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THE LIMITS OF STATE SOVEREIGNTY

THE RESPONSIBILITY TO PROTECT IN THE 21ST CENTURY

Neelan Tiruchelvam

Eighth Memorial Lecture

by

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at the

BMICH, Colombo

July 29, 2007

International Centre for Ethnic Studies, Colombo

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I

Today more than ever, on this eighth anniversary of his assassination, Sri Lankans and those in the wider international community need to remember and be re-inspired by Neelan Tiruchelvam's life and achievements. While we can no longer benefit directly from his remarkable intelligence and learning, his boundless energy, his political commitment, and his optimism, we do still have his spirit living among us in the ideas and institutions he gave us, and in the example he set for us of an engaged intellectual and a principled politician.

Neelan was an extraordinary institution builder. The best known of those he helped found are our host institution tonight, the International Centre for Ethnic Studies (ICES), so ably and imaginatively now led by Dr Rama Mani, and the Law and Society Trust (LST) – both of which continue to make their intellectual and political mark not only in Sri Lanka and South Asia, but across the globe. Beyond that Neelan played an important role in creating the Official Languages Commission, the Human Rights Task Force and later the Human Rights Commission, as well of course as his own distinguished law firm, Tiruchelvam Associates, now led by his wife Sithie. His ability to build and maintain institutions was the product not only of good ideas and hard work but also of his ability to inspire others – particularly young people – to see, believe in, and work for otherwise hidden possibilities.

Of course the institutions he believed above all worth building were effective, decent states - protecting the rights and interests of *all* their peoples, with conflicts and disputes being resolved through law, democratic process and effective government structures, not violence. Probably best known internationally as a brilliant constitutional lawyer, Neelan was closely involved in constitution-making processes in Kazakhstan, Ethiopia, and Nepal, but above all he will be remembered as a central architect of the then Sri Lankan government's ground breaking constitutional proposals of the mid and late 1990s, which while unhappily never ratified, continue to inspire hope that a consensus on a just constitutional and political settlement is, in fact, within reach should only the political will be there.

Neelan knew that political will is never waiting in a cupboard to be found: it has to be nurtured and generated, campaigned for persistently and relentlessly. He was an impressive scholar - with academic interests and writings spanning a remarkable range of topics from South Asian culture and ethnicity, to gender, political theory and of course constitutional law. But he refused to limit himself to mere scholarship, believing the obvious risks and challenges of politics were necessary for the ideas he believed in to be brought to life, to be made real in people's lives. And it was his willingness to engage in electoral politics as a member of the TULF and his work in parliament and through other government mechanisms that ultimately, tragically for him, his family and all of us, cost him his life.

There is one other celebrated aspect of Neelan Tiruchelvam's life and character that is directly relevant to my main topic tonight, and that is his cosmopolitanism. Neelan's sense of community and attachment went beyond ethnicity, beyond religion, beyond nation, and beyond region. He didn't ignore or reject any of those particular attachments in the name of an empty universality, but rather attempted to connect them all in a more vibrant, integrated, and just whole. He argued that developing states not only had something to learn from the richer, developed states but also something to teach

them, arguing for instance, that the individualist discourse of human rights born in the West "needs to be enriched by explicit reference to the religious and cultural traditions of South Asia." And he argued strongly, too, that it was only if Western states themselves actively tried to live up to their own professed principles, and applied them in evenhanded ways, that their concern with human rights in non-Western countries could begin to be taken seriously.

Approaching issues in this integrated way, confident of the contributions his own country and culture and region could make to wider international discourse, led Neelan to have no fear of international involvement designed to assist countries like his own extricate themselves from particular crises, or cycles of violence and counter-violence in which they seemed to be trapped. What mattered was whether that involvement was not only effective, but principled and consistent.

II

This leads directly into my subject tonight: the limits of state sovereignty, and the proper role of the international community in responding to catastrophic human rights violations - genocide and other mass killing, large scale ethnic cleansing and crimes against humanity – occurring within the boundaries of a single country. There is a widespread concern that involvement of countries in the affairs of others, and in particular the involvement of developed countries in the internal affairs of developing ones, has *not* always been principled or consistent in the past. It is an article of faith around a good deal of the global South that Article 2 (7) of the UN Charter is to be read as an all-embracing prohibition when it says that "Nothing should authorise intervention in matters essentially within the domestic jurisdiction of any State".

