

THE RESPONSIBILITY TO PROTECT: WHERE TO NOW?

Amnesty International/ANU College of Law Address by Professor the Hon Gareth Evans AC
QC FASSA FAIIA, Chancellor of Australian National University, Canberra, 23 May 2018

There are many kinds of human rights violations which properly concern Amnesty International and its legion of admirable supporters here and worldwide. I want to focus tonight on what most of us would regard as the most horrifying of them all – genocide, ethnic cleansing, other crimes against humanity and large scale war crimes: those gross and systematic violations of everything it is to be human, described by Kofi Annan as offending ‘every precept of our common humanity’.

Troubling Times. These are troubling times for those, like me, who have worked for decades on halting and averting such mass atrocity crimes, and who have not only hoped but believed – when the ‘Responsibility to Protect’ principle was unanimously embraced by the UN General Assembly over a decade ago – that the world might at last be moving closer to ending them once and for all. Over the last twelve months:

- we have seen nearly 700,000 Rohingya crossing the border from Myanmar into Bangladesh, fleeing military operations involving widespread killings, rape, and the burning of more than 350 villages that have been described by the UN High Commissioner for Human Rights as a ‘textbook example of ethnic cleansing’ – and living now in catastrophically vulnerable refugee camp conditions;
- we have seen the horror of Syria, with more than 500,000 people killed and over 12 million displaced, continuing unabated, most recently with the deadly assault by government forces on the previously agreed ‘de-escalation zone’ in eastern Ghouta;
- we have seen all parties to the conflict in Yemen, which has left 10,000 dead over the last two years and put over 8 million at alarming risk of famine, committing war crimes and crimes against humanity by indiscriminately attacking civilians and civilian infrastructure;
- we have seen, despite partially successful efforts by UN peacekeeping forces to moderate these conflicts, in the Democratic Republic of the Congo recurring mass atrocity crimes being committed by the security forces and various militias, with serious new threats of major inter-communal violence; and in South Sudan, the repeated breakdown in peace negotiations – after 50,000 have already died since 2013 – putting at further risk populations being targeted for their ethnicity and presumed political loyalties;
- and we have seen just last week, while the opening of the US Embassy in Jerusalem was being celebrated, the shockingly disproportionate response of Israel to the demonstrations on the Gaza border, leaving 60 Palestinian men, women and children slaughtered and as many as 2,000 or more injured – with, for all Israel’s stated fears, the fence-line not breached and just one Israeli soldier reported as ‘slightly wounded’: a juxtaposition of events described by the Israeli journalist Gideon Levy in Haaretz as an ‘atrocious moral eclipse’ in which ‘Rwanda is coming to Gaza, and Israel is celebrating’.

The United Nations, in whom so many of us have vested so much hope, has been impotent in response to most of these situations: Security Council resolutions have been blocked or

watered down by vetoes or threatened vetoes – from Russia and sometimes China in the case of Syria, and invariably from the US in the case of Israel; the Human Rights Council passes resolutions and issues reports but has been for the most part incapable of energizing effective action; and the hugely respected High Commissioner for Human Rights Prince Zeid has announced that he will not seek reappointment, citing an ‘appalling’ climate for advocacy, with the United States and other world powers retreating from their historic commitment to human rights. When it comes to the worst of the mass atrocity crimes now being perpetrated, the world seems to have just gone missing.

Middle powers like Australia occasionally talk the talk – and I do acknowledge that under both Coalition and Labor Governments we have from the outset been a strong and helpful, and by me much appreciated, voice in UN forums in the birth and evolution of the concept of the responsibility to protect, the subject of my talk this evening – but we have simply not been doing the hard yards in trying to mobilize effective international responses to the Rohingya and other crises.

It distresses me also to have to add that Australia’s international credibility on human rights issues – already under strain with the indefensible cruelty involved in the offshore detention of asylum seekers, whatever the stated humanitarian rationale of that policy – was dealt a further serious blow in Geneva last week with our ‘No’ vote on the Human Rights Council resolution last week to establish an independent commission of inquiry into the Gaza killings. Yes, there were legitimate concerns about the one-sided nature of some of that resolution’s text, which led to the the abstention of the UK, Germany, Switzerland, Rwanda and others, and certainly would have justified our abstention.. But to vote ‘No’ as we did – alongside only the United States – was to be on the wrong side of history, and the wrong side of decency.

