

From R2P to RANP: Sri Lanka and ‘Responsibility After Not Protecting’

Written by Henrietta Briscoe

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HENRIETTA BRISCOE, FEB 7 2014

The Responsibility to Protect (R2P) doctrine sets out a three-fold responsibility. First, states have a primary responsibility to protect their populations from genocide, war crimes, crimes against humanity and ethnic cleansing. Second, the international community has a responsibility to assist states so that they can fulfil their R2P. Third, if the state in question ‘manifestly fails’ to fulfil its R2P then the international community has a responsibility to act in a “timely and decisive manner” on a “case by case basis”.^[1] But what happens when both the host state and the international community fail to fulfil their obligations under the doctrine of R2P? I argue that the international responsibilities under R2P survive after mass atrocities have been committed and after a failure of prevention and protection. I argue that inherent to R2P is ‘RANP’ – Responsibility After Not Protecting – and I employ the example of Sri Lanka to demonstrate the value of this concept.

Sri Lanka: Placing the Conflict in Context

For some 26 years, Sri Lanka was ravaged by civil war.^[2] Following independence in 1948, tensions mounted between the Buddhist Sinhala majority and the island’s minority Tamil community. From 1956 successive governments had campaigned on a Sinhala nationalist platform. What was an electoral democracy at time of Independence became the ‘tyranny of the majority’.^[3] With the failure of social mechanisms to hear and address grievances, violence erupted. The Liberation Tigers of Tamil Eelam (LTTE) emerged as the self-declared representatives of the Tamil people. The conflict intensified. All attempts at resolution failed, most notably the Norwegian brokered peace process (2002 – 2006).^[4] On November 19, 2005, Mahinda Rajapaksa was sworn in as President to the Sri Lankan Freedom Party Government, it was a narrow victory fought on the promise of reasserting state sovereignty on the international stage and, on the domestic front, ending the civil war. Under Rajapaksa’s presidency the forces of the LTTE were dealt with illiberally. President Rajapaksa celebrated the destruction of the LTTE, triumphal, in May of 2009.

The Failure of R2P in Sri Lanka

With the exception of Sri Lankan state denials, there is now near full acceptance that Sri Lanka was responsible for the commission of atrocities particularly in the final months of the war. The UN Panel of Experts report from March 2012 puts the civilian death toll at a minimum of 40,000.^[5] The November 2012 Internal Review Panel Report, the ‘Petrie’ report, references ‘credible reports’ that civilian casualties were as many as 70,000.^[6]

The International Community has recognized its own failures in 2009: the Petrie report detailed both the extent of knowledge of the crimes perpetrated by the Sri Lankan state against its citizens and the lack of international action in the face of such knowledge. It was not a war without witness, but a war where a decision was made not to bear witness. More recently, Madeleine K. Albright and Richard S. Williamson, in their capacity as co-chairs of the Working group on the R2P, observed, “Tens of thousands of Tamil civilians died at the end of the Sri Lankan civil war with little inter-national outcry or effective UN response”.^[7] Sri Lanka is thus an example of R2P “double manifest failure”: a failure to protect on the part of both the state and the international community.^[8]

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Countless reports attest to the vast human rights abuses that have been committed in the island since 2009. The UN Human Rights Council (HRC) has twice passed resolutions on Sri Lanka in 2013 and 2012 expressing concern at the human rights violations, at

“enforced disappearances, extrajudicial killings, torture and violations of the rights to freedom of expression, association and peaceful assembly, as well as intimidation of and reprisals against human rights defenders, members of civil society and journalists, threats to judicial independence and the rule of law, and discrimination on the basis of religion or belief”.^[9]

The Council urged Sri Lanka to bring itself to account.

