 1998).

2009, including licenses for bombs, torpedoes and missiles from Slovakia and Spain as well as for ground vehicles from Slovakia and the Czech Republic.⁴⁶

The European Union also held a dialogue with Sri Lanka on “the fight against terrorism” with the participation of Europol, co-sponsored by the US government and the French EU presidency. The first meeting took place in June 2008 in Colombo, in parallel with consultations between the European Commission and the Sri Lankan government. The second meeting took place in The Hague on 9-10 December 2008. At the latter meeting, the Sri Lankan ambassador to the EU acknowledged that this was the “first time such a wide-ranging international group of experts have chosen to devote an entire two days to discuss with EU member states and other 3rd affected countries, the ramifications of the activities of the Liberation Tigers of Tamil Eelam (LTTE)” and called on the states and organizations represented to increase intelligence cooperation, include LTTE front organizations on the sanctions list and to improve the criminal justice cooperation.⁴⁷

Clearly, EU's practices that portrayed the LTTE as terrorists were not disconnected from the group's actions, as the assassination of foreign minister Kadirgamar underlined. The failure to continue the peace negotiations as well as repeated attempts by the Norwegian mediators to revive them also allowed the Sri Lankan government to point out that it had tried a political solution before it would fully engage in its military offensive. The military record of the LTTE, and their support from Tamil diaspora groups worldwide made it much harder for any human rights advocacy regarding the protection of the Tamil population in the final battle. A British minister at the time observed in hindsight:

This was a determined insurgency which had kept going through thick and thin, which enjoyed local support, which had brushed aside the very limited offers of self-government. ... The thing was colored. This was not unarmed civilians. This was not Rwanda or Srebrenica. This was an insurgency which had never be willing to lay down its arms and enjoyed civilian support. So the debate was not as clear cut as one would have liked it to be.⁴⁸

The failure of human rights pressure 2008-2009

Counterterrorism legitimizes counter-insurgency

In view of the LTTE's record of violence against civilians, suicide attacks and political assassinations, most UN member states including from Europe recognized the legitimacy of the Sri Lankan government's counter-insurgency operation. Austria's ambassador to the UN, Thomas Mayr-Harting, said after a briefing by Emergency Relief Coordinator John Holmes to the Security Council in February 2009: “The Security Force activity in Sri Lanka is against terrorist organization conducted by an elected Government. However, international humanitarian law must be respected by both sides.”⁴⁹ His British colleague John Sawers added:

The LTTE is a terrorist organization proscribed by many countries including the UK. They are cornered and under pressure and the solution to the current situation is the LTTE laying down arms and allowing civilians to freely move and for political process begin. We have received an interesting briefing from Sir John Holmes. The IDP situation in transit camps are not as concerning as once feared. The problem is those trapped by the LTTE. UN Secretary General and his team can continue to remain engaged in this humanitarian situation and assist the process. The United Kingdom was in favour of

⁴⁶ Council of the European Union, ‘Twelfth annual report according to article 8(2) of council common position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment’ (Brussels, 13 January 2011), 255-56.

⁴⁷ ‘Act now to curb the LTTE front organizations in Europe - Sri Lanka urged at the Europol seminar’, Asian Tribune, <http://www.asiantribune.com/node/14692>, 14 December 2008, last accessed on 4 November.

⁴⁸ Interview with former British minister, London, June 2013.

⁴⁹ Daya Gamage, ‘U.N. Ambassadors unanimous LTTE laying down arms, releasing civilians to Sri Lanka government’, Asian Tribune, <http://www.asiantribune.com/node/15821>, 28 February 2009, last accessed on 5 November 2014.

receiving a briefing on Sri Lanka humanitarian aspect but the UK has a clear position that Sri Lanka is not on the agenda of the Security Council and it is not that kind of situation and the briefing was therefore received informally under other matters.⁵⁰

The government’s framing strategy could thus build on widespread international support. It delegitimized the LTTE as “terrorist” organization that was holding the civilians hostage. The response to such a criminal organization was consequently law enforcement. The government described this objective through a language of care and rescue. It was “engaged in protecting [...] [the] civilian population from terrorists”⁵¹ in a “humanitarian operation” to “rescue civilians”, as it insisted.⁵² In this way, the government of Sri Lanka turned the protection language used by the promoters of such notions as a “responsibility to protect” on its head. It unilaterally declared “no fire zones” and ordered all civilians to move in them, notwithstanding that LTTE units remained there as well.⁵³ Consequently, everything outside of these areas was potentially a military target. Defence secretary Gotabaya Rajapaksa replied to the question of a reporter in a TV interview who had asked him whether the hospital in Puthukkudiyiruppu, just outside the recently declared no-fire zone and only remaining strong-hold of the LTTE, would be a “legitimate target”: “Yes. No hospital should operate in the area, nothing should operate. That is why we clearly gave these No Fire Zones.”⁵⁴

