Mario Emmanuel (Commerce/Law III); Samuel Thampapillai (Economics/Law IV) discuss humanitarian intervention in the context of the Sri Lankan conflict.

No place does the tension between state sovereignty and promoting respect for human rights manifest itself more clearly than in the notion of humanitarian intervention. The most recent conception of humanitarian intervention is the Responsibility to Protect (R2P) doctrine which obligates UN member-states to intervene if ‘national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.’

R2P was recently lobbied for in the last stages of the 30-year war in Sri Lanka between the Sri Lankan Armed Forces and the Liberation Tigers of Tamil Eelam (LTTE), who took up an armed struggle for a Tamil homeland in the face of widespread marginalisation at the hands of the country’s Sinhalese majority. The Sri Lankan army’s final assault on the rebel LTTE, who at one stage ran a de-facto administration in one third of Sri Lanka’s territory, all but wiped out the militants, but at a monumental cost to the Tamil civilian population. Several hundred thousand civilians were left trapped on a two-mile-wide sliver of land, blocked from leaving by rebel fighters, who used them as shields, whilst facing an aerial barrage by government forces who shelled hospitals, shelters, refugee camps and designated safe zones with apparent impunity. Hospitals in the no-fire zone were teeming with victims. Despite claims to be protecting civilians, the Sri Lankan government blocked the delivery of humanitarian aid to the combat zone by the International Committee of the Red Cross. Government doctors from the conflict zone reported that in May, on average one thousand civilians were dying per day, although some later recanted their testimony after two months of government ‘interrogation.’ Independent media were prevented from entering the conflict zone, with the only non-government accounts coming from the aforementioned doctors and other civilian sources. Government reports on the situation grossly understated the volume of civilian casualties, and by using the politick of the UN and controlling the information flow out of the conflict zone, the Sri Lankan government managed to avoid having a United Nations Human Rights Council (UNHRC) investigation into potential war crimes committed during the crisis.

Despite Barack Obama calling it an ‘imminent catastrophe,’ the UN terming it a ‘bloodbath,’ and repeated warnings from several international organisations of impending mass civilians killings, the international community did little more than issue strong statements, urging the principal actors to take steps to avert the bloodshed. Yet mass deaths still occurred. More than 20,000 civilians are reported to have been killed in the first four months of 2009 as a result of the fighting. Investigations run by The Times of London and Le Monde have suggested that most of these civilian deaths were the result of government shelling. If the atrocities of the conflict were not severe enough, now in the post-conflict period, three hundred thousand civilians who managed to escape the war zone are being forcibly interned in government camps run by the military.

This tragedy in Sri Lanka, where both the state and a non-state armed group acted without regard for civilian welfare, is prima facie a scenario that should attract international concern and intervention. Yet it did not occur. This paper attempts to explore the efficacy of current mechanisms for humanitarian intervention in light of recent events in Sri Lanka. The first section of the paper will explore the development of humanitarian intervention as a principle in International Law culminating in the doctrine of R2P. The second section will examine R2P with respect to the Sri Lankan situation with view to establishing the legal, geopolitical and political impediments to its fair exercise. Particular emphasis will be placed on modern interpretations of genocide, the strategic interests of foreign powers and the role of the media in establishing the case for intervention.

The Evolution of Humanitarian Intervention

The international community has always been cautious in approaching intervention, even in severe humanitarian situations, for fear of undermining the integrity of sovereign states. While there is a theoretical understanding amongst the international community that the need for intervention in situations where there have been grave breaches of international law supersedes considerations of state sovereignty, the application of this concept has proved troublesome.
Difficulty articulating precisely when intervention is justified, and legitimising it without explicit UN Security Council (UNSC) approval, has meant that historically states have chosen to avoid asserting humanitarian grounds as the basis of intervention, choosing instead to rely on the principle of self-defence. The refusal of states to legally base intervention on humanitarian grounds means that there is little evidence of state practice or opinio juris upon which to assert that humanitarian intervention is part of customary international law.

This legal void means that until recently there were no principles articulating when ‘legitimate’ intervention can or should be made. This void poses significant legal, economic and political costs for potential intervening states. These costs coupled with the inherently self-interested nature of geopolitics have meant that without significant strategic motivation, humanitarian intervention has been nonexistent. Rwanda and Sudan are prime examples of such non-intervention.

**Words like ‘never again’ are little more than rhetoric**

### The Responsibility to Protect

The ‘responsibility to protect’ (R2P) doctrine attempts to provide a workable reconciliation of the concepts of state sovereignty and the need for humanitarian intervention, and clearly articulates when intervention can and should take place. Developed by the *International Commission on Intervention and State Sovereignty* (The Commission) in 2001, the doctrine formed part of a unanimously supported resolution of the World Summit Outcome in 2005. At the time R2P was hailed as Secretary-General Kofi Annan’s ‘greatest achievement’ and provided hope that the UN may finally have the mechanisms in place to do what it had not been able to do in Rwanda and deliver on the post-Holocaust promise of ‘never again.’