Despite the overwhelming evidence of Sri Lankan state responsibility for crimes against International Humanitarian and Human Rights Law, attempts to bring the Sri Lankan state and its officials to account are frustrated on multiple levels. Domestically the state is neither willing nor able to provide justice. The UN Office of the High Commissioner for Human Rights released a damning report on the domestic ‘Lessons Learnt and Reconciliation Commission’ and the ‘National Action Plan’.^[10] Since the Sri Lankan state refuses to concede that there were any civilian deaths in the final phase of the conflict, save minimal collateral damage, the findings of the report come as no surprise. Furthermore there is no independent judiciary in Sri Lanka.^[11] On the international stage, Sri Lanka is not a state party to the Rome Statute and thus the International Criminal Court cannot exercise jurisdiction, at least not without a Security Council referral.^[12]

Today’s abuses in Sri Lanka are a continuation of past crimes and policies. A potent blend of impunity and triumphalism begets yet more Tamil suffering. Although the international community has reflected upon its own failures, it is in danger of filing away that failure, of consigning it to the past as though the time for R2P action is over. But the violence has not stopped. The citizens of Sri Lanka continue to be failed, nationally and internationally, in part because R2P is understood and employed too narrowly.

Responsibility After Not Protecting (‘RANP’)

The available measures to ‘protect’ and ‘prevent’ under the R2P are many and varied.^[13] The provision of justice is part and parcel of the international community’s responsibilities under R2P. Madeleine K. Albright and Richard S. Williamson, in their co-authored report, previously mentioned, recognise the pre-eminent importance of prevention within the R2P and the significance of justice and accountability for prevention.^[14] The imperative to provide justice is arguably made all the more pressing after a demonstrable failure of R2P, as is the case in Sri Lanka, where the state (having perpetrated crimes against the Tamil people during the conflict, in contravention of international humanitarian law), is now, in the space enabled by impunity, committing grave human rights violations predominantly against the same body of people.

However, despite the scope and breadth of the concept in theory, R2P has become increasingly associated with military intervention at the climax of a crisis. Thus Libya is held up as an R2P success; Syria, a current failure; Sri Lanka, a past failure. To re-engage the less kinetic aspects of the R2P, and maximise the concept’s potential utility, I argue that there is room for and need of another new acronym, namely ‘RANP’: Responsibility After Not Protecting.^[15]

RANP is a concept forged entirely from within R2P. As such, it is not a new creation. But it is in need of its own title in order to impress that R2P is as alive and pertinent after a failure, after a mass atrocity, as it is at the point of commission of that atrocity. RANP demands that the international community remains fully engaged – and in diverse ways and places – in the aftermath of a crisis, in the understanding that the obligations of the R2P’s third pillar still hold. In the case of Sri Lanka, the lack of any meaningful lawful accountability for crimes, the systematic cruelty of the ‘rehabilitation’ programme of former members of the LTTE,^[16] the flood of asylum boats laden with their desperate cargo,^[17] all are examples testifying to the failure of R2P today, post ‘conflict’ – that is, a failure of RANP.

R2P’s utility has been suffocated by a too narrow temporal interpretation of its reach, but also by a restrictive spatial

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understanding. Although conceptually the *there* and *here* are bound in R2P – since the domestic is made the concern of the international – in terms of action the distinction between the *here* and the *there* remains heavily drawn. That is, the site of action under R2P is largely conceived as being within the borders of the R2P 'host' state, over *there* where the crisis is unfolding. But Sri Lankan state violence post 2009 firmly exceeds the boundaries of state; the government of Sri Lanka conducts surveillance on Tamil diaspora groups, and treats that diaspora as inherently dangerous.[18] And it is only outside of Sri Lanka that survivors can speak out. In the absence of political consensus among the members of the UN Security Council on the situation in Sri Lanka, individual member states can nevertheless, in the interim, at least meet some of their responsibilities under R2P, *here* at home.

Some Aspects of RANP

RANP therefore demands action along the full gamut of the R2P toolbox both *after* a failure and in diverse sites, *here* and *there*. Some tentative suggestions for the shape that that action could take and that are pertinent to the current situation in Sri Lanka include honouring the right to political asylum, pursuing domestic suits, and the concerted application of diplomatic pressures.

1. Honouring the right to political asylum: Asylum is one area decidedly within the control of individual member states of the UN. States can protect the victims of Sri Lankan state crimes, on their own territories, but on so many occasions are failing to do so, cementing failure with failure.[19] As part of their responsibilities under RANP, states ought to not only meet their international obligations – such as the right to political asylum – but ought to exceed them. This could be done by, for example, proactively seeking out and protecting witnesses of international humanitarian and human rights crimes, with an eye to preserving evidence, not only in support of hoped for future international prosecutions, but also for domestic proceedings. To do so requires a framework, one that compels a thorough understanding of international responsibilities and of a country situation, with the political appetite to act – RANP.

