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Mass Atrocity Crimes after Syria: The Future of the Responsibility to Protect

Public Lecture by Professor the Hon Gareth Evans AC QC, Chancellor of The Australian National University, Co-Chair of the International Commission on Intervention and State Sovereignty and Global Centre for the Responsibility to Protect, University of Queensland, 6 November 2013.



The long paralysis of the UN Security Council in the face of the Syrian crisis – at least until the large scale use of chemical weapons proved to be something of a game-changer – has raised fundamental questions as to how far we have really come with “the responsibility to protect” (R2P). Just how much vitality and utility is left in the new doctrine that was unanimously embraced, with so much hope and fanfare, by more than 150 heads of state and government at the World Summit in 2005? Is R2P an idea whose time has come – and now gone?

While R2P may be down, it’s certainly not out, for three reasons I will spell out. First, there still is effectively universal consensus now about its basic principles. Second, those principles have shown their worth in real world cases, and the Security Council has continued to invoke them, even after it became divided over Libya and has been paralysed on Syria. And third, it is possible to see how the consensus that matters most – in the Security Council, on the hardest of cases, those which might only be capable of being resolved by the use of coercive military force – could be re-created in the future.

But let me begin at the beginning. To understand how important an innovation the new R2P doctrine has been, we need to understand where we were before it was born; and to evaluate how serious a mid-life crisis R2P might now be facing, we need to be very clear about what precisely were its intended scope and limits.

The Origins and Development of R2P. The emergence of the “Responsibility to Protect” (R2P) was a response to a very real international problem: the continuing inability of the international community, notwithstanding the embrace of the

Genocide Convention and many other new international human rights standards after World War II, to effectively prevent or halt mass atrocity crimes – viz. genocide, ethnic cleansing and other major crimes against humanity and war crimes – occurring behind sovereign state borders.

The issue came to a head with the horrifying massacres in Rwanda and Bosnia in the 1990s, and the complete absence of international consensus, in the UN Security Council (as shown again with Kosovo in 1999) or anywhere else, around the North-sponsored idea of “humanitarian intervention”. While troubled by these atrocities, countries of the global South – many newly independent, conscious of their fragility, and very conscious of the impact of “civilising” interventions from the imperial and colonial powers in the past – were, understandably, unwilling to acknowledge any general “right to intervene” militarily in any state, whatever the circumstances. The flag under which *they* marched was a very narrow reading of the non-intervention language of Article 2(7) of the UN Charter: “nothing ... shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”

But that left unanswered the challenge posed by UN Secretary-General Kofi Annan in his 2000 Millennium address to the General Assembly: “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 to answer that challenge, and try to build a new international political consensus, that the Canadian sponsored *International Commission on Intervention and State Sovereignty* (ICISS) came up in 2001 with the concept of “R2P”. As subsequently refined, and endorsed by the UN General Assembly at the 2005 World Summit, the new doctrine had three key dimensions:

- its language, which re-characterized the issue as not being about the “right” of big states to throw their weight around militarily, but rather the “responsibility” of all states to act to protect their own and other peoples from mass atrocity crimes;
- its spreading of that responsibility: every state had the responsibility to protect its own people; other states had a responsibility to assist them to do so; and – if a state was manifestly failing, as a result of either incapacity or ill-will, to protect its own people – the wider international community then had a responsibility to act more decisively; and
- its broadening the range of appropriate responses. Whereas “humanitarian intervention” focused one-dimensionally on military reaction, R2P involves multiple elements across the response continuum: preventive action, both long and short term; reaction when prevention fails; and post-crisis rebuilding aimed again at prevention, this time of recurrence of the harm in question. The “reaction” element, moreover, was itself a nuanced continuum, beginning with persuasion, moving from there to non-military forms of coercion of varying degrees of intensity (like sanctions, or threat of international criminal prosecution), and only as an absolute last resort contemplating coercive military force.

The period from 2005 to 2011 saw the gradual growth to the maturity of the new norm. Conceptual arguments as to its precise scope and limits were largely resolved; rear-guard political resistance to it fell right away (as evidenced by successive annual UN General Assembly debates from 2009 onwards); new institutional mechanisms and processes to facilitate its application gradually evolved; and it was being seen as increasingly relevant in practice – most obviously and importantly in Kenya in early 2008, when a diplomatic mission led by Kofi Annan under the auspices of both the UN and African Union, and explicitly invoking R2P, successfully defused what was rapidly deteriorating into a Rwanda-scale catastrophe.