It is understandable that sovereignty should be a very sensitive subject indeed with the many states who gained their independence during the decolonisation era – states in all cases proud of their new identity, in many cases conscious of their fragility, and

generally inclined to see the non-intervention norm as one of their few defences against threats and pressures from more powerful international actors seeking to promote their own economic and political interests.

But the trouble with this approach, like anything taken to extremes, is that it has had a terrible downside, one which came to a head in the 1990s in the international response to the series of conscience-shocking man-made catastrophes that erupted in the Balkans and Central Africa – most horribly the genocide in Rwanda in 1994, followed by the almost unbelievable default in Srebrenica just a year later. Over and again, when situations seemed to cry out for some response, the international community reacted erratically, incompletely, counter-productively or not at all. And when killing and ethnic cleansing started all over again in Kosovo in 1999, and the international community did in fact intervene militarily as it probably should have, it did so without the authority of the Security Council in the face of a threatened veto by Russia, raising anxious questions about the integrity of the whole international security system.

The great debate throughout the 1990s was about the competing claims of intervention and state sovereignty. One side of the argument was the concept, coined by Bernard Kouchner, the founder of Medicines Sans Frontier and now France's Foreign Minister, of 'droit d'ingerence' – the 'right to intervene', or, more fully, the 'right of humanitarian intervention'. But while, from many perspectives this was a noble and effective rallying cry – with a particular resonance in the global North – around the rest of the world it enraged as many as it inspired. On the other side, equally vehemently claims, mostly coming from the global South, were made about the primacy and continued resonance of the concept of national sovereignty. Battle lines were drawn, trenches were dug, and verbal missiles flew: the debate was intense and very bitter, and the1990s finished with it utterly unresolved in the UN or anywhere else.

UN Secretary-General Kofi Annan at one stage made his own effort to resolve the conceptual impasse at the heart of this debate by arguing that national sovereignty had to be weighed and balanced in these cases against *individual* sovereignty, as recognised in the international human rights instruments. But this fell on deaf ears, being seen not so much as resolving the dilemma of intervention but restating it. In his report to the General Assembly in 2000, the Secretary-General brought the issue to a very public head, saying in language that was both moving and agitated, and which resonates to this day: *If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Sebrenica, to gross and systematic violations of human rights*?

The task of meeting this challenge fell, in the event, to International Commission on Intervention and State Sovereignty (ICISS), sponsored by the Canadian Government, which I had the privilege of co-chairing, along with the Algerian diplomat and veteran UN Africa adviser Mohamed Sahnoun. We presented our report, entitled *The Responsibility to Protect,* at the end of 2001. The Commission made what are generally now acknowledged to be two critical conceptual contributions to resolving this increasingly ugly and sterile debate.

The first was to invent a new way of talking about 'humanitarian intervention'. We sought to turn the whole weary – and increasingly ugly – debate about the 'right to intervene' on its head, and to recharacterise it not as an argument about the 'right' of states to anything, but rather about their 'responsibility' – one to protect people at grave risk: the relevant perspective, we argued, was not that of prospective interveners but those needing support. The searchlight was swung back where it should always be: on the need to protect communities from mass killing and ethnic cleansing, women from systematic rape and children from starvation. We very much had in mind the power of new ideas, or old ideas newly expressed, to actually change the behaviour of key policy actors. And a model we very much had in mind in this respect was the Brundtland Commission, which a few years earlier had introduced

the concept of 'sustainable development' to bridge the huge gap which then existed between developers and environmentalists. With a new script, the actors have to change their lines, and think afresh about what the real issues in the play actually are.

The second big conceptual contribution of the Commission, linked with the first, was to insist upon a new way of talking about sovereignty itself: we argued, building on an earlier formulation by Francis Deng (the Sudanese scholar and diplomat now named by UN Secretary General Ban Ki-Moon as his Special Adviser for the Prevention of Genocide and Mass Atrocities) that its essence should now be seen not as 'control', as in the centuries old Westphalian tradition, but, again, as 'responsibility'. The starting point is that any state has the primary responsibility to protect the individuals within it. But that is not the finishing point: where the state fails in that responsibility, through either incapacity or ill-will, a secondary responsibility to protect falls on the wider international community. That, in a nutshell, is the core of the responsibility to protect idea, or 'R2P'as we are all now calling it for short.