For the Sri Lankan government, managing the international fallout of their actions was crucial. It had analysed military campaigns by previous governments and concluded that international pressure because of humanitarian concerns had always caused their predecessors to stop before defeating the LTTE.⁵⁵ Indeed, in 1987 the Indian government had air-dropped relief items to the cornered LTTE and Tamil civilians, which effectively stopped the Sri Lankan offensive shortly before defeating the rebels.⁵⁶ The deployment of the India Peacekeeping Force (IPKF) had followed, which failed to disarm the rebels and enabled them to establish almost full control of the Jaffna peninsula when it left in 1990.

The government’s strategy now consisted of regulating what international media could report about the war, but also strategically sowing doubts on any critical pieces. Journalists were only allowed to see the front on trips organized by the Sri Lankan army, and were not allowed access to IDP camps. Consequently, independent information from contacts in the conflict zone was tainted by the LTTE that remained in control. Every claim by international NGOs, foreign governments, or the media could be countered this way.

As one aid convoy by the World Food Programme (WFP) got stuck in the conflict zone, the two international staff accompanying it relayed their observations of shelling near their bunker inside the “no fire zone” and on clearly marked hospitals to the UN and foreign embassies in New York.⁵⁷ But even when it became undeniable that civilians were dying in the “no fire zones”, it was also increasingly clear that the LTTE did not let civilians flee – anyone who tried would be shot. In the 48 hours-humanitarian pauses that the government declared in reaction to international (and in particular Indian) pressure several times in those months,⁵⁸ no more than a few thousand IDPs emerged each time. The government also tried to deflate the absolute number of civilians left in the conflict zone. It claimed in February 2009 that there were between 70,000 and 100,000 people still

⁵⁰ Ibid.

⁵¹ UN Security Council, ‘Meeting Records, 6151st meeting’, UN Doc. S/PV.6151 (Resumption 1) (New York, 26.06. 2009), 23.

⁵² Ministry of Defense Sri Lanka, ‘Humanitarian Operation. Factual Analysis July 2006 - May 2009’ (Colombo, 2011).

⁵³ United Nations, ‘Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka’ (New York, 2011), 24.

⁵⁴ ‘Packed Sri Lanka Hospital Shelled’, Sky News, <http://news.sky.com/story/667068/packed-sri-lanka-hospital-shelled>, 02.02. 2009, last accessed on 18.08.2014. Transcript cited according to Weiss, *The Cage. The fight for Sri Lanka & the last days of the Tamil Tigers*, 129.

⁵⁵ VK Shashikumar, ‘Lessons from Sri Lanka’s War’, *Indian Defence Review* 24:3, 2009.

⁵⁶ Jyotindra Nath Dixit, *Assignment Colombo* (New Delhi: Konark, 1998).

⁵⁷ Cf. Weiss, *The Cage. The fight for Sri Lanka & the last days of the Tamil Tigers*, 96-120.

⁵⁸ Paul Moorcraft, *Total Destruction of the Tamil Tigers: The Rare Victory of Sri Lanka’s Long War* (South Yorkshire: Pen & Sword Books, 2012), 141-44.

left, while the UN thought there were around 300,000 in the same area.⁵⁹ The latter figure turned out to be closer to reality, as subsequent events showed.

Last minute European pressure

Only in the very last weeks of the hostilities did the European discourse change. On 15 April 2009, Bernard Kouchner and David Miliband called on the Sri Lankan government to commit to a ceasefire and abide by international humanitarian law. The French ambassador to the UN said a week later: “Most of the burden now is on the shoulders of the Sri Lankan authorities - because they have won the war. And they have the responsibility to protect their own population.”⁶⁰ The visit by Miliband and Kouchner at the end of April occurred in a stiff atmosphere, with Miliband and President Mahinda Rajapaksa exchanging harsh allegations against each other. According to reports, Miliband said: “This massacre needs to be stopped immediately”, to which the President reportedly replied: “We are trying to free these people from the LTTE. Do you think we are still a colony of yours?”⁶¹