For someone who has been, as I describe myself in the title of my recently published memoir, an *Incorrigible Optimist* I can’t pretend that in the face of all these developments my optimism is not under some strain. But it has not evaporated. Compared to where we were two decades ago, and for many decades – indeed centuries – before that, I believe that we have come a long way. And I also believe that the future, though extremely challenging, is not unremittingly bleak. Let me explain why – beginning at the beginning, with where we were before the birth of the responsibility to protect as a new standard bearer.

The Genesis of R2P. Slaughtering people not for anything they do, but simply for who they *are* – their national, ethnic, racial, religious, or political identity – is morally as bad as it gets. Yet that was the fate of at least 80 million men, women and children in the twentieth century, including Armenians in Turkey, Jews in Europe, suspect classes in the Soviet Union and China, communists in Indonesia, non-communists in Cambodia, Bengalis in former East Pakistan, Asians in Uganda, Tutsis in Rwanda, and Muslims in the former Yugoslavia.

As extraordinary as it now seems looking back, the scarifying experience of the Nazi Holocaust did not make all that much difference to the way in which the world reacted to these mass atrocity crimes. For centuries there had been no generally accepted principle in law, morality or state practice to challenge the core notion that it was no-one’s business but their own if states murdered or forcibly displaced large numbers of their own citizens, or allowed atrocity crimes to be committed by one group against another on their soil. And even

after World War II – with all the new instruments of international humanitarian law and human rights law that emerged, including the Universal Declaration of Human Rights, the Nuremberg Tribunal Charter in 1945, and the Genocide Convention in 1948 – things did not fundamentally change. The overwhelming preoccupation of those who founded the United Nations was not, in fact, human rights, but the problem of states waging aggressive war against each other.

What actually captured the mood of the time, and the mood that prevailed right through the Cold War years, more than any of the human-rights provisions, was Article 2(7) of the UN Charter stating that ‘Nothing...shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state’ (although this language of course leaves open the question as to what *is* essentially domestic). The state of mind that even massive atrocity crimes like those of the Cambodian killing fields were just not the rest of the world’s business prevailed throughout the United Nations’ first half-century of existence. States from the global South in particular saw 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.

With the arrival of the 1990s and the end of the Cold War, the prevailing complacent assumptions about non-intervention did at last come under challenge as never before. With the break-up of various Cold War state structures, and the removal of some superpower constraints, conscience-shocking situations repeatedly arose, above all in the former Yugoslavia and in Africa. But the UN remained a consensus-free zone. Old habits of non-intervention died very hard. Even when situations cried out for some kind of response and the international community did react, it was too often erratically, incompletely or counter-productively – as in the debacle of Somalia in 1993, the catastrophe of Rwandan genocide in 1994, with 800,000 butchered in a two-month orgy of ethnic violence, and the almost unbelievable default in Srebrenica just a year later, in 1995, when 8000 Bosnian Muslim men and boys taken from under noses of a contingent of Dutch UN peacekeepers and executed in nearby fields. When military action *was* taken, after the killing and ethnic cleansing started all over again in Kosovo in 1999, it was without Security Council endorsement because of a threatened veto by Russia: the action may have been legitimate but it certainly wasn’t legal.

This was the environment which drove UN Secretary-General Kofi Annan to make, in his 2000 *Millennium Report*, the despairing and heartfelt plea to the General Assembly which proved to be a turning point in the intervention debate: ‘If humanitarian intervention is indeed an unacceptable assault on sovereignty, how *should* we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?’ And that was the challenge that gave birth to what the world now calls ‘R2P’ – the responsibility to protect.

Kofi Annan’s plea stimulated Canadian Foreign Minister Lloyd Axworthy to initiate the International Commission on Intervention and State Sovereignty – which he asked me to co-chair, leading an extraordinarily distinguished cast of characters including, among others, Cyril Ramaphosa, now President of South Africa and former Philippines President Fidel

Ramos. And we came up in our 2001 report with a whole new way of approaching the problem of mass atrocity crimes committed behind sovereign state borders which at last made it politically possible for the global North and South to find common ground – in a way that had simply been impossible when the debate was solely, as it had been in through the 1990s, in terms of ‘humanitarian intervention’: send in the big guys with all guns blazing, or do nothing.

