

The Conflict in Sri Lanka and the Responsibility to Protect

Written by Alex J. Bellamy

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ALEX J. BELLAMY, MAY 1 2009

In mid 2008, the Sri Lankan government began a military offensive against Liberation Tigers of Tamil Eelam (LTTE) rebels known as 'Tamil Tigers'. That offensive escalated at the beginning of this year as towns and cities fell to government forces. By April 2009, the rebels had been pushed into a small area of jungle near Mutulivu. Alongside the 'Tigers', however, were approximately 150,000 civilians (and around half that number at the time of writing, 1 May 2009). Many of these civilians have been prevented from fleeing to safer ground by the LTTE, which is determined to use them as human shields and bargaining chips, and subjected to aerial bombardment and mortar fire directed against the LTTE by Sri Lankan government forces. According to the UN's Office for the Coordination of Humanitarian Affairs (OCHA), by April 2009 around 2,600 civilians had been killed by the fighting. Civilians trapped by the fighting therefore face a double peril: if they flee, they risk being killed by the LTTE; if they stay, they are in danger of becoming victims of the government's bombardment. To make matters worse, the Sri Lankan government has limited the access of humanitarian agencies and the UN to the disputed territory. As a result, trapped civilians have little hope of accessing vital medical help and life sustaining supplies. And finally, even if they do manage to escape, ad hoc camps for displaced persons are anything but safe havens. Not only are there scant supplies and medical support, but there have also been reports of 'disappearances' and other violations inside the camps.[1] The UNHCR has had some access to populations through its relief centers for the displaced populations, but has reported limited access to humanitarian supplies and an inability to protect the populations seeking access to camps.

All this has inevitably prompted some humanitarian advocates to call for urgent international action. A few have invoked the 'Responsibility to Protect' (RtoP) principle. For instance, writing in the *Washington Post*, James Traub described Sri Lanka as 'exactly the kind of cataclysm that states vowed to prevent when they adopted the "responsibility to protect"'. [2] Traub called for the UN Security Council to take matters into its own hands by threatening to refer the matter to the International Criminal Court, dispatching a UN envoy and considering the imposition of sanctions. In contrast, Mary Ellen O'Connell rejected RtoP as a 'distraction' likely to increase mistrust and provoke opposition to international engagement aimed at protecting the civilians who remain in peril.[3] Which of these perspectives is right?

The first thing we need to do is be very clear about what we mean when we talk about RtoP. All too often, global debate about RtoP has been hampered by confusion about what the principle actually says – and what it does not say. There are, of course, multiple accounts of RtoP circulating today, but the definitive version is found in Paragraphs 138-140 of the 2005 UN World Summit. It is this version of RtoP-and no other-that the world's states have agreed to. As unanimously agreed by governments in 2005, and helpfully summarized by the UN's Secretary-General Ban Ki-moon in 2009, RtoP rests on three pillars:

First, the responsibility of the state to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement.

Second, the international community's duty to assist the state to fulfill its responsibility to protect.

Third, the international community's responsibility to take timely and decisive action, through peaceful diplomatic and

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humanitarian means and, if that fails, other more forceful means, in a manner consistent with Chapters VI, VII and VIII of the UN Charter, in situations where a state has manifestly failed to protect its population from the four crimes.

The first thing that should become apparent when we think about whether or not this principle 'applies' to Sri Lanka is that the question itself is wrongheaded. The language of the first pillar points to a universal and enduring RtoP. RtoP applies to all states, all the time. Paragraph 138 of the World Summit Outcome Document is unambiguous about this, stating simply that: 'Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. We should not be asking whether RtoP 'applies', as if there may be situations where a state does not have a duty to protect its population from genocide and mass atrocities. Rather we should be asking about the best way of protecting imperiled civilians from genocide, war crimes, ethnic cleansing and crimes against humanity. When we recognize this, the apparent gulf between RtoP's advocates and its critics – represented here by Traub and Connell – becomes a shallow stream. Both emphasize the critically important role of mediation; both demand respect for the laws of war and human rights, both suggest (Traub explicitly, Connell implicitly) that the International Criminal Court (ICC) should be asked to stand ready to prosecute those accused of crimes against civilians. And Connell does not challenge Traub's call for UN Security Council activism or consideration of sanctions. In the future, therefore, let's take RtoP as our starting point, recognizing that it is universal and enduring, and focus on the practicalities of protecting civilians.