A number of non-governmental organizations played an important part during this period, and still do – through their analysis, advocacy, workshops, conferences and training programs – in consolidating the understanding of the scope and limits of the new norm, and in promoting its effective implementation in practice, not least at the crucial prevention stage. Prominent among them are the New York-based Global Centre for the Responsibility to Protect, whose international advisory board I chair, and – especially – UQ's own Asia Pacific Centre for the Responsibility to Protect, sponsoring today's lecture. Under the leadership of Alex Bellamy, Tim Dunne and Noel Morada, the Centre here has done some really outstanding work in basic research and conceptual analysis, regional capacity building and diplomacy, and the development of preventive strategies.

When in 2011 the UN Security Council authorised military action explicitly under the R2P banner, in the cases of Cote d'Ivoire and Libya, this was widely heralded as the coming of age of the new norm. Libya especially, at least at the outset, seemed a textbook example of how R2P is supposed to work in practice, at the reaction stage, in the face of a rapidly unfolding mass atrocity situation. A condemnatory and sanctions-imposing resolution was first passed unanimously, and this was followed three weeks later – when it seemed clear to everyone that new atrocities were imminent – by the authorisation, with no dissenting voices, of military measures “to protect civilians and civilian populated areas under threat of attack”. Acting under this authorization, NATO-led forces took immediate action, and the feared massacres in Benghazi and elsewhere did not eventuate. If the Security Council had acted equally decisively and robustly in the 1990s, the 8,000 murdered in Srebrenica and 800,000 in Rwanda might still be alive today.

But with the apparent maturity of R2P also came a mid-life crisis. As time went on, the Western-led intervention came under fierce attack by the BRICS countries – Brazil, Russia, India, China and South Africa – for exceeding its narrow civilian protection mandate, and being content with nothing less than regime change, which was of course finally accomplished with the overthrow of Gaddafi in October that year.

Unhappily, that criticism translated into Security Council paralysis in responding to what rapidly became the even more alarming situation in Syria. From mid-2011, all the way through until September 2013, when the use of chemical weapons – the most extreme atrocity crime of all – fundamentally changed the dynamics of the Syrian situation, the Security Council could agree on almost nothing at all: not

only on the extreme step of military force (as to which there have been many good reasons not to act) but even on lesser coercive measures like targeted sanctions, an arms embargo, or referral to the International Criminal Court. The attitude seems to have been 'give the P3 (US, UK and France) nothing because if you give them anything they will take everything.'

Although the P3 continue to be very defensive about their implementation of the Libyan mandate, the truth of the matter is that unless and until there is some recognition of what went wrong there, it will be extremely difficult ever again to secure an un-vetoed majority vote for tough action – even action falling considerably short of military action – in a hard mass atrocity case, at least if it does not involve the use of weapons of mass destruction. The recent highly-welcome Council action to authorise the destruction chemical weapons after the Ghouta massacre in August, foreshadowing consideration of coercive action under Chapter VII of the UN Charter should the Syrian regime not cooperate, could easily have been portrayed in explicit R2P terms as a response to a major war crime had the Council been in a mood to do so. But it is probably best understood as a specific response to the proven use of a weapon of mass destruction. It has to be assumed that, in an R2P case without this WMD dimension, there will still be a reluctance by the Council to endorse tough action unless and until the concerns of the BRICS states start being taken seriously, voicing as they do the concerns of a much wider swathe of the developing world.

The Future of R2P. But all that acknowledged, the overall situation for R2P is by no means bleak, for the three reasons I foreshadowed at the outset, which I will now spell out.

First, there still is effectively universal consensus now about its basic principles. The best evidence for R2P's general acceptance lies in the statements made in successive annual General Assembly debates on the subject since 2009. No state now disagrees that every sovereign state has the responsibility, to the best of its ability, to protect its own peoples from genocide, ethnic cleansing, and other major crimes against humanity and war crimes. No state disagrees that others have the responsibility, to the best of their own ability, to assist it to do so. And no state seriously continues to challenge the principle that the wider international community should respond with timely and decisive collective action when a state is manifestly failing to meet its responsibility to protect its own people. Certainly there is less general comfort with this last pillar than the first two, and there will always be argument about what precise form action should take in a particular case, but the basic principles are not under challenge.

In this year's annual General Assembly debate on R2P in mid-September, in which 68 countries – more than ever before – participated, there was overwhelming support for these basic principles; and that support was repeated two weeks later in many strong leaders' statements in the general debate opening the new session. As Secretary-General Ban Ki-moon has repeatedly said, "Our debates are now about how, not whether, to implement the Responsibility to Protect."