R2P shifts the focus of sovereignty by defining sovereignty in terms of responsibility rather than rights. Essentially R2P dictates that, ‘sovereign states have a responsibility to protect their own citizens from avoidable catastrophe…but when they are unable or unwilling to do so that responsibility must be borne by the broader community of states.’ This implicitly recognises that human sanctity is a principle to which sovereignty must cede.

R2P’s distinctive feature is its articulation of when military intervention can be justified. It does this by first establishing a ‘just cause’ threshold for any military intervention. ‘Just cause’ arises in two situations; first when there is actual or anticipated large-scale loss of life, and the second is actual or anticipated ‘ethnic cleansing,’ which can include *inter alia* killing and forced expulsion. Once ‘just cause’ has been established, R2P outlines four ‘precautionary principles,’ which aim to ensure that the intervention undertaken is reasonable and justly motivated. These principles are:

- **Right intention:** Intervening states must prove that their primary intention is to remedy the humanitarian situation.
- **Last resort:** All other alternate responses must have been explored, if not attempted.
- **Proportional means:** Intervention must only be enough to remedy the wrong.
- **Reasonable Prospects:** The intervention must have reasonable prospects of halting or averting the wrong without the risk of inflaming greater conflict, essentially precluding any intervention in powerful states.

R2P then goes on to identify the *right authority,* recognising the UNSC as the primary source of authority and allowing recourse to a special meeting of the UN General Assembly (UNGA) if the UNSC is unable or unwilling to make such authorisation. Finally when both these avenues fail the Commission suggests that action by regional organisations (NATO etc.) with *ex post facto* UNSC approval may also be legitimate. In articulating these six principles, *just cause, right intention, last resort, proportional means, reasonable prospects and the right authority,* R2P seeks to provide enough safe guards to prevent ad hoc intervention while still enabling the international community to mobilise efficiently and effectively in the face of humanitarian crisis.

We argue however that the high hopes built around R2P were misplaced. Whilst the codification of principles around humanitarian intervention is itself a small victory, the Sri Lankan case demonstrates the pragmatic reality of intervention has not changed.

### Why R2P Failed to Deliver in Sri Lanka

#### 1. Defining ‘Just Cause’

R2P is premised on the notion of state abuse of sovereignty. Intervention cannot occur unless the state has failed to fulfil its responsibility. However the Sri Lankan conflict gives rise to competing narratives, both involving large scale loss of life but ascribing markedly different levels of responsibility to the state. Several commentators referred to the situation facing Sri Lanka’s Tamils in the latter stage of the war in 2009, as genocide. The long history of Sinhalese nationalist oppression against the Tamil community, since Sri Lanka’s independence in 1948, is well documented. However the persistent armed struggle of the LTTE against the state turned a history of oppression and resistance into one of brutal insurgency and counterinsurgency.

Hence the Sri Lankan conflict is often referred to as a ‘civil war’ in the media and framed by the Sri Lankan state as an internal battle against terrorism. However, as Martin Shaw, a contemporary sociologist of genocide writes, these narratives need not be mutually exclusive. Civil war is one of the most common contexts of genocidal violence where armed resistance by an oppressed minority leads the
dominant power to collectively punish the civil population of that minority group in the name of quelling the insurgency.43

The claim that Sri Lanka’s conflict was ‘only’ a civil war, in which civilians unfortunately got in the way, has been the prime notion44 that the Sri Lankan state, like many regimes before it, has used to obfuscate accusations of genocide. For Shaw, indiscriminate allegations of a long-running Sri Lankan genocide and the competing claims of counter-terrorism paradoxically blunt the real questions which are what kind of violence did the Sri Lankan state commit against its Tamil civilian population in the concluding stages of the war, on what scale and with what intentions? By steering the issue away from broader political narratives, those questions have been left on the bedrock issue of R2P, the material role of the state. Those questions cannot be deflective by pointing to the culpability of non-state actors such as the LTTE whose obligations under international law are markedly different to sovereign states.45 For example in the recent fighting, the Sri Lankan state attempted to evade its ultimate responsibility for the loss of life by accusing the LTTE of using civilians as human shields.46 This however misses the point. Associate Professor Jake Lynch from Sydney University’s Centre for Peace and Conflict Studies stated of the Sri Lankan government:

> It accused a non-state armed group of using civilians as human shields - then went ahead and attacked them anyway. This is explicitly ruled out by a norm of humanitarian protection. The 1977 Additional Protocols to the Geneva Conventions specify that the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character. 47

As Professor John Neelsen48 put it, ‘the plight of the Tamils is not due to a natural disaster but the result of the conscious policy of a government that had no qualms of bombardng people that it claims as its own citizens with heavy artillery.’

