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High Commissioner and the Secretary-General

Written statement* submitted by the Association des étudiants tamouls de France, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in
accordance with Economic and Social Council resolution 1996/31.

[13 February 2017]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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UN Failed on Responsible to Protect on Sri Lanka*

Placing the Conflict in Context

For some 26 years, Sri Lanka was ravaged by civil war. 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'. 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). 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. The November 2012 Internal Review Panel Report, the 'Petrie' report, references 'credible reports' that civilian casualties were as many as 70,000. According Sri Lankan Government agent and Catholic Bishop Rayappu there were about 147,000 are missing.

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 international outcry or effective UN response". 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.

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".

Following a landmark international investigation, in September 2015 the United Nations released a major report (the 'OISL' report) into serious human rights violations in Sri Lanka between 2002 and 2011. It was clear in its view that many of those violations would amount to war crimes and crimes against humanity if established in a court of law. It also made a number of recommendations as to how Sri Lanka might begin to address these crimes and start laying the foundations for a sustainable peace.

In response, the Government of Sri Lanka, acting through the UN Human Rights Council, made a series of promises to war survivors and the international community, pledging to address the legacy of the war through a wide-ranging set of measures. These promises were contained in Human Rights Council resolution 30/1, agreed in October 2015.

Below, we have distilled the text of this agreement into 25 specific commitments – commitments which the Sri Lankan government must now live up to if it is to have the trust of war affected communities. As our recent report highlights, it is the very lack of trust that is currently the biggest obstacle to meaningful reconciliation in Sri Lanka.

Next to each of the commitments we have provided a short evaluation of progress to date along with a colour code. As illustrated most starkly by the overview chart, though there has been improvement in several areas, there remains much more that needs to be done in others.

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’. 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. 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.

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. 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. 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; the Syrian Arab Republic, 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.

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.

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.

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.

4. Council members should recognize Tamil Rights to self-determination.

*Swiss Council of Eelam Tamils (SCET), NGO without consultative status, also shares the views expressed in this statement.