Second, those principles have shown their worth in real world cases, and the Security Council has continued to invoke them, even after it divided over Libya and became paralysed on Syria. There is plenty of evidence that R2P means more than just words. Most notably, there has been Kenya in 2008 when diplomatic action was quick and effective; and the cases of Cote d'Ivoire and Libya in 2011 when the Security Council authorized the use of military force. And for all its divisions over Libya and Syria, the Security Council has continued since 2011 to use explicit "R2P" language where appropriate, for example in resolutions on Yemen and South Sudan and Mali, and also presidential statements on the role of prevention in international peace and security and, most recently, on 2 October 2013, the humanitarian situation in Syria.

Third, and this is the reason on which I'll spend most time, for all the division and paralysis over Libya and Syria, it is possible to see how the consensus that matters most – in the Security Council, on the hardest of cases – could be re-created in the future.

It is important to emphasise that the disagreement now evident in the UN Security Council *is* really only about how the R2P norm is to be applied in the hardest cases, the sharp-end cases, those where prevention has manifestly failed, and the harm to civilians being experienced or feared is so great that the issue of military force has to be given at least some prima facie consideration. But of course these *are* the talismanic cases, and if consensus has broken down at the highest political level on how they should be handled, there is a danger of flow-on risk to the credibility of the whole R2P enterprise. So how can that consensus begin to be restored?

The key to the future is recognizing what went wrong in the past, and in particular what went wrong with Libya. There was no problem at the outset. But a major one did arise when it became rapidly apparent that the three permanent Council-member states driving the intervention (the US, UK and France, or "P3") would settle for nothing less than regime change, and do whatever it took to achieve that. The BRICS countries – Brazil, Russia, India, China and South Africa, all then represented on the Council – argued fiercely that narrow civilian protection mandate was being exceeded, in particular when the P3 dismissed without serious exploration various Gaddafi peace overtures. And they had a strong case.

While some of the counter-arguments have force of their own – in particular that if civilians were to be protected house-to-house in areas like Tripoli under Gaddafi's direct control that could only be achieved by defeating him outright – the P3 resisted debate on them at any stage in the Security Council itself, and other Council members were never given sufficient information to enable them to be evaluated. Maybe not all the BRICS (Russia in particular) are to be believed when they say that, had better process been followed, more common ground could have been achieved. But they can all be believed when they say they feel bruised by the P3's dismissiveness during the Libyan campaign – and that those bruises will have to heal before any consensus can be expected on tough responses to such situations in the future. It is not entirely coincidental

that it's over the last two years that that P3 has come to be commonly described in private around New York by the alternative, and rather more acerbic, acronym of FUKUS.

The good news is that there are now some signs from the BRICS that they are looking to re-establish some common ground, in an initial proposal from Brazil at the end of 2011 which it labelled "Responsibility While Protecting"; in the interest shown by China very recently – last month – in a very similar concept labelled by scholars there as "Responsible Protection"; and in the interest shown by Russia even more recently – last week – in both concepts.

The Brazilian proposal – initially articulated in statements to the UN by both its President and Foreign Minister in late 2011, and subsequently by its Permanent Representative to the UN – that the idea be accepted of *supplementing* R2P, not replacing it, with a complementary set of principles and procedures which it has labelled "responsibility while protecting" or "RWP".

Although there were some distracting features in the initial presentations (e.g. the apparent insistence that the three pillars of R2P, and the measures to advance each in turn, had to march in strict chronological sequence), as RWP has evolved in subsequent discussions in New York and Brazil (in a number of which I and my colleagues at the Global Centre have participated), it seems clear that it has just two major substantive elements:

- First, there should be a set of prudential criteria (including in particular "last resort", "proportionality" and "balance of consequences") fully debated and taken into account before the Security Council mandates any use of military force (which is something for which my own Commission, and subsequent UN reports, have long argued); and
- Second, there should be some kind of enhanced monitoring and review processes which would enable such mandates to be seriously debated by all Council members during their implementation phase, with a view to ensuring so far as possible that consensus is maintained throughout the course of an operation.

The initial reaction by the P3 powers to the Brazilian RWP proposal when it was first articulated was very sceptical – "these countries would want all those delaying and spoiling options, wouldn't they" – but their Syrian experience has begun to compel some rethinking. Realisation that it will indeed be very hard to get unvetoed majority support for any kind of tough action in an R2P case in the future has led them, on the evidence of my own conversations in New York and capitals over the last two years, to be much less contemptuously dismissive than they initially were.

With Brazil no longer a member of the Security Council, it has shown less interest in continuing to play an active leadership role in keeping the RWP idea alive, but – in some very interesting recent developments in which I and my Global Centre colleagues have been involved – there have been signs that the two BRICS

countries that matter most in this context because of their veto-wielding powers, China and Russia, may be interested in pursuing these ideas further.