On this basis, the actions of the state towards the Tamil civilian population appeared to more than satisfy the just cause threshold for R2P. However the state’s ability to direct, define and distribute its own narrative, particularly in light of Western sensitivities towards terrorism49 post 9-11, distorted the international community’s understanding50 of the situation to the extent that no clear ‘just cause’ was identified.

2. A Controlled Media and Establishing Just Cause

Fundamental to satisfying the ‘just cause’ threshold in any conflict is the ability of the international community to accurately identify the situation on the ground. Yet Sri Lanka’s war was fought without witnesses because the government refused independent media access to the conflict zone.51 As British Foreign Secretary David Miliband observed, ‘the fog of war makes it difficult to be certain of the facts of the present situation.52 Leaving aside foreign journalists, Sri Lanka’s local media record is poor, ranked 9th last in the world for press freedom by Reporters Without Borders,53 with state censorship and widespread killings, abductions and threats made against journalists with apparent impunity.54 The absence of independent media allowed the state to ‘stage manage’ the flow of information. The narrative started as one of a fight against terrorism and later changed to one of a ‘rescue-operation’,55 which characterised the LTTE as the aggressor with the Government making the fantastical claim that ‘not a single drop of civilian blood was shed’56 during the saga. US satellite imagery released post-conflict appeared to validate non-government claims of civilians being targeted,57 and footage released in August 2009 by dissident journalists showed what appear to be Sri Lankan army soldiers summarily executing naked and blindfolded Tamils during the conflict.58

The media in many ways defines public opinion and indirectly the politico-cultural canvas on which Western governments operate. To that extent the absence of free media in many conflict situations allows the public narrative to be shaped by holders of military power59 and avoids the creation of a ‘conscience shocking event’ around military behaviour. This in one sense imposes an obligation on the media to not be silent on such issues or release an equivocal narrative. But most importantly the meaningful exercise of R2P requires the international community to refuse to allow limited or murky information mute its stance on evolving humanitarian disasters.

3. A Lack of Political Will: The Geopolitical Maze

States it is said ‘have no permanent friends only permanent interests.60 Thus, despite the aforementioned facts, the primary driver of intervention is the geopolitical interest of international actors.61 Sri Lanka’s location in the Indian Ocean and the presence of strategic natural harbours such as Trincomalee,62 in a region claimed by Tamil militants, have meant that a variety of actors have a stake in Sri Lanka’s politics. Most of the permanent members of the UNSC have conflicting interests in Sri Lanka, a fact that brings into question the efficacy of the mechanisms through which R2P should operate.

India, China, and the West

India as the regional superpower has a particular interest in asserting its pre-eminence on Sri Lankan issues. Moreover its own 55 million strong population of Tamils in South India has meant that the central government has traditionally been sympathetic to the Sri Lankan Tamil cause. Indeed, India equipped the nascent Tamil militants in the 1980’s.63 However, the LTTE’s assassination64 of former Indian Prime Minister Rajiv Gandhi, due to an ill-fated Indian intervention in Sri Lanka in 1987, had the effect of muting India’s engagement in Sri Lankan domestic issues.

China on the other hand only recently emerged as a player in Sri Lanka, pledging over $1bn for large infrastructure projects in 2007. The most significant of these is a port in
Hambantota, providing China security for vital shipping routes.68 The Sri Lankan government also found some unlikely allies in Iran66 and Libya67 who have both poured money into Sri Lanka. The West on the other hand, with no primary interest in Sri Lanka has traditionally only been interested to the extent that it wished to prevent the rise of either China or India as a regional hegemonic power. However, given China’s new dominance and the emergence of Iranian and Libyan interests, it would seem that the West, in particular the US, is now focused on turning India into a close ally by developing India’s influence in the region.69 70

In the face of these conflicting geopolitical interests the Sri Lankan government effectively sided with China and other non-western aligned states, receiving significant military hardware and arms financing.69 China’s growing influence has had the effect of rousing India out of its ambivalent stance, and it has recently attempted to outdo China in support of the Sri Lankan military.

Sri Lanka’s anti-western stance also had an electoral dimension that allowed the government to embody an aggressive Sinhalese nationalism,70 with Western governments, NGOs, foreign media and the UN all painted as LTTE conspirators. In a series of anti-West manoeuvres the Sri Lankan government removed Norway from its role as peace facilitator,71 rejected a US offer to evacuate trapped civilians using its naval vessels,72 and rejected US and EU calls for amnesty to the LTTE leadership and their surrender to a third party.73 Similarly UN calls for unhindered access to the camps and the war zone were consistently rebuffed74 with some foreign MPs75 and journalists76 belligerently deported.