2. Litigation: The impediments to bringing Sri Lanka to account have already been listed. But it is not enough to turn to UN bodies for justice and then turn away as the UN stumbles, waiting until the political situation is amenable, and in the meantime relinquishing all individual state responsibility in the prosecution of crimes. Indeed some crimes, including genocide, war crimes and crimes against humanity, are considered so heinous that every state has a legitimate interest in their repression – such is the rationale of the principle of universal jurisdiction. Thus, simultaneously to pushing for an International Independent Investigation through the UN Human Rights Council, we ought in the meantime *here* in the UK and elsewhere, as part of our responsibilities (R2P and RANP), seize upon our domestic universal jurisdiction provisions as a vehicle by which to bring some, albeit limited, accountability.[20]

3. Diplomacy: Diplomatically, much more can be done, and the momentum towards an international independent inquiry into the conduct of the Sri Lankan government in the civil war, spurred forwards by David Cameron's words after the Commonwealth Heads of Government Meeting held in Colombo November 2013, must be capitalised and built upon.[21] That Colombo did host the meeting is however a sad indictment of the Commonwealth.

Above all, concerted engagement must start with rigorous analysis. In the reviews of Sri Lanka's record at the Human Rights Council, there was a worrying tendency among states party, to beg for 'time' on Sri Lanka's behalf: time to transition from war to peace.[22] Such pleas represent a fundamental misreading of the nature of the Sri Lankan state, of the state's intentions and conduct in the civil war, and since May 2009. The calls for time and patience, the invocation of mitigating circumstances – largely that of terrorism – are also reflective of a propensity to attribute human rights failings to the inadequacies of government institutions and to extraordinary conditions. International support and guidance bestowed upon the offending state are offered as the salve to such failings and excesses. But failure to 'protect', in war and peace, can also be intentional. Giving more time to a state that has intentionally committed atrocities against its own populace is deeply problematic. Without a rigorous case by case analysis, set in historical context, and without the international community remaining alive to its enduring responsibilities, the true nature of the state is all too easily obscured, and failings are understood, as they too often are in the case of Sri Lanka, reductively, as the product and proof of the inadequacies of ill-formed institutions that have been corrupted by a long civil war.[23]

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Conclusion

As has been demonstrated in the four years since the end of the civil war in Sri Lanka, it is sadly all too easy for the United Nations and all the states that comprise it to say "we failed to protect" – past tense – and then to continue to do nothing – present tense – consigning R2P to action, over *there*, in a crisis and not after one. It has the potential to be so much more.

Under R2P, the International community has a collective responsibility after not protecting, RANP, if not a collective obligation.[24] It is a responsibility to be exercised *here* and *now*. Continued failure with regards to Sri Lanka serves to give confidence to those who would transgress the peremptory norms of international law, that they can do so with impunity.

[1] '2005 World Summit Outcome Document' UNGA Res. 60/1, 16 September 2005, paragraphs 138 and 139. Also, Report of the Secretary-General B. Ki-moon, 'Implementing the Responsibility to Protect' (A/63/677, 12 January 2009).

[2] "A protracted intrastate conflict" pg. 3 Kristian Stokke and Jayadeva Uyangoda, Liberal peace in question: politics of State and Market reform in Sri Lanka, (Anthem South Asian Studies, 2011).

[3] Rampton, D, 'In the Wake of Legends. The Need for an Ontological Understanding of Nationalism and Power' Appendix 1 in Bruce Kapferer Legends of people myths of state, (ed 2012). Pg. 278

[4] Lewis, D, 'The failure of a liberal peace: Sri Lanka's counter-insurgency in global perspective', Conflict, Security & Development, 10(5), 2010, pp. 647–671.

[5] 'Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka' 31 March 2012.

[6] Paragraph 34, the Petrie Report

[7] Madeleine K. Albright and Richard S. Williamson 'The United States and R2P: From Words to Action' 2013

[8] Melissa T. Labonte coined the term "double manifest failure" to describe a situation when both a host nation and international community have been unable or unwilling to protect civilians through R2P. "Whose Responsibility to Protect? The implications of double manifest failure for civilian populations" International Journal of Human Rights 16:7 982-1002.

[9] UN HRC, A/HRC/22/L.1/Rev.1, Twenty Second Session 'Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General' 19 March 2013. UN HRC A/HRC/19/2, "Report of the Human Rights Council on its Nineteenth Session".