A number of factors contributed to our report’s favourable reception. There was the language we used – the ‘responsibility to protect’ being much less inherently abrasive than the ‘right to intervene’. There was our emphasis on multiple actors sharing that responsibility, not just the big military players. There was our strong emphasis on preventive strategies, not just reactive ones. There was our identification and support for a whole continuum of reaction measures, not just military ones but including diplomatic isolation, and sanctions and embargoes, and threats of International Criminal Court prosecution. And there was our insistence that the bar for any military intervention be set very high, with legality dependent on Security Council endorsement, and legitimacy dependent on satisfying clear prudential criteria, including proportionality and doing, on balance, more good than harm.

Our objective in crafting our report and recommendations concept was not to create new international legal rules nor undermine old ones. Our intended contribution was not to international relations theory but political practice. We wanted to create new standards of international behaviour which states would feel ashamed to violate, compelled to observe, or at least embarrassed to ignore. Above all, we simply wanted to ensure that when genocide, ethnic cleansing or other crimes against humanity or major war crimes were being threatened or committed behind sovereign state borders, the rest of the world would regard this as everyone’s business, not nobody’s business.

And that was the view which eventually prevailed five years later when the world’s heads of state and government, effectively sitting as the UN General Assembly celebrating the UN’s 60th anniversary at the 2005 World Summit agreed to unanimously endorse the principle of R2P. The language of that resolution made it clear that the responsibility to protect had three distinctive ‘pillars’: the responsibility of a state to its own people not to either commit such mass atrocity crimes or allow them to occur (‘Pillar One’); the responsibility of other states to assist those lacking the capacity to so protect (‘Pillar Two’); and the responsibility of the international community to respond with ‘timely and decisive action’ if a state is ‘manifestly failing’ to meet its protection responsibilities – including ultimately with coercive military force if that is authorised by the Security Council (‘Pillar Three’).

The 2005 decision to embrace R2P was in many ways against the odds, because practically nothing else of any importance was agreed at that Summit, and it was preceded by weeks of often very cantankerous diplomatic negotiation (in which the US Ambassador John Bolton then as ever played a spectacularly unhelpful spoiling role). What mattered most at the end of the day was the active support of a group of sub-Saharan African countries, led by South Africa, who succeeded in persuading their dubious developing country friends that, when it came to mass atrocity crimes, indifference was an even greater sin than intervention.

The Effectiveness of R2P. But that was all then, and now is now. Looking back well after a decade has passed since 2005, what have we managed to achieve? Just some fine words, or something more than that? There are plenty of cynical voices to be heard saying that the whole enterprise has been a complete waste of time, or worse. Looking at the series of current catastrophes I listed at the outset, it's a hard argument to contest. But contest it I do, taking as my benchmarks the four big things that R2P was designed to be: a normative force; a catalyst for institutional change; a framework for preventive action; and a framework for effective reactive action when prevention has failed. There is zero room for complacency – particularly in the post-truth, post-rationality, post-decency, Trumpian world we now inhabit. But there are positive things we can say on each of these fronts,

Normatively, R2P has achieved a global take-up unimaginable for the earlier concept of 'humanitarian intervention' which R2P has now rightly, and almost completely, displaced. Although many states are still clearly more comfortable with the first two pillars of R2P than they are with the third, and there will always be argument about what precise form action should take in a particular case, there is no longer any serious dissent evident in relation to any of the elements of the 2005 Resolution. The best evidence lies in the General Assembly's annual interactive debates since 2009, which have shown ever stronger and more clearly articulated support for the new norm, and in the more than 50 resolutions referencing R2P that have now been passed by the Security Council (more than 40 of them after the divisions over Libya in 2011). I don't suggest for a moment that R2P has become so embedded in international practice that it now counts as a new rule of customary international law. But when considered as a guide to behaviour, I believe that R2P is more than just an 'emerging' norm: it is a new norm.

