THE RESPONSIBILITY TO PROTECT: WHERE TO NOW?

Keynote Address by Professor the Hon Gareth Evans, Asia Pacific Centre for R2P High Level Meeting on *Strengthening Cooperation for Atrocity Prevention in the Asia Pacific*, Bangkok, 23 August 2018

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These are troubling times for all of us, not just in this Asia Pacific region but around the world, who passionately believe in the need, whatever else we achieve or fail to achieve in the cause of peace, justice and human rights, to at least try to end once and for all those most horrifying violations of them all: genocide, ethnic cleansing, other crimes against humanity and large scale war crimes

How can these **not** be troubling times for those of us who believe that we must never again stand by in the face of those gross and systematic violations of everything it is to be human, which the late, great Kofi Annan, whose loss we so grievously mourn this week, described as offending 'every precept of our common humanity'.

It is thirteen years now since the 'Responsibility to Protect' principle was unanimously embraced by the 2005 World Summit and UN General Assembly. But over the last eighteen months:

- we have seen more than 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, even as the Syrian regime, with Russian support, gets ever closer to regaining total control of the conflict;
- 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 in Africa, 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 the repeated breakdown of peace agreements in South Sudan, where 50,000 have died since 2013;
- and we have seen the shockingly disproportionate response of Israel to the demonstrations on the Gaza border in May this year, leaving scores of Palestinian men, women and children slaughtered and 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'.

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. The hugely respected High Commissioner for Human Rights, Prince Zeid, has not sought a second term, citing an 'appalling' climate for advocacy, with the United States and other world powers retreating from their historic commitment to human rights. And regional human rights protection bodies have proved largely impotent – not least the ASEAN Intergovernmental Commission for which there were high hopes, but which has had no impact at all in moderating the plight of the Rohingya or the behaviour of the Duterte administration in the Phlippines. When it comes to the worst of the mass atrocity crimes now being perpetrated, the world seems to have just gone missing.

For someone who has been, as I describe myself in the title of the political memoir I published last year, an *Incorrigible Optimist* I can't pretend that in the face of all these developments my optimism is not under some strain. But, and this is the main theme of this talk, 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 – or at least where we were at the dawn of the new century.

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 in the twentieth century that was the fate of at least 80 million men, women and children, , 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.

At the turn of the new century we did at last recognize that the world could no longer continue to be a consensus free zone when it came to confronting these atrocities, with the global North talking 'humanitarian intervention' talk but doing little or nothing to implement it, and the global South – as concerned as they were about atrocity crimes – hating even more, as a threat to their often newly won and treasured sovereign independence, the whole idea of accepting a 'right to intervene' militarily. The turning point in the intervention debate came with Kofi Annan's despairing and heartfelt plea to the General Assembly in his 2000 *Millennium Report*, from which I have already quoted: '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?' It was his 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, with the Algerian diplomat Mohammed Sahnoun, 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.

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 The language of the 2005 World Summit resolution, endorsed by tg made it clear, as all of you here will know, 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 – and the Asian countries, led by India, continued to be most dubious of all – 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 on the thirteen years that have 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).

The 2018 General Assembly debate a few weeks ago was particularly instructive in this respect. For the first time since the inauguration of interactive dialogues on the annual Secretary-General's R2P report, the debate was a formal on-the-record one in the main Assembly Hall, which had long been resisted and itself sent a powerful message. Statements were made by or on behalf of 113 member states, and there was overwhelming support again expressed for the whole R2P concept, although as always with more enthusiasm for effective prevention than necessary reaction. There were, again as always, a small number of detractors arguing that R2P (as with every other human rights arrow in the UN's quiver) was a threat to national sovereignty – this year Cuba, Syria and Russia, the most prominent among them – but observers have commented that their speeches were met for the most part with complete yawns by the rest of the Assembly. Apart from Russia, the Permanent Five were all supportive, although as always China insisted on a very strict interpretation of the 2005 pillars.

I don't suggest for a moment – particularly with Russia playing the spoiling role it now is on the Security Council – 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, an ever-growing number, now 60, 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, although prevention is very much the UN flavor of the month – and was the main focus of this year's Secretary-General's report and General Assembly debate – action still 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. There has been a distressing lack of response to the Rohingya crisis. 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, even if there is not much of a market for it right now.

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 in the past 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*. It may be true that everybody now is much more comfortable talking about by preventing atrocities before they begin rather than the best way of conducting military interventions to quell them. But I for one believe the military option must never be taken off the table as a last resort, and I propose in that context to go on advocating for RWP even if no-one else is.

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 some momentum has been building behind two initiatives 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, as I have already said, 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. I am delighted to see that finding ways to put some atrocity prevention and response spine into these organizations in our own Asia Pacific region is the central theme of this conference.

Apart from the role of regional organizations, 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 and enough of them do tend to modify their behaviour under that kind of fellow-state scrutiny to make it worthwhile.

Of course the credibility of peer group 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 we run a very real risk of being branded as hypocrites. I have to say that Australia has quite a lot more to do in this respect, not least on refugee policy, where a credible argument can be mounted that our quite deliberately cruel treatment of asylum seekers on Manus Island and Nauru – treatment overtly designed to deter others seeking haven with us – is not just morally intolerable, but may actually involve the commission of crimes against humanity.

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, the big humanitarian relief agencies like Oxfam and MSF, and quite

a few other NGOs – including many participating in this conference – have been indefatigable and indispensable global and regional advocates on mass atrocity crime issues.

In talking about bottom up pressure, it is critical to acknowledge the 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, led as so often by former UN Special Adviser on R2P Ed Luck, 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 last words 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.

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. You have to get out there and *work* for change. That's exactly what the Asia Pacific Centre for R2P and so many of you here at this conference are now doing, and in the interests of our common humanity which Kofi Annan so movingly invoked, it is absolutely crucial that we succeed.

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