[10] 'Report of the Office of the United Nations High Commissioner for Human Rights on advice and technical assistance for the Government of Sri Lanka on promoting reconciliation and accountability in Sri Lanka' 11 February 2013

[11] Report on the Impeachment of Sri Lanka's Chief Justice, Conducted for the Bar Human Rights Committee by Geoffrey Robertson Q.C. 2013. International Commission of Jurists "Sri Lanka: ICJ Report Documents Crisis of Impunity" 1 November 2012

[12] For a list of signatories to the Rome Statue see http://www.iccnw.org/documents/Signatories_RomeStatute_2009.pdf

[13] "A Toolkit on the Responsibility to Protect", International Coalition for the Responsibility to Protect, 21-25.

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<http://responsibilitytoprotect.org/ICRtoP%20Toolkit%20on%20the%20Responsibility%20to%20Protect%20high%20res.pdf>

[14] They argue that the steps that need be taken to strengthen R2P include, "pursuing a policy of positive engagement with the International Criminal Court (ICC)" as "a means of deterring and prosecuting war crimes".

[15] In 2011 the Brazilians introduced RWP, Responsibility While Protecting to the R2P. 'Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General' 11 November 2011.

[16] ICJ Briefing Note, September 2010, "Beyond Lawful Constraints: Sri Lanka's Mass Detention of LTTE Suspects" http://reliefweb.int/sites/reliefweb.int/files/resources/28738E40D73D48AB492577AF000B5BD6-Full_Report.pdf?bcsi_scan_76859af71b923077=0&bcsi_scan_filename=28738E40D73D48AB492577AF000B5BD6-Full_Report.pdf

[17] And the governments who either send those asylum seekers back to face torture, or indefinitely detain them without due process. <http://theconversation.com/australia-dangerously-close-to-the-abuse-of-fleeing-sri-lankans-21166>. <http://www.theguardian.com/commentisfree/2013/jun/17/enhanced-screening-sri-lanka-claims>

[18] Tamils Against Genocide 'Activist Intimidation: Surveillance and Intimidation of Tamil Diaspora Activists and their Supporters' 13 March 2013

[19] In March 2013, the UK was sharply criticised by the UN Committee Against Torture for falling short of its international legal obligations under the UN Convention Against Torture – including for the UK's refusal to admit new evidence of the torture of Tamils returning to Sri Lanka from the UK into its asylum policy. <http://www.freedomfromtorture.org/news-blogs/7347>.

[20] I would argue that when the substantive issue is one of alleged violations of peremptory norms – from which no derogation is permitted – the procedural bar that is diplomatic immunity should be waived, particularly when there are no other means available to hear justice. But at the very least, states can focus their attentions on those who do not fall under the expansive protections of diplomatic immunity.

[21] Channel 4 News, 'David Cameron on Sri Lanka in the Commons – video' 18 November 2013, last accessed 10 January 2014. In that speech to the Commons, David Cameron recounted a conversation with President Rajapakse, "I pressed for credible, transparent and independent investigations into alleged war crimes and I made it clear to him that if these investigations were not begun properly by March then I will use our position on the UN Human Rights Council to work with the UN Human Rights Commissioner and call for an international inquiry".

[22] "The UPR: On the significance of context, of terror, and lest we forget the Tamil Question" 14 November 2012, and Tamils Against Genocide Press Release, 15th November 2012 "Sri Lanka's continued appeal to 'terror' threat while the International Community 'forget' the Tamil Question" <http://www.tamilguardian.com/article.asp?articleid=6309> and <http://www.tamilsagainstgenocide.org/read.aspx?storyid=88>

[23] For example, systematic discriminate torture in Sri Lanka has been explained as an unintended product of a shortage of legal checks and balances, whilst the question of state intentionality has not been posed. See ICJ "Beyond lawful constraints: Sri Lanka's mass detention of LTTE suspects" Sept 2010. Ibid fn 12.

[24] Indeed there is arguably a legal dimension to the doctrine of prevention, within the R2P, i.e. a positive obligation on states to prevent the four R2P crimes. Rosenberg (2009) "Responsibility to Protect: A Framework for Prevention" Global Responsibility to Protect 1 (2009) 442–477

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