Institutionally, more than 50 states and intergovernmental organizations have now established R2P 'focal points' – designated high-level officials whose job is to analyze atrocity risk and mobilize appropriate responses. Civilian response capability is receiving much more organized attention, as is the need for militaries to rethink their force configuration, doctrine, rules of engagement, and training to deal better with mass atrocity response operations.

Probably the most crucial institutional need for the future is to create a culture of effective support for the International Criminal Court (ICC) and the evolving machinery of international criminal justice, which machinery is designed to enable not only trial and punishment for some of the worst mass atrocity crimes of the past, but in doing so to provide an important new deterrent for the future. It is deeply regrettable that the ICC has come under so much recent fire from African states in particular, although threatened mass withdrawals have not eventuated – Burundi is the only departure so far, with the only other current notice to withdraw being that of Duterte's Philippines. Implementation of the ICC's mandate may not always have been perfect but it is trying hard to fill what has far too long been a major institutional vacuum, and its processes should be respected.

Preventively, R2P-driven strategies have had a number of notable successes, notably in stopping the recurrence of strife in Kenya after 2008; in the West African cases of Sierra Leone, Liberia, Guinea, and Cote d'Ivoire over the last decade; and Kyrgyzstan after 2010. Volatile situations such as Burundi get the kind of continuing Security Council attention unknown to Rwanda in the 1990s. Strong civilian protection mandates are now the norm in

peacekeeping operations. And the whole preventive toolbox, long and short term, structural and operational, is much better understood. But action still often lags behind the rhetoric. Part of the problem of getting sufficient resources to engage in successful prevention is the age-old one that success here means that nothing visible actually happens: no-one gets the kind of credit that is always on offer for effective fire-fighting after the event.

Reactively? But how effective are we at fire-fighting in atrocity cases? How effective has R2P been as a reactive mechanism, when prevention has failed? The not-so-good news is that on the critical challenge of stopping mass atrocity crimes that are under way, whether that is done through diplomatic persuasion, stronger measures like sanctions or criminal prosecutions, or through military intervention, R2P's record has been mixed, at best.

There have been some success stories: Kenya in 2008, Côte d'Ivoire, and – at least initially – Libya in 2011. And some partial success can be claimed for the new or revitalized UN peacekeeping operations in Congo, South Sudan, and the Central African Republic, where mobilization of the international community, although late, was better late than never. But there have also been some serious failures, certainly including Sri Lanka in 2009. In Sudan, where the original crisis in Darfur predates R2P but the situation continues to deteriorate, President Omar al-Bashir remains effectively untouched either by his International Criminal Court indictment or multiple Security Council resolutions. We are not doing as well as we should be in stopping non-state actors like Boko Haram committing atrocity crimes in territory over which they have control. International censure has not inhibited Israel from using manifestly disproportionate force to maintain its occupancy of the West Bank and isolation of Gaza. And, above all, there has been catastrophic international paralysis over Syria.

The crucial lapse in Syria occurred in mid-2011, when the Assad regime's violence was one-sided and containable. Driven by the perception, not itself unreasonable, that the Western powers had overreached in Libya by stretching a limited mandate to protect civilians into a regime-change crusade, a number of Security Council members then over-reached in the other direction: seeing another slippery slope in Syria, there was no majority support for a resolution even just to condemn the regime's violence against unarmed civilians. And with the Syrian leadership sensing its impunity, the situation deteriorated quickly into the full-scale civil war still dragging on disastrously today.

The Future of R2P. The future of the responsibility to protect will only be assured if we fight for it, and like almost everything else that matters when it comes to attitudinal and behavioural change, domestically or internationally, the momentum for change can come from three different directions – top-down, sideways from peer group members, and bottom-up. And it is obviously most successful when initiatives and pressure are coming from all three.

Top-Down. Beginning with top-down moves, there is no more important or urgent task for R2P advocates than to rebuild consensus within the Security Council as to the right way to handle the hardest of cases. And the hardest cases of all are those where it is evident – as with Rwanda, Srebrenica, Kosovo, Cote d'Ivoire, and Libya in early 2011 – that the threat or use

of coercive military force is really the only way of stopping catastrophic atrocity crimes in their tracks.