After laying these foundations, the Commission spelled out what the responsibility to protect should mean in practice. Certainly it means *reacting* effectively in situations where genocide, ethnic cleansing, war crimes and crimes against humanity are currently occurring or imminent. But it also means *preventing* situations, not yet at that conscience-shocking stage but capable of reaching it, from so deteriorating. And it means *rebuilding* societies shattered by such catastrophes to ensure they do not recur.

The action required by R2P is overwhelmingly, preventive: building state capacity, remedying grievances and ensuring the rule of law. But if prevention fails, R2P requires whatever measures – economic, political, diplomatic, legal, security, or in the last resort military – become necessary to stop mass atrocity crimes occurring.

As to who should in practice bear the responsibility in question, for individual states, R2P means in the first instance the responsibility to protect their own citizens from such crimes, and

to help other states build their capacity to do so. For international organizations, including the United Nations, R2P means the responsibility to warn, to generate effective preventive strategies, and when necessary to mobilize effective reaction. For civil society groups, R2P means the responsibility to force the attention of policymakers on what needs to be done, by whom and when.

It is one thing to develop a concept like the responsibility to protect, but quite another to get any policy maker to take any notice of it. The most interesting thing about the *Responsibility to Protect* report is the way its central theme has continued to gain traction internationally, even though it was almost suffocated at birth by being published in December 2001, in the immediate aftermath of 9/11, and by the massive international preoccupation with terrorism, rather than internal human rights catastrophes, which then began.

In just five short years, a remarkably brief time in the history of ideas, the responsibility to protect concept evolved from a gleam in an international commission's eye, to what now has the pedigree to be described as a broadly accepted international norm, and one with the potential to evolve further into a rule of customary international law

The concept was first seriously embraced in the doctrine of the newly emerging African Union, and over the next two to three years it won quite a constituency among academic commentators and international lawyers. But the big step forward came with the UN 60th Anniversary World Summit in September 2005, which followed a major preparatory effort involving the report of the 2004 High Level Panel on new security threats (of which I was, rather conveniently, a member) which fed in turn into a major report by the Secretary-General himself. Both these reports emphatically embraced the responsibility to protect concept, and the Summit Outcome Document, unanimously agreed by the more than 150 heads of state and government present and meeting as the UN General Assembly, unambiguously picked up their core recommendations.

A further important conceptual development has occurred since the September 2005 Summit: the adoption by the Security Council in April last year of a thematic resolution on the Protection of Civilians in Armed Conflict which contains, in an operative paragraph, an express reaffirmation of the World Summit conclusions relating to the responsibility to protect. And we have now begun to see that resolution in turn now being invoked in subsequent specific situations, as with Resolution 1706 of 31 August 2006 on Darfur. A General Assembly resolution may be helpful, as the World Summit's unquestionably was, in identifying relevant principles, but the Security Council is the institution that matters when it comes to executive action. And at least a toehold there has now been carved.

But, for those of us who believe in R2P, this is just about where the good news ends. We are deluding ourselves if think the battle is won, in the sense that when the next R2P situation comes along, involving large-scale killing, or ethnic cleansing, or other crimes against humanity, or all of the above, within a sovereign state's borders – as surely some such situation will, some time, some where, and maybe sooner than we think – there really will be a shared, instinctive, reflex global response. A response not only of horror that something which we have all said should happen 'never again' is in fact happening again. But a response which makes something happen - mobilizing effective international action to actually stop the threat.

As someone who has been speaking and writing on this subject around the world for several years now, I have been well aware that the consensus reached at the World Summit was based on fairly fragile foundations. In 2005, a fierce rearguard action was fought, almost to the last, by a small group of developing countries, joined by Russia, who basically refused to concede any kind of limitation on the full and untrammelled exercise of state sovereignty, however irresponsible that exercise might be. What carried the day in the end was not so much consistent support from the EU and U.S. – support which after the invasion of Iraq in 2003

was not particularly helpful, it has to be acknowledged, when it came to meeting these familiar sovereignty concerns. The support that mattered, rather, was persistent advocacy by sub-Saharan African countries, led by South Africa; a clear - and historically quite significant - embrace of limited-sovereignty principles by the key Latin American countries; and some very effective last minute personal diplomacy with major wavering-country leaders, including India in particular, by Canadian Prime Minister Paul Martin.

