

TAKING STOCK OF THE RESPONSIBILITY TO PROTECT: ACHIEVEMENTS AND CHALLENGES

Public Lecture/Inter by Professor the Hon Gareth Evans AC QC, Chancellor of The Australian National University and 2016-17 Simons Visiting Chair in International Law and Human Security, Simon Fraser University, Vancouver, 22 March 2017

Those of us present at the creation of the Responsibility to Protect (R2P) – and many of the founding fathers and mothers are together here in Vancouver this week thanks to the wonderful commitment and generosity of Jennifer Simons and her Foundation – had a single abiding objective. It was to ensure that whatever else the international community managed to screw up in its conduct of international relations, we would not continue to screw up – as we had throughout the 1990s, and indeed for not only many decades, but many centuries, before – when it came to responding effectively to the threat or reality of mass atrocity crimes.

We wanted, above all, 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.

That was the motivation that led Kofi Annan to throw down his millennial challenge in 2000: “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?”

That was the motivation which led Lloyd Axworthy (back in the days when Canada behaved like Canada, as it is now mercifully again) to respond to that challenge by initiating the International Commission on Intervention and State Sovereignty, which I had the pleasure and privilege of co-chairing, which came up in our 2001 report of that name with the breakthrough concept of ‘The Responsibility to Protect’, which in turn 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 in terms of ‘humanitarian intervention – send in the big guys with all guns blazing or do nothing.

And that was the motivation which enabled the UN General Assembly, in the context of the 2005 World Summit – against the odds, because practically nothing else of any importance was there agreed – to unanimously endorse the principle of R2P, with its 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’ – including ultimately with coercive military force if that is authorised by the Security Council – if a state is ‘manifestly failing’ to meet its protection responsibilities (‘Pillar Three’).

But that was then, and now is now. Looking back after more than 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 present catastrophe in Syria, where R2P gained no traction at all, and the horrible aftermath of the initially-successful R2P-based military intervention in Libya, that might seem 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, and positive foundations on which we at this conference can build when we discuss over the next two days how to re-energize the commitment to R2P of the world's key players.

R2P as a Normative Force. I love quoting the British historian Martin Gilbert when he said, two years after the 2005 World Summit, that acceptance of the responsibility to protect is ‘the most significant adjustment to sovereignty in 360 years’. That may be a stretch, but it is certainly true to say that there has been continuing growth in acceptance of R2P as a *principle*, or normative standard, in a way that would have been unimaginable for the earlier concept of ‘humanitarian intervention’ which R2P has now almost completely, and rightly, 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.

R2P as an Institutional Catalyst. All the normative consolidation in the world will not be of much use if R2P is not capable of delivering protection in practice. That means for a start the continued evolution of institutional preparedness, at the national, regional and global level, particularly at the crucial stages of early prevention, and early reaction to warning signs of impending catastrophe. R2P has been a change agent here, with civilian response capability receiving much more organized attention. The Peace and Stabilization Operations Program announced last year by the new Canadian Government, although it has a wider remit than purely R2P situations, is an excellent example of the thinking now going into coordinating more effective responses by multiple agencies to complex political crises abroad. Militaries are also rethinking their force configuration, doctrine, rules of engagement, and training to deal better with mass atrocity response operations, which often need to fall somewhere between peacekeeping and full-scale war fighting.

Of great importance has been the move to establish ‘focal points’ – designated high-level officials, or groups of officials, whose job is to analyse atrocity risk and mobilise appropriate responses. There are now more than 50 members of the ‘Global Network of R2P Focal Points’ convened by the Global Centre which I chair and Simon Adams directs. One of the most visible and potentially effective of them has been the Atrocities Prevention Board, established by President Obama in the US National Security Council, the existence of which is now unhappily at real risk under the new Trump administration – an issue I’ll come back to. But however much has been achieved so far, here as elsewhere more needs to be done – not least at UN Headquarters, where the roles of the Special Adviser on the Prevention of Genocide and, unhappily still only part-time, Special Adviser on R2P, need to be not only recognized, but rationalised, coordinated and strengthened.

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, including South Africa, although the threatened exodus of a number of them from accepting the Court’s jurisdiction has not yet happened. 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.

One development that would certainly turn on its head any perception of pro-North bias on the part of the ICC would be for it to seriously pursue a case against my own country, Australia, for possible crimes against humanity committed by successive governments in forcibly detaining asylum seekers on Nauru and Manus Island in Papua New Guinea. A detailed brief has recently been lodged with the prosecutor of the ICC seeking just that, with evidence and supporting legal argument that are both seem prima facie credible’, though no doubt will be fiercely contested. It is painful for me as a former Australian foreign minister to acknowledge that if such action were to prove successful, this would be deeply shaming for Australia’s good international citizenship credentials. But I also have to acknowledge, from a broader global perspective, that this might just be the circuit-breaker needed to restore the court’s credibility in the global South.