There will always be acute difficulty in getting Council agreement on the use of coercive military force. Given that such force has been misused in the past, and the stakes and risks are always so high, it is right that the bar for action here always be set very high. But it should not be set impossibly high, and there is a proposal to cut through the present paralysis that was put on the table by Brazil in late 2011, in response to the breakdown of consensus over Libya, which in my judgement remains the most constructive of all the suggested ways forward. The idea is for R2P to be supplemented, not supplanted, by a complementary principle, dubbed 'Responsibility While Protecting' (or 'RWP') which would require all Council members to debate more comprehensively the criteria that need to be met before any use of force is authorized, and to accept close monitoring and review of any coercive military mandate throughout its lifetime. Both Russia and China have shown a degree of interest in going down this path, but the US – even under the Obama administration – has shown as yet no enthusiasm for any process which would limit its divine right of *ad hocery*.

Of course it is not only coercive military interventions but less extreme measures, like sanctions or arms embargoes or ICC investigations, which have been stopped by vetoes or threats of vetoes in circumstances where they might have been effective – like the very early days of the Syrian conflict, and arguably now in cases like Myanmar and the Rohingya, and Israel and Gaza. In this context it is encouraging that momentum has been building behind two initiatives (both of which I am pleased to note that Australia *has* supported) calling on the Five Permanent members not to use their veto powers in mass atrocity crime cases. One is from France and Mexico, which has now attracted support from 99 member states, and the other from the so-named Accountability, Coherence and Transparency (ACT) Group which has attracted 111 signatories to its proposed Code of Conduct. But neither has won support so far from the Security Council members who matter most – Russia, China and the United States.

Sideways. These initiatives, while they are directed at top-level decision-making, are also examples of peer-group pressure at work. That 'sideways' pressure can also be very relevant and helpful in other R2P contexts. Members of the regional organizations recognized formally under Chapter VIII of the UN Charter, acting collectively, can play an important role in stimulating the Security Council into action, as the Arab League did in the case of the initial very effective response to Gaddafi's atrocity crimes in Libya. And such organizations, harnessing the collective strength of middle and smaller powers, can also play an important role in their own right in halting or averting atrocity crimes through diplomatic, economic, court-focused or, as necessary, military, means, as the West African organization – ECOWAS – has repeatedly demonstrated.

That said, most of the other regional and sub-regional organizations – including ASEAN and SAARC in our own area – have a long way to go in realizing their potential in this respect. ASEAN has been particularly limp – although not unusually so – in responding to the Rohingya crisis, putting no effective pressure whatsoever on the Myanmar government to behave decently.

Apart from the role of regional organization peer group international pressure can also be important in other ways, even if it only takes the form of naming or shaming, or just genuinely strong-minded backroom diplomacy in those cases where more public condemnation would be counterproductive (and there are some, though not as many as some Foreign Ministers like to pretend). Most states most of the time are quite uncomfortable being the subject of sustained and wide-ranging critical international attention – as Amnesty International has long understood with its own *modus operandi* – and enough of them do modify their behaviour under that kind of fellow-state scrutiny to make it worthwhile.

In that context I have long argued that all states should have an ethical dimension to their foreign policy, regarding the ending of mass atrocity crimes – along with other global and regional public goods – not as discretionary add-ons, or the foreign affairs equivalent of boy-scout good deeds, but as hard-headed, core foreign policy business. Given the centrality today in international discourse of so many global and regional public goods issues, not just related to human rights protection, but those like climate change, international crime, terrorism, arms control and health pandemics, I have long thought it sensible to think of ‘national interests’ as not being exhausted by just the two traditional and familiar baskets of security and economic prosperity, but as having a distinct third category as well, namely every country’s national interest in being, and being seen to be, a good international citizen. Which means in turn being willing to seriously engage in cooperative international action to try to resolve all these kinds of problems. And states should be willing to be and be seen to be good international citizens not just because that is the right thing to do, but because there are two very hard-headed returns – in terms of reputation and reciprocity respectively – for a state being seen to be a good international citizen. Enhancement of a state’s international stature by being the kind of good guys the Scandinavians have always been, and Australia has sometime been, is bound to work, over time, to its economic and security advantage.

The corollary of all this, however, is that the credibility of good-international-citizenship advocacy can never be greater than that of the governments who conduct it. If we don’t get our own human rights houses in order – and Australia has quite a lot more to do in this respect, not least on refugee policy – we run a very real risk of being branded as hypocrites.