In this context the doctrine of R2P proved to be a lame duck. China’s interests and veto power prevented any real discussion or action on Sri Lanka at the UNSC.77 Furthermore, the global recession and the wars in Iraq and Afghanistan, meant that most of the West’s ‘altruistic capital’ has been spent, with domestic issues occupying the short-term agenda. Importantly, the need to court India as a bulwark against China means the West is reluctant to take a stance that undermines India’s position vis-à-vis China. In effect the West was reduced to making humanitarian pleas but with no impetus to act or intervene. It is this mazer of strategic interests that allowed the Sri Lankan government to prosecute a war of such catastrophic proportions with callous disregard for the loss of Tamil civilian life.

As a postscript to the war, with the support of China, Iran, India and Israel, a motion moved by several EU nations to investigate war crimes by both parties, was blocked at the UNHRC.77 The UNHRC instead chose to issue a resolution ‘congratulating’ Sri Lanka for its ‘victory’ over terrorism.79 Moreover, with the support of China, Sri Lanka is well placed to implement its stated agenda of military expansion,80 leading to fears of colonisation and permanent military occupation of traditional Tamil areas.81 By failing to take a principled stance on Sri Lanka, the US and UK to some extent have lost not only moral stature as champions of human rights, but also perpetuated their own marginalisation in the face of China’s increasing influence in the region.82

Conclusion

The doctrine of R2P represented a paradigm shift for its formal acknowledgment and codification of the legitimacy of humanitarian intervention. Yet this is ultimately a theoretical abstraction unless the international community has the political will to act in the face of human tragedies as witnessed in Sri Lanka. Here a failure to acknowledge the genocidal characteristics present in the civil war, albeit shrouded by the nomenclature of terrorism, and the acquiescence to unacceptable media practices, allowed a human disaster to be ambiguously framed. The geopolitical interests of various states, and a lethargy on the part of the West allowed this disaster to escalate with no real threat conveyed to the Sri Lankan state that such a catastrophe would lead to action.

During his campaign, President Obama stated ‘when ethnic cleansing is happening somewhere around the world and we stand idly by, that diminishes us’.83 This endorsed the idea that the West has an obligation to intervene to protect civilians from war even where no vital national interests were at stake. It was precisely the idleness Obama referred to that led the international community to say ‘never again’ after the Holocaust in 1945 and Rwanda in 1994. The plight of Sri Lanka’s Tamils in 2009 should serve as a reminder to the international community that without true commitment to act when human sanctity is threatened, words like ‘never again’ are little more than rhetoric from a West that perennially promises more than it delivers, providing little hope to war’s luckless victims and undermining its own claim as the upholder of human rights.

References

5 June 2009; Ratnesar, above n6.


13 The Times UK above n9, Thomas Fuller above n6.

14 Rhys Blakely, Septicism as Sri Lankan Doctors Backtrack over mass deaths by Army Shelling (22 June 2009) <http://www.iREPORT.com/docs/DOC-228628> accessed 1 August 2009; Bruce Boyle, Sri Lanka's genocidal “rolling” genocide in which Sinhalese governments have sought “to annihilate the Tamils and to steal their lands and natural resources, what Hitler and the Nazis called Lebensraum – “living space” for the Sinhalas at the expense of the Tamils.” This history includes linguistic and religious marginalisation, discrimination in education and economic exploitation of the Tamil island nation and state. Triggs, above n23 at 600.


22 The Times UK, above n10.

23 Ibid.


26 UN Charter Article 2(4).


28 Breaches of Int’l Cogens norms such as; genocide, war crimes, crimes against humanity and ethnic cleansing.


32 UN Charter Article 2(4).

33 Triggs, above n23 at 600.


38 Genocide as framed in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is ‘a national policy of systematic extermination, or in part, a national, ethnical, racial or religious group.’ This intent component is very hard to prove in civil war contexts where the civilian casualties can be framed as ‘collateral damage.’ Related to this is that Western conceptions of genocide are largely of the Holocaust and similar ‘vocanic’ violence in places like Rwanda as chattel, whereas the Tamils are considered an ‘amorphous’ or ‘featureless’ group.


China means Sri Lanka can take a pass on human rights. There are ways we deal with each other — perhaps a quiet chat, but not wagging the finger,” Somini Sengupta, ‘Aid from China means Sri Lanka can take a pass on human rights’ The New York Times (9 March 2008).

Ratnesar, above n6.