In my travels since 2005, I have become fairly accustomed to hearing suggestions from the representatives of a number of countries, not least in Asia – and not excluding diplomats from Sri Lanka – that while they had not been prepared to break consensus and oppose R2P language outright in 2005, they had been less than pleased to see its inclusion in the World Summit Outcome Document. R2P, I have been told more often than I like to recall, is simply another name for humanitarian intervention, providing a means for powerful countries, and in particular the West, to intervene in the internal affairs of smaller countries. But I have to say that, even having been immunized to this extent, I was more than a little taken back when the head of the Crisis Group office in New York reported to me a conversation two weeks ago, in which the head of mission of a major country in the Arab-Islamic world said to him: *'The concept of the responsibility to protect does not exist except in the minds of Western imperialists'*

What has gone wrong here? Why is there so much continuing resistance to a principle which has seemed to so many others to be an important breakthrough, capable of resolving an age old debate in a practical and principled way? Is there anything that we of a cosmopolitan mindset – to pick up my earlier reference to Neelan Tiruchelvam's extraordinarily decent, civilized and balanced approach to these kinds of issues – can possibly do to get this debate back on the rails and generate the kind of response that this haunting issue of preventing genocide and mass atrocity crimes demands?

I think what we need to do is address and clearly answer four big misunderstandings about R2P that exist to some extent everywhere, but are particularly prevalent in the global South.

Misunderstanding One. The first is that *R2P is only about military intervention*, that it *is* 'simply another name for humanitarian intervention'. This is absolutely not the case, and that cannot be said too often. R2P is above all about taking effective *preventive* action – recognizing those situations that are capable of deteriorating into mass killing, ethnic cleansing or other large-scale crimes against humanity, and bringing to bear every appropriate preventive response: political, diplomatic, legal and economic. The responsibility to prevent is very much that of the state itself, quite apart from that of the international community. And when it comes to the international community, a very big part of *its* preventive response should be to help countries to help themselves. Paragraph 138 of the World Summit Outcome Document makes that very clear:

> *Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. The international community should as appropriate encourage and help States to exercise that responsibility*

So does Paragraph 139 of the document, in which the world's leaders said, again unanimously:

> *We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.*

Of course there will be situations when prevention fails, and reaction becomes necessary. But reaction does not have to mean military reaction: it can involve political and diplomatic economic and legal pressure, all measures which can themselves each cross the spectrum from persuasive to intrusive, and from less to more coercive – something which is true of military capability as well. As the ICISS Commission insisted, *'the exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied'*. Coercive military action is not excluded as a last resort option in extreme cases, when it is the only possible way – as nobody doubts was the case in Rwanda or Srebrenica, for example – to stop large scale killing and other atrocity crimes. But it is an absolute travesty of the R2P principle to say that it is about military force and nothing else.

Misunderstanding Two. The second misunderstanding, at the opposite end of the spectrum, is that *R2P is about the protection of everyone from everything*. I remember first thinking that this might become something of a problem when a distinguished international statesman, who had been much involved in the intervention versus sovereignty debate in the 1990s, asked me a few months ago whether I agreed that the international community had a 'responsibility to protect' the Inuit people of the Antarctic from the consequences of global warming! Of course, linguistically, one can argue that there is indeed a responsibility to protect of *some* kind in this case – and in the case of HIV/AIDS, or the proliferation of nuclear weapons, and much more besides. But 'human security' is much more appropriate umbrella language to use in these cases than 'R2P'.

To use the R2P concept in any of these ways is to dilute to the point of uselessness its role as a mobiliser of instinctive, universal action in cases of conscience shocking killing, ethnic cleansing and other such crimes against humanity: the whole point of embracing R2P language is that it is capable of generating an effective,

consensual response in extreme, conscience shocking cases, in a way that 'right to intervene' language was not.