What does RtoP contribute to how we think about the crisis in Sri Lanka, and how the international community should engage with this issue? The first port of call is the Sri Lankan government's responsibility to protect its own population – including, and in this case especially, its Tamil civilians. In this context, RtoP represents a unanimous and unambiguous political commitment to see that the specific responsibilities associated with sovereignty are properly adhered to. Among other things, the Sri Lankan government has a duty to three things immediately:

1. Ensure that its use of force is discriminately targeted against combatants and military objects only, and where it cannot discriminate between combatants and non-combatants treat everyone in its sights as civilians (in line with the Geneva Conventions). Where this rule is broken, the government has a duty to investigate and prosecute. If it fails to do this, the Security Council could consider referring the matter to the ICC. This cardinal rule also applies to the LTTE, which must stop attacking civilians, using them as human shields, and preventing them from fleeing the area. These acts are legally prohibited and it may be appropriate for the Security Council to refer to LTTE to the ICC. If, as seems to be the case in Sri Lanka today, the circumstances of the armed conflict preclude the drawing of definitive distinctions between armed rebels and unarmed civilians, and the military is unable to use force with the utmost of precision, then it is incumbent on the government to facilitate the timely and orderly evacuation of the civilian population. From what we know about the situation at the time of writing (1 May 2009), it seems clear that the discriminate use of force is difficult if not impossible, placing the onus on the duty to facilitate evacuation.

2. Allow humanitarian agencies and the UN unhindered access to the conflict zone in order to deliver life-sustaining assistance to the civilian population. The General Assembly has passed several resolutions on this matter. For example, Resolution 46/182 (1991) calls upon 'States whose populations are in need of humanitarian assistance' to 'facilitate the work of these organizations in implementing humanitarian assistance, in particular the supply of food, medicines, shelter and health care, for which access to victims is essential'. Likewise, in 2000 the UN Security Council underlined 'the importance of safe and unhindered access of humanitarian personnel to civilians in armed conflict, including refugees and internally displaced persons' (Resolution 1265, 2000). Humanitarian access requires that the government respect a humanitarian ceasefire and open a protected corridor that allows agencies into the affected areas and permits civilians to evacuate safely. For its part, the LTTE has a duty to observe the humanitarian pause, allow civilians to flee and respect the sanctity of humanitarian agencies.

3. Ensure the protection of displaced persons who have managed to flee the war zone. The treatment of displaced persons should be consistent with the Guiding Principles on Internal Displacement, which has been welcomed by the UN Human Rights Council and General Assembly. Significantly, Sri Lanka is one of only a handful of states to have developed a national policy based on the Guiding Principles. The government therefore has a duty to fulfill the pledges it has freely made to the displaced in its care. This includes ensuring that the displaced do not suffer discrimination, are provided with humanitarian assistance, and protected against violent and non-violent

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crimes.

What is the appropriate role of the international community here? First and foremost, the international community should encourage the Sri Lankan government to fulfill its responsibilities. This is a specific duty enunciated by the 2005 World Summit. Thus, it was appropriate that the UN Secretary-General, Ban Ki-moon, condemned the LTTE for placing civilians at great risk and reminded the Sri Lankan government of its responsibility to protect civilians by avoiding the use of indiscriminate heavy weapons in areas densely populated with civilians, treating the displaced in accordance with international law, and working closely with the UN to meet their protection and physical needs.[4] The Secretary-General could also consider dispatching a high-level mediation to broker an agreement whereby the LTTE permit the safe evacuation of civilians and the Sri Lankan government facilitates the process by observing a ceasefire and opening a corridor. Should the LTTE fail to act in good faith, it should find itself subjected to punitive measures by the UN Security Council.