R2P as a Preventive Framework. The credibility of the whole R2P enterprise has depended from the outset on giving central importance to prevention. There is now a very good understanding of the large toolbox of preventive measures available at all stages of the crisis and conflict cycle, but while there is a very long tradition of regular lip-service being paid to the need for effective prevention, the record of practical delivery is not nearly as strong as it should be. 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.

All that acknowledged, it is fair to claim that R2P-driven strategies have had a number of notable successes, especially in the context of post-crisis prevention of recurrence. Notably in Kenya after 2008; the West African cases of Sierra Leone after 2002, Liberia after 2003, Guinea and Kyrgyzstan after 2010, and Cote d'Ivoire after 2011. While Burundi has been a catastrophe waiting to happen again for over a decade now, the immense amount of R2P-focused attention it has been receiving from the Security Council and African Union has arguably been an important factor in so far preventing the volcano erupting. Most peacekeeping operations now have protection of civilians mandates – built on R2P's sister concept of Protection of Civilians in Armed Conflict (POC) – and most of the time those operations are succeeding in keeping the lids on some often very simmering pots. The situation is dire, but nobody doubts that we can and should be doing much more by way of prevention.

R2P as a Reactive Framework. This is where the rubber hits the road. What do we *do* if a state, through incapacity or ill-will, has failed to meet its Pillar One responsibilities? The not-so-good news is that on the critical challenge of stopping mass atrocity crimes that are under way, whether through diplomatic persuasion, stronger measures like sanctions or criminal prosecutions, or through military intervention, and acting under either pillar two or pillar three, 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 CAR, 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. 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 raging today.

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, when it may well be that the threat or use of coercive military force is the *only* way of stopping catastrophic atrocity crimes in their tracks. The 'responsibility while protecting' (RWP) proposal put on the table by Brazil in 2011 remains the most constructive of all the suggested ways forward,

requiring as it would all Council members to accept close monitoring and review of any coercive military mandate throughout such a mandate's lifetime. Re-establishing the necessary consensus is not impossible, but it will take time – and maybe, with the advent of the Trump Administration, much more time than I had thought likely before last November.

There are a number of other ways in which Security Council practice could be modified to enhance its responsibility when handling atrocity crime cases, which I also hope will be taken seriously by Council members. They include embracing the Accountability, Coherence and Transparency (ACT) Group's Code of Conduct and French/Mexico veto restraint initiatives, both of which are receiving increasing support from the wider UN membership, though not – as of now – of the Security Council members who matter most, above all the United States.

Recent political developments in the United States and Europe have given optimists everywhere a reality check. In particular, I have to acknowledge that there are now real concerns about whether the United States under the new Trump administration will have any serious commitment to R2P at all, let alone be prepared to moderate some of the less-helpful positions taken by its predecessor. The Obama administration, for all its reluctance – in the finest national tradition – to yield American power to anyone else, and for all its stubborn resistance to veto restraint and continued unwillingness to acknowledge error in its treatment of the Libyan mandate, was at least manifestly sympathetic to the underlying principles of the norm. There is obviously a real prospect that the Trump administration will be anything but that, given its already articulated hostility to the UN and all its works. It could be a long four years wait – with R2P as with so many other foreign policy issues – before there is a chance of returning to anything like normal international diplomacy.

It is obviously the case that the new president's instincts are clearly neither multilateral nor interventionist, and he is not likely to be moved by appeals to 'universal values' of any kind. But maybe, just maybe, he will come to be persuaded that 'American values' are relevant here, and that his stated aim to 'make America great again' will only be achieved, in the eyes even of his own inward-looking hard-core supporters, if the United States occasionally demonstrates not just great attentiveness to its own immediate self-interest, but greatness of heart and spirit, at least when it comes to the protection of those at risk of genocide and mass atrocity crimes. While the chances of sympathy for Muslim victims may not be very great, at least Christians may be in with a chance...

For all the scepticism and pessimism and general depression we are entitled to feel about the role likely to be played by the United States over the next few years, the bottom line for me is that I don't believe that pessimism on that scale is justified more generally. 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.

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. That’s a measure of how far we have come with R2P. And if that’s true, it’s a great tribute to a great Canadian initiative.