The trouble is, of course, that if you stretch the R2P concept to embrace what might be described as the whole 'human security' agenda, you immediately raise the hackles of those who see it as the thin end of a totally interventionist wedge – as giving an open invitation for the countries of the North to engage to their hearts content in the *missions civilisatrices* that so understandably raise the hackles of those in the South who experienced it all before.

That trouble is compounded when it is remembered that coercive military intervention, while absolutely not at the heart of the R2P concept – as I have just been saying – is nonetheless a reactive response that cannot be excluded in really extreme cases. So any understanding of R2P as a very broad-based doctrine, which would open up at least the possibility of military action in a whole variety of policy contexts, is bound to give the concept a bad name.

The short point, which cannot be repeated too often, is that R2P is *not* about protecting everybody from everything. It's about protecting men, women and children from large-scale killing, ethnic cleansing and crimes against humanity – either occurring now, or imminently feared likely to occur, or readily capable of so occurring if a situation deteriorates through want of effective preventive action.

Misunderstanding Three. The third misunderstanding, and it's really a subset of the second, is the notion that *R2P is about responding to conflict and human rights abuses generally*. The problem here is not so much R2P being stretched to deal with all the world's ills – from HIV/AIDS to climate change – but being too indiscriminately applied to a narrower group of those ills. But as much as people need protection from the horror and misery of any violent conflict, and from the ugliness of tyrannical human rights abuse, 'R2P situations' have to be more narrowly defined.

If they are perceived as extending across the full range of

human rights violations by governments against their own people, or all kinds of internal conflict situations, it will be difficult to build and sustain any kind of consensus for action: we will find ourselves rapidly back in the area of North governments worrying about how to justify foreign entanglements where no vital national interests seem to be immediately involved, and South governments being concerned about their sovereignty being at risk of interventionary over-reach.

To say it again, 'R2P situations' must be seen only as those actually or potentially involving large-scale killing, ethnic cleansing or other similar mass atrocity crimes - situations where these crimes are either occurring or appear to be imminent, or which are capable of deteriorating to this extent in the absence of preventive action – and which should engage the attention of the international community simply because of their particularly conscience-shocking character.

Looked at in this way, for example, Iraq at the time of the coalition invasion in 2003 was *not* an R2P situation, because although there were clearly major human rights violations continuing to occur (which justified international concern and response, for example by way of censure and economic sanctions), and although mass atrocity crimes had clearly occurred in the past (against the Kurds in the late 1980s and the southern Shiites in the early 1990s) such crimes were neither actually occurring nor apprehended when the coalition invaded the country in early 2003. By contrast, it would be proper to characterise the situation in Iraq *now*, in July 2007, as an R2P one, because there is every reason to fear – particularly in the context of a precipitate withdrawal of foreign forces from the centre of the country – that the present situation, bad as it is, will rapidly deteriorate into massive outbreak of communal and sectarian violence and ethnic cleansing beyond the capacity of the Iraqi government to control, and from which it would be unconscionable for the wider world to stand aloof.

Burundi since the early 90s is a good example of what can properly be described as an 'R2P situation', although nobody has

really badged it as such. It is one, moreover, which has not at any stage involved coercive military action – just a lot of hard, grinding preventive action to ensure that the worst which everyone feared did not in fact happen. The situation there was certainly capable of deteriorating into the kind of large scale genocidal violence that wracked neighbouring Rwanda, and it arguably only the intense engagement of many international actors – including among others Nelson Mandela with his mediation, South Africa with its troop presence, the International Crisis Group with our analysis and advocacy, and the new Peacebuilding Commission with its making of Burundi its first case – that has prevented that occurring.

Misunderstanding Four. The last big misunderstanding is that *R2P justifies coercive military intervention in every case where large-scale loss of life, or large-scale ethnic cleansing, is occurring or apprehended.* What needs to be understood much more clearly than it has been is that not just one criterion but *multiple* criteria must be satisfied if coercive, non-consensual military force is to be deployed within another country's sovereign territory: it is not just a matter of saying that if a threshold of seriousness is crossed, then it's time for the invasion to start.