In view of the history of the Sri Lankan conflict and the government’s perception that international pressure had stopped its predecessors from defeating the LTTE once and for all, this last-minute pressure may have had even counter-productive effects. Sri Lanka’s ambassador to the UN in Geneva, Dayan Jayatilaka, later claimed: “If not for these external factors acting as accelerants, the war could/would have taken another month to finish, with greater circumspection. [...] We had to outrun the pressures by accelerating the military offensive and closing the endgame as soon as possible.”⁶²

In any case, the human rights pressure seemed to contradict the strong previous support for the military approach. President Mahinda Rajapaksa later expressed “a combination of bewilderment and frustration” that the US was pressing his government on war crimes allegations, as US President Bush “personally had encouraged him to pursue [the] defeat of the LTTE,” the US embassy in Colombo cabled to Washington.⁶³ “What Western governments really wanted, though they could not and did not say so,” claims John Holmes, “was a quick government victory and minimal civilian casualties in the process.”⁶⁴

Reports indicated as the fighting drew to a close in May 2009 that this logic was not tenable: the relatively quick government victory was achieved with considerable civilian casualties in the process. On 15 May, for example, Walter Kälin, UN Special Rapporteur on IDPs, warned that the government had still been using heavy weapons in the last few days in the conflict zone, where at least 50,000 civilians were remaining trapped. This “must have resulted in unacceptably high numbers of civilian casualties,”⁶⁵ he said. Thus, the Sri Lankan government had not complied with its numerous assurances to cease using heavy weapons in public and private at least since February.⁶⁶

The use of heavy weapons, despite heavy international pressure, served a tactical objective: boosting morale in the army and bolstering military self-protection. As strategists in the region point

⁵⁹ For a helpful overview of the different claims at different points in time, see United Nations, ‘Report of the Secretary-General’s internal review panel on United Nations action in Sri Lanka’, pp. 37-39.

⁶⁰ Permanent Mission of France to the United Nations, ‘Comments to the Press by H.E. Mr. Jean-Maurice Ripert, Permanent Representative of France to the United Nations’, <http://franceonu.org/la-france-a-l-onu/espace-presse/declarations-presse/points-de-presse/avril-2009-973/article/22-avril-2009-commentaires-a-la>, 22.04. 2009, last accessed on 15.08.2009.

⁶¹ Moorcraft, *Total Destruction of the Tamil Tigers: The Rare Victory of Sri Lanka’s Long War*, 139.

⁶² Dayan Jayatilaka, *Sri Lanka’s North-South Crisis. Long War, Cold Peace* (Colombo: Vijitha Yapa Publications, 2014), 323.

⁶³ President Rajapaksa even complained to the US that US President Bush had encouraged him to defeat the Tamil Tigers, which he had done, but was now being criticized for it, US Embassy Colombo, ‘President Bewildered, Frustrated With U.S. Sri Lanka Policy’, Wikileaks, <http://www.cablegatesearch.net/cable.php?id=09COLOMBO893>, 18.09. 2009, last accessed on 12.12.2012.

⁶⁴ Holmes, *The politics of humanity. The reality of relief aid*, 105.

⁶⁵ Walter Kälin, ‘UN expert extremely concerned about situation of displaced in Sri Lanka’, Press Release, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7575&LangID=E>, 15 May 2009, last accessed on 18 September 2014.

⁶⁶ John Holmes, ‘Briefing to the Security Council on the humanitarian situation in Sri Lanka’ (New York, 2009).

out, fighting morale in the Sri Lankan army against an enemy that has eluded its defeat for several decades and constructed a myth of invincibility around it was traditionally low.⁶⁷ In addition, the Sri Lankan armed forces effectively doubled between 2006 and 2009, with new recruits being given only limited training before being sent to fight. “Softening the ground”⁶⁸ of LTTE defense positions before moving in with infantry could thus help to counter these tactical challenges – to the detriment of the civilians trapped in the war zone.