Bottom Up. The remaining kind of pressure that really matters when one is working for change is from the bottom up. It is very difficult to engage the attention and commitment of government decision-makers anywhere in the world – as I know better than most after 21 years in parliament and government, and another few decades before and after then trying to influence them from the outside -- unless they sense there is some wider community enthusiasm for taking the action in question, whether it’s voting in the UN or anything else.

NGOs can play a tremendously important role in this respect in gathering information, articulating the necessary arguments, energizing the media, and directly mobilizing or supporting highly-visible grass-root campaigns. Amnesty International, Human Rights Watch, the International Crisis Group which I used to lead in Brussels, the Global Centre for the Responsibility to Protect which I still chair in New York, the big humanitarian relief agencies like Oxfam and MSF, and quite a few other NGOs have been indefatigable and indispensable global advocates on mass atrocity crime issues.

But my last word on bottom up pressure is the critical importance of ordinary individuals in the community making their voices heard on these issues, whether through an NGO or a political party or just as concerned citizens. There is a growing body of thinking and writing about R2P which emphasises not just the role of governments and intergovernmental organizations like the UN, but the agency of individuals – and not only those individuals who have the capacity to perpetrate atrocity crimes and those who have the power to stop them, but ordinary, individual citizens (so much so that we now have another acronym in the literature: ‘IR2P’, the ‘Individual Responsibility to Protect’). Effective atrocity prevention depends above all else on the exercise of political will of those in power, and getting decision makers off their backside depends on them hearing, loudly and clearly, many passionate community voices telling them that human lives are at risk and that inaction is intolerable.

Staying Optimistic. My very last words of all are on the critical necessity for all of us, governments, intergovernmental organizations, NGOs and ordinary citizens is to stay optimistic, to go on believing that what we do can and will make a difference. The crucial point is that in international relations, as in life itself, outlooks can be self-reinforcing. Pessimists see conflict, horror and sheer human idiocy of one kind or another as more or less inevitable, and adopt a highly wary and competitive approach to the conduct of international relations. But for optimists of all stripes and colours, what matters rather is believing in and nurturing the instinct of cooperation in the hope, and expectation, that decent human values will ultimately prevail. If we want to change the world for the better, we must start by believing that change is possible.

Being an incorrigible optimist, I continue to be upbeat about the progress we are making towards the ultimate effective elimination of all mass atrocity crimes, despite all the things that are still going wrong. As I move around the world discussing these issues, as I regularly continue to do, I really don’t see evidence anywhere that anyone wants a return to the bad old days, when the whole UN was a consensus free zone on mass atrocity crime issues. And we should never forget how bad those days could be. In November 1975, seven months after the Khmer Rouge had commenced its genocidal slaughter, US Secretary of State Henry Kissinger famously said to Thai Foreign Minister Chatichai Choonhavan: “You should also tell the Cambodians [the Khmer Rouge] that we will be friends with them. They are murderous thugs, but we won’t let that stand in our way.” As cynical as our political leaders sometimes remain – and as a long-time politician myself, I know a fair bit about that culture – it’s hard to imagine any of them today, even in the Trump administration, feeling able to talk like that.

But while optimism may be self-reinforcing, it is not self-fulfilling. When things that matter get depressing and difficult, however disappointed and frustrated we may be, there is no alternative but to try actively to remedy them, in every way one realistically can. You don’t get to change the world simply by observing it.

Throughout my public life, there is one little mantra, beloved in the labour and student protest circles of my youth, which has always buoyed me in these situations – and which some of my fellow grey hairs may remember, if only from the ballad immortalised by Pete Seeger and Joan Baez in the ‘60s. On the eve of his execution by firing squad in a Utah prison in 1915, after being convicted on a probably trumped-up murder charge, Joe Hill, the International Workers of the World (‘Wobblies’) union agitator and songwriter, wrote to his

colleagues : ‘Don’t waste time mourning, organize!’ That mantra – however bad things may seem, ‘Don’t mourn – organize! – resonates with me still. It resonates, I think, with everything that Amnesty International has always been about. And I hope it resonates with at least some of you who have been kind enough to come and listen to me this evening.

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