As the ICISS Commission said in its 2001 report, and the High Level Panel in its report to the UN before the 2005 World Summit, and UN Secretary-General Kofi Annan in his pre-Summit report, and as every serious supporter of R2P has made abundantly clear, military intervention for human protection purposes is a desperately serious, exceptional and extraordinary measure, which has to be judged by not just one but a whole series of prudential criteria.

The first of those criteria *is* the seriousness of the threat to people which is occurring or apprehended: this would need to involve large scale loss of life or ethnic cleansing to prima facie justify something as extreme as military action. But there are another four criteria, all more or less equally important, which also have to be satisfied: the motivation or primary purpose of the proposed military action (whether it was primarily to halt or avert

the threat in question, or had some other main objective); last resort, viz. whether there were reasonably available peaceful alternatives; the proportionality of the response; and, not least, the balance of consequences – whether overall more good than harm would be done by a military invasion.

Even if one stretched the threshold criterion, as to seriousness of human rights threat, to its absolute limit in the case of Iraq in 2003, it doesn't take much analysis – even looking just at what we knew then, not now – to generate grave doubts as to whether the balance of consequences of an invasion could possibly be positive.

One of the many disappointments of the World Summit is that although guidelines for the use of force of just this kind were argued for in all the reports I have mentioned, in the hope that this would lead to their adoption by the Security Council, they were not adopted by the Summit – caught in a diplomatic pincer movement between the US, who wanted no such restrictions to affect any decision to use force, and some in the South who, I think very misguidedly, argued that to adopt guidelines purporting to limit the force would in fact, by recognizing its legitimacy in at least some cases, on the contrary encourage it.

Of course no prudential criteria of this kind, even if agreed as guidelines by the Security Council, will ever end argument on how they should be applied in particular instances, for example Darfur right now. But it is hard to believe they would not be more helpful than the present totally ad hoc system in focusing attention on the relevant issues, revealing weaknesses in argument, and generally encouraging consensus.

While answers are readily available to all the misunderstandings I have described, and others as well, there is no doubt that a considerable effort of analysis and advocacy will be necessary to keep the flame of R2P alive, and to create a global environment in the 21st century, like no other before it, where we can be confident that the Holocausts and Cambodias and Rwandas and Bosnias of the past, and the Darfurs of the present, and maybe the Iraqs of the near future, really will happen never again.

One of the efforts in which I and Crisis Group and a number of other major global NGOs have recently been involved, and in which I hope wonderful institutions like ICES will become involved shortly, is putting together a project to fund and establish a new 'Global Centre for the Responsibility to Protect', based in New York, but with a strong North-South character and outreach, to work on just these issues – to be a resource base and catalyst for ongoing activity worldwide by NGOs, like-minded governments and international organizations. Although there will be some in this country and this region who will certainly differ, I hope there will not be too many in this audience who would think this whole effort misguided.

It has taken the world an insanely long time, centuries in fact, to come to terms conceptually with the idea that state sovereignty is not a license to kill – that there is something fundamentally and intolerably wrong about states murdering or forcibly displacing large numbers of their own citizens, or standing by when others do so. Now that we have at last won recognition of that in this new century, with the unanimous acceptance of the principle of the responsibility to protect by the world's assembled heads of state and government in 2005, it seems to me – and I hope to all of you here – that it would be a tragedy now for there to be any backsliding. I don't think there will be, but it's going to take a lot of effort and energy from men and women of goodwill all round the world to ensure not only that R2P continues to be accepted in principle, but is effectively operational in practice.

III

This leads me to ask finally – as I guess a number of you in this audience will have already been asking yourselves, and are about to ask me – what has all this to with Sri Lanka, here and now? Is this horrible, apparently intractable conflict – that took Neelan Tiruchelvam's life, and has taken the lives of so many scores of

thousands of others – properly described as an R2P situation? And if so, what follows from that? Whose responsibility is it to do what?

Since the resumption of hostilities last summer, both the government and the LTTE have been careful to keep their military actions, and their terror and counter-insurgency operations, within certain limits. While more than 4,500 have been killed over the last 20 months, and both government and LTTE forces have repeatedly violated international humanitarian law, the recent violence has not crossed the boundary into mass atrocity or obvious genocide, war crimes, ethnic cleansing, or crimes against humanity. The violence has been contained just this side of full-scale disaster and internationally-recognized catastrophe.