Failure in Geneva

If they could not stop the final offensive by the Sri Lankan military, European governments at least wanted to ensure accountability for crimes committed in the process and a political process to address the underlying grievances of the conflict.⁶⁹ On the international level, the European Union had been lobbying for a special session of the UN Human Rights Council in Geneva to address these challenges. Initially, the session was planned for 14 May, but the EU member states failed to gather sufficient sponsors in time. Both Tamil diaspora groups as well as Sri Lankan diplomats engaged in intense lobbying with members of the Council. On the same day President Rajapaksa declared the end of the war (19 May), Germany finally submitted the request to the president of the Council for a special session on behalf of the European Union. Instead of attaching a draft resolution to the request, however, Germany and the other European sponsors of the draft chose to continue negotiating with possible sponsors.

They did not anticipate the skilled diplomacy by the Sri Lankan mission. It submitted its own draft resolution just one hour after receiving the notification for the special session. Since the procedural rules of the Council demand that the draft that has been submitted first is discussed first, the Sri Lankan draft was to be the basis for the special session.⁷⁰

As the special session took place on 26 and 27 May 2009, the Europeans were outgunned and outmaneuvered. The Sri Lankans had secured a broad alliance of non-aligned states, including its neighbor India. In contrast, the Europeans had only carried out very few demarches in member state capitals to gather support for their draft.⁷¹ The Sri Lankan group of friends included the non-aligned movement’s present and incoming chairs (Cuba and Egypt). It managed to paint the European effort in stark terms as expression of an “old-fashioned manner” that was in contradiction with the “new culture of work... [of] transparent and inclusive dialogue.”⁷² The Human Rights Council had indeed been established in 2006 as a successor to the Human Rights Commission that had been perceived as biased and ineffective. The new Universal Periodic Review, where all UN member states would receive a review of their human rights record on a rotating basis, was the most visible new instrument of this new objective, one for which the European countries had pushed hard. So quickly after the end of the war, the European initiative was perceived as overly demanding and unfair, given the massive humanitarian challenge facing the country now (with around 300,000 IDPs in camps) and the rhetorical commitment to reconciliation and accountability by the President in his victory speech⁷³ and in his joint communique with Secretary-General Ban Ki-Moon who had visited the country on 22-23 May.⁷⁴ In addition, the Sri Lankan diplomats conceded a number of amendments to their draft, partly from the European draft, which seemed to have helped secure support from non-European

⁶⁷ Interviews in Delhi, March 2014, and Nitin A. Gokhale, *Sri Lanka. From war to peace* (New Delhi: Har-Anand, 2009).

⁶⁸ United Nations, ‘Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka’, p. 16.

⁶⁹ Council of the European Union, ‘EU Council conclusions on Sri Lanka’ (Brussels, 18 May 2009).

⁷⁰ United Nations, ‘Report of the Secretary-General’s internal review panel on United Nations action in Sri Lanka’, p. 89.

⁷¹ US Mission to the UN, ‘Ambassador Rice Meeting With UNHCHR Pillay’, Wikileaks, <https://cablegatesearch.wikileaks.org/cable.php?id=09USUNNEWYORK622>, 25 June 2009, last accessed on 5 November 2014.

⁷² Cuba, ‘Statement by H.E. the ambassador of Cuba, Juan Antonio Fernández Palacios, on behalf of the on-aligned movement’ (Geneva: Human Rights Council, 2009).

⁷³ Mahinda Rajapaksa, ‘Address at the ceremonial opening of Parliament’, http://www.president.gov.lk/speech_New.php?Id=74, 19 May 2009, last accessed on 12.08.2014.

⁷⁴ UN Secretary-General and Government of Sri Lanka, ‘Joint statement at the conclusion of UN Secretary-General’s visit to Sri Lanka’ (Colombo, 2009).

states. Uruguay, which had originally sponsored the request for the special session, even volunteered to become a co-sponsor of the Sri Lankan draft.⁷⁵

The Human Rights Council passed the amended draft with a clear majority of 29 votes in favor, 12 against, and 6 abstentions. In the resolution, the council confirmed the Sri Lankan narrative of a rescue operation by “welcoming the conclusion of hostilities and 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, as well as the efforts by the Government to ensure the safety and security of all Sri Lankans and to bring permanent peace to the country.”⁷⁶ Not without glee, Sri Lanka’s ambassador to the UN in Geneva described the outcome as “miniature diplomatic Dien Bien Phu or Bay of Pigs.”⁷⁷

Conclusions

So, Europe’s human rights diplomacy at the end of the war in Sri Lanka turned out to be highly ineffective, even counter-productive. Instead of ensuring the respect for human rights and international humanitarian law in combating terrorism, its counterterrorism discourse and policy out-crowded its belated human rights diplomacy. While pledging its commitment to its values and international commitments, the participation of European governments in the war in Iraq as well as in the US practice of “extraordinary rendition” exposed them to allegations of hypocrisy, double standards and selectivity. Having supported the Sri Lankan government in its fight against the LTTE with arms, the sanctioning of the LTTE and dialogue forums, European governments did their part to create an international environment that signaled its affirmation of an “all-out war” strategy in counter-insurgency against the LTTE.