The most helpful things that other world leaders could do would be to underscore the UN Secretary-General's messages. The UN Security Council has done so to a certain extent, asking for a number of briefings on the situation. Thus far, the Council has chosen to neither act nor formally express its opinion but its informal meetings help convey the fact that it is paying attention to the situation and stands ready to act should compelling evidence emerge to suggest that the Sri Lankan government has manifestly failed to fulfill one of the three primary duties set out above. What is more, the Council's President has indicated that its members are concerned with the situation, have condemned the actions of the LTTE and urged them to lay down their arms, negotiate a settlement, and facilitate a UN-led evacuation of civilians, and have called upon both parties to abide by international humanitarian law and allow humanitarian agencies access to those affected by the conflict.[5]

Sri Lanka has taken measures to fulfill these responsibilities. It has not, by all accounts, deliberately targeted civilians and on 12 April it announced a 'humanitarian pause' to the fighting. But cooperation has been less than forthright. The UN's Emergency Relief Coordinator, John Holmes, reported that whilst he welcomed the humanitarian pause, it was neither sufficient nor generally respected. Since then, the government has repeatedly rejected calls for a humanitarian ceasefire – most recently issued by the Foreign Ministers of Britain and France. It has also refused to grant humanitarian access and has been reticent about cooperating fully with the UN's agencies in respect to the camps for displaced people.

This has prompted some commentators to call for the imposition of sanctions. Such calls are premature and – in the face of compelling evidence that sanctions seldom work – misguided. [6] Others have gone further and called for neighbouring states to airlift supplies into the affected region either with or without the government's support.[7] This would only make matters worse. On the one hand, acting without the government's consent would make it harder to persuade it to grant access on the ground. On the other, airdropped supplies would land into the hands of the LTTE, allowing the rebels to prolong civilian misery

But international engagement is needed to ensure that the Sri Lankan government fulfills its responsibilities, to assist it in doing so, and to hold the LTTE to account. The Security Council should therefore be prepared to move to the next stage by holding a formal meeting on Sri Lanka, expressing its concern at the situation, condemning abuses by the LTTE and demanding the release of civilians, stressing the need for the Sri Lankan government to do more to fulfill its duties, and orchestrating an up-scaling in the UN's humanitarian relief effort.[8] In short, the government should be asked to observe a ceasefire in return for an LTTE agreement to permit the evacuation of civilians. If that fails, the Security Council should consider asking the UN Secretary-General to dispatch a high-profile mediator to negotiate an end to the crisis that facilitates the demise of the LTTE and protection of civilians. Such a request would significantly strengthen the Secretary-General's hand. The Council should also consult on whether to invite the ICC prosecutor to examine the conduct of both sides.

RtoP represents a global consensus on the three pillars discussed earlier. As a global consensus, it provides a universal and enduring standard by which to hold governments to account. This standard is not a foreign imposition. It is only what governments themselves have agreed to. But RtoP also provides a lens through which to view crises such as that in Sri Lanka; one that focuses on the rights of the victims and the international community's

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responsibility to protect them. These rights are already enshrined in international law but RtoP represents a universal political commitment to protect those rights and turns attention to what needs to be done in order to protect civilians at risk. In future, let us not ask whether RtoP 'applies' but instead focus on what measures can reasonably be taken by reference to the three pillars identified above to protect those in need. And more importantly, to paraphrase Ban Ki-moon, let us focus on translating our fine words into deeds.

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[1] On general conditions see Gethin Chamberlain, 'Civilians held in Sri Lanka camps face disease threat', *The Guardian*, 20 April 2009. The UN has commented that it cannot verify or dismiss claims of disappearances and other abuses because the government has not granted it access to camps.

[2] James Traub, 'At Risk in Sri Lanka's War', *Washington Post*, 22 April 2002.

[3] Mary Ellen O'Connell, 'Sri Lanka Needs Peace, Not R2P', e-IR, 28 April 2009.

[4] 'Secretary-General Deeply Distressed at On-Going Civilian Casualties', UN News, SG/SM/12166, 12 April 2009.

[5] See Security Council Report, *Monthly Forecast: May 2009*, 30 April 2009, p. 3.

[6] See Dursun Peksen, 'Better or Worse? The Effect of Economic Sanctions on Human Rights', *Journal of Peace Research*, 46 (1) 2009, pp. 59-78.

[7] 'Francis Boyle calls for humanitarian airdrop to starving civilians in "safety zone"', <http://www.tamilnet.com/art.html?catid=13&artid=29231>, 30 April 2009.

[8] These recommendations are based on Security Council Report, *Update Report: Sri Lanka*, 22 April 2009.

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