We know, nonetheless, that for those who directly experience the war it is brutal and devastating. Hundreds of thousands – three hundred on UNHCR's figures, two hundred on the government's – have survived the Tiger shelling and bombing, or the government's aerial attacks and multi-barrel rocket launchers, only to face months of constant displacement – in jungles, in camps, or in the overcrowded houses of family or friends.

And we know, from recent history as well as informed analysis of present political dynamics, that there are plenty of reasons to fear that things can get much worse, especially if the war turns from the east to the north, as it appears may already be happening. Recent Sri Lankan history offers all-too-many examples of large-scale atrocities, mass-graves, serious war crimes, and ethnic cleansing. And there are disturbing signs that the restraint on both sides – such as it has been – could be eroding. The rhetoric and threats from both sides are increasingly dire and suggest the next round of fighting could well be extreme even by Sri Lanka's standards.

Should the war move into the LTTE-controlled areas in the north, it is likely to be much more fierce than the recent fighting in the east, and the impact on civilians is almost certain to be devastating. As the war grows more vicious, it could well spill over into areas outside the north – perhaps through deliberate attacks on

civilians designed to provoke excessive, and politically damaging, replies from the other side. Such attacks and the communal tensions they are sure to increase, could well lead to the further erosion of the remaining elements of the rule of law

All this makes it hard to argue that Sri Lanka is anything but an R2P situation. It may not be one where large scale atrocity crimes – Cambodia-style, Rwanda-style, Srebrenica-style, Kosovo-style – are occurring right now, or immediately about to occur, but it is certainly a situation which is capable of deteriorating to that extent. So it is an R2P situation which demands preventive action, by the Sri Lankan government itself, but with the help and support of the wider international community, to ensure that further deterioration does not occur.

So what would an effective preventive strategy, featuring cooperation between the Sri Lankan government and the international community, actually look like? This is not the occasion for me to offer any kind of comprehensive analysis or prescriptions, covering all the necessary issues in all the necessary detail: we in Crisis Group have only been here on the ground for a year, and we are still feeling our way. And I have been talking to you, I suspect, quite long enough already. But let me try to sketch just in outline what in our judgement the main elements of that strategy – legal, military and political – should involve.

First, recognizing that the government's primary responsibility, like that of any state, is to protect all its citizens, it must take steps to ensure that all its citizens are accorded the equal protection of the laws. The record in this respect leaves a great deal of room for improvement. As Crisis Group has documented in our most recent report on Sri Lanka, there have been hundreds of abductions, disappearances, and killings, both by the Tigers and by security forces that are part of or linked to the government. These have taken place with virtually complete impunity. To date there has been only a single indictment announced for an identifiable human rights violation committed by government personnel.

The priority need is effective prosecutions. This means disciplining those members of the police and security forces who are known to have intimidated witnesses; setting up an effective witness protection program, with active assistance from other governments concerned with supporting Sri Lanka's justice system; providing an adequate and independent budget to the Presidential Commission of Inquiry headed by Justice Udalagama; and making full use of the resources of the International Independent Group of Eminent Persons rather than challenging its legitimacy and trying to limit its mandate.

In a recent letter to members of the US Congress, Sri Lanka's ambassador to the United States has rejected the need for United Nations help in monitoring the human rights situation, while calling rather for technical assistance to strengthen the government's policing and judicial capacities. But these should not be either-or options. As the recent experience in Nepal shows, UN human rights monitoring can play an important role in supporting and developing the state's capacities to protect its citizen's rights. The Sri Lankan government should not see UN monitoring as punitive, or invasive. Instead, it's designed to help government authorities do their job better, in part by increasing the confidence of witnesses.

Secondly, the government's sovereign responsibility is not to put its own citizens at undue risk. For this reason, the government must resist the temptation to continue its military campaign into the areas of the Northern Province held by the LTTE. Here, too, the international friends of Sri Lanka have a role to play.

Sri Lanka's conflict presents a particularly difficult situation for would-be peacemakers in part because of the very real difficulty of containing and taming the LTTE. Given the deliberately provocative manner in which the Tigers attacked government forces in late 2005 and early 2006, and given their past willingness to target civilians and the brutal nature of their rule in north, the government clearly has legitimate security concerns to which it must respond. Sri Lanka's international supporters can assist the government's legitimate need to defend itself and protect its people

by strengthening the global crackdown on Tigers fundraising, arms procurement and coercive control of the Tamil diaspora outside Sri Lanka.