Ironically, during the same time, the dominant Western model of counter-insurgency changed to fully embrace the “population-centric” approach propagated by David Kilcullen and David Petraeus implemented in Afghanistan.⁷⁸ Nonetheless, despite a commitment to the protection of civilians, even this approach continued to cause substantial civilian casualties and included targeted killings through drone strikes.⁷⁹ This is not just a matter of doctrines and principles; it is also a question of capacity and training. Civilian engagement in a counter-insurgency situation requires different skills than conventional warfare.

Naturally, European states were not the only international players affecting the outcome in Sri Lanka – India was certainly the most influential international actor, and the US, China, Japan, Pakistan and others played their part as well. Still, the crisis management tools theoretically available to the EU and its member states mostly proved to be too cumbersome, too long or too late. The US and the EU pressured the IMF to delay a stand-by facility for Sri Lanka at least for a few months, as Sri Lanka’s coffers had been emptied by the rearmament and the world economic crisis in early 2009. The Sri Lankan government, however, was able to turn to the Gaddafi government in Libya for an interim loan until the IMF ultimately disbursed the funds in July 2009.⁸⁰

In 2008, the European Union’s trade preferences agreement with Sri Lanka (General Scheme of Preferences, GSP+) came up for renewal. The EU is Sri Lanka’s largest trading partner, accounting for around 36% of its total exports, more than half of which consist of textiles and garments. The EU uses GSP+ to encourage human rights compliance by linking the removal of tariffs for the target country with the implementation of 27 international conventions on labor and other human rights, sustainable development and governance (for Sri Lanka, this was mainly about garment exports). The Sri Lankan government refused an on-site “investigation” into its compliance with those conventions, so that the year-long investigation by the European Commission relied on

⁷⁵ Jayatilleka, *Sri Lanka’s North-South Crisis. Long War, Cold Peace*, 285.

⁷⁶ UN Human Rights Council, ‘Assistance to Sri Lanka in the promotion and protection of human rights’.

⁷⁷ Jayatilleka, *Sri Lanka’s North-South Crisis. Long War, Cold Peace*, 294.

⁷⁸ David Kilcullen, *Counterinsurgency* (Oxford and New York: Oxford University Press, 2010), US Army, ‘Field Manual 3-24. Insurgencies and countering insurgencies’ (Washington, DC: US Army, 2014).

⁷⁹ David Lewis, ‘The failure of a liberal peace: Sri Lanka’s counter-insurgency in global perspective’, *Conflict, Security & Development* 10:5, 2010.

⁸⁰ C. A. Chandraprema, *Gota’s War: The Crushing of Tamil Tiger Terrorism in Sri Lanka* (Colombo: Piyasiri Printing Systems, 2012), 463-64.

UN and non-governmental reports. This process probably came in too late to actually affect the behavior of the Sri Lankan authorities. In the end, the Council of the EU decided on 15 February 2010 to suspend the GSP+ trade benefits.⁸¹

Most importantly, short of sanctions or even military options, political pressure was hardly effective. Sri Lanka still cared a great deal about its image abroad, as it was hoping for a surge in investments and tourists after the war, and depends on its good trade links for its exports and commercial hub near a major shipping line between East Asia and the Gulf. "The only thing that could have really made a difference was political pressure", observed a UN official cognizant of the situation.⁸² But Europeans, especially the British, were easily portrayed as acting on the demands of very active Tamil diaspora groups, as well as of double standards and hypocrisy in view of their own counterterrorism practices in Afghanistan and at home. This underlines the unintended consequences of a security discourse focused on counterterrorism. While it justifies extraordinary measures by the actor, it also affects its credibility and diplomatic room of maneuver with third parties. The EU and its member states would do well to critically review their counterterrorism rhetoric and policies in this regard.

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⁸¹ Council of the European Union, 'Implementing regulation (EU) no. 143/2010 of the Council temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka' (Brussels, 20 February 2010).

⁸² Phone interview with UN official, Executive Office of the Secretary-General, July 2014.

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