Various foreign states bear some of the responsibility for allowing the Tigers to build up their power over the years, in part on the misguided belief that they were a legitimate national liberation movement. It's time to make amends for that by making it harder for them to wage war and to carry out terror attacks – by better enforcing existing restrictions on the LTTE's ability to raise money, buy weapons and propagate its message of violence.

All that said, and done, the probability remains, on all available historical and analytical evidence that it is highly unlikely that the Tigers can be defeated militarily. Some argue, however, that while the outright defeat of the Tigers may be out of reach, weakening them militarily would help persuade them to negotiate seriously. It is true that some means must be found to force the Tigers to start negotiating in a serious way, after repeated refusals to do so over the years. But attempting to regain control of the territory they control in the Wanni does not seem to be the way to do this. Even assuming the Tigers can be significantly weakened, the past thirty years teaches us that this is not likely to encourage them to negotiate: the more probable LTTE response in these circumstances is retreat to unconventional warfare, and possible attacks designed to provoke government or Sinhalese attacks on Tamil civilians.

Thirdly, the government's responsibility is to seriously seek an ultimate political settlement that is responsive to such justice as there is in the Tamil cause. If it can work at all, the "fight now in order to negotiate later" strategy will work only if the government is ready with a package of political and constitutional reforms that appeal to non-separatist Tamils and non-LTTE Tamil parties, and were at least capable of discussion by the LTTE itself.

In the end, the only pressure to which the Tigers are likely to respond is *political* pressure. This will have to be a combination of domestic pressure – based on the two major political parties finally coming to some consensus on constitutional reforms that

address Tamil grievances – and international pressure that limits the Tigers' ability to raise funds to wage war and maintain their grip on the north. International pressure on the Tigers without corresponding political moves by the government will be ineffective and perhaps even counter-productive, to the extent that it served to further isolate the Tigers and push them into extremism, and drive more moderate Tamils into their arms. At the very least, then, until the government comes up with a constitutional offer that at least non-separatist Tamil leaders can take seriously, there should be no international support for offensive operations in the north.

The All-Party Conference, headed by Minister Tissa Vitharana, provides a ready-made process through which the SLFP and parties both within and out of government can come to terms on such an offer. The majority and minority reports of the expert committee offer excellent starting points for a final consensus. The government needs to do everything it can to encourage the APRC process, beginning with a clear public statement that the SLFP is not wedded to its own particular proposal to the APRC and will not veto a consensus plan that offers more extensive devolution at the provincial level. Meanwhile, the opposition parties – in particular the UNP – need to become active and enthusiastic members of the process, willing to assist in the development of a meaningful proposal that could form the basic of a lasting settlement.

IV

I hope it will be apparent from what I have said about the R2P principle, including how it might be applied to the present traumatic situation here in Sri Lanka, that this is a complex, multi-dimensional concept, which is genuinely aimed at helping countries find their way, with international support, through apparently intractable internal situation – and that it is simply grotesque to describe it as a tool of Western imperialists.

I don't think Neelan Tiruchelvam, were he alive today, would have any difficulty in grasping this. His loyalties weren't to any

closed, static version of state or nation or community. He understood very well what were the limits of state sovereignty, and the nature of sovereign state responsibilities. His central intellectual and political struggle was to help reinvent Sri Lankan politics beyond competing and defensive nationalisms, whether Tamil or Sinhalese, and his perspective in this was that of a genuine cosmopolitan, alive to the possibilities of what such a polity could contribute to the wider world, and to what the wider international community, provided it acted in a principled and consistent way, could contribute to peace and stability and development within this country.

Neelan's belief in the power of words and of ideas, his devotion to pluralism and democracy, his active defence of human rights and the rule of law, and his tireless work towards a peaceful, negotiated binding of his country's agonizingly self-inflicted wounds, made him not only a great Sri Lankan, but a great international citizen – whose memory we celebrate on this day. His beliefs and principles, and his capacity to translate them into action, have never been more sorely needed, both here in Sri Lanka and in the wider global community.

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