The first sign was a two-day meeting in Beijing last month, hosted by the foreign ministry's think tank, the China Institute of International Studies, which brought together specialist scholars and practitioners from China and the other BRICS countries (Brazil, Russia, India, and South Africa) together with a handful of Western specialists, including me, to discuss what would be involved in "Responsible Protection". Although no outcome was formally agreed or made public, from the Beijing meeting, I believe the first of its kind in that country, several themes emerged from it which I found both intriguing and encouraging.

First, there was widespread acceptance that R2P was here to stay. True, some Chinese scholars remain inclined to argue that the entire R2P enterprise – particularly its sanction of military action in exceptional cases – was just "old neo-interventionist wine in a new bottle." But this did not appear to be a majority sentiment, nor did it stop anyone from engaging in lively discussion of how the R2P doctrine could be most effectively implemented in practice.

Second, there was widespread agreement about what had caused the breakdown of consensus in the Security Council concerning how to respond to events in Syria; it was not an attempt by the global South to revive outdated notions of unlimited sovereignty, but rather as I have described it, a reaction to the perceived overreach of the NATO-led military intervention in Libya in 2011.

Third, and most important, there was widespread agreement about how consensus within the Security Council on the hardest cases might be recreated. The idea was that R2P should be "enriched" by the acceptance of a complementary principle, called "Responsible Protection" (RP). Floated by the Chinese scholar Ruan Zongze in a journal article last year, explicitly referring to and building upon the Brazilian RWP proposal, and evidently the subject of much internal discussion since, the core elements of "RP", as articulated by Chinese participants in the Beijing debate, won strong support around the table.¹ Tough criteria – specifically, legitimate intention, last resort, proportionality, and balance of consequences – should be clearly satisfied before any military mandate is granted, with every effort made to exhaust diplomatic solutions before more robust alternatives are embraced. There should be better methods of supervision and accountability to ensure that the "protection" objective remains at the heart of any response. And the primary emphasis of the entire R2P enterprise should continue to be prevention of mass-atrocity crimes – both their occurrence and their recurrence.

The other very recent development to which I want to refer was the hosting in Moscow at the end of October, by the Diplomatic Academy of the Russian Ministry of Foreign Affairs, apparently on the initiative of Foreign Minister Lavrov himself, of a one-day meeting on R2P. Again I believe the first of its kind, the participants were senior ministry officials and Russian academics and a handful of Western specialists, including the Global Centre's Director, Simon Adams, and the new UN Special Adviser on R2P, Professor Jennifer Welsh. While a little less focused than the Beijing event, I am told there was again much attention paid to RWP and the

Chinese RP concept, and an emerging sense from the meeting that Russia needed to align itself with those views.

It remains to be seen whether China, Russia – and the other BRICS countries – will now move to champion the idea of Responsible Protection or RWP in a more formal, officially endorsed, way. My strong view is that if they do, it should not be viewed as a rear-guard action designed to undermine the R2P norm, but rather an effort to assume co-ownership of it. And in terms of getting serious about saying “never again” to mass-atrocity crimes, that is about as positive a development as anyone could hope for.

If we are to break out of the post-Libya impasse it is clear that detailed attention is going to have to be paid within the Security Council to developing better process when confronting these hard cases. I hope very much that Australia – during its remaining period on the Security Council – can play a leading role in making that happen, perhaps by initiating a specific discussion on the key issues during its second occupancy of the presidency of the Council in November 2014.

That process is going to have to require more systematic attention to the two areas highlighted in the original RWP proposal and repeated in the RP formulation, which I have already described in outline.

The first is systematic attention to the relevant prudential criteria for the use of coercive military force, not yet formally adopted in any UN process but spelt out in the initial ICISS report more than a decade ago and very much part of the currency of international debate ever since: seriousness of harm involved, right intention, last resort, proportionality and balance of consequences. I don't believe it is necessary to formally adopt these five criteria in a General Assembly or Security Council resolution, and it would probably be counter-productive to try. Nor can it be argued that attention to these benchmarks will produce consensus with push-button consistency: life is never that easy. But there is plenty of reason to believe that if an understanding develops that those arguing a case for military intervention must in practice make a detailed and compelling case that all five criteria would be satisfied, the chances of reaching consensus – one way or the other – will be significantly improved.

The second element of a new process would require some kind of serious ongoing review of coercive mandates once granted. This is likely to be met with some resistance by the P3 on the ground that there must be some flexibility in the implementation of any military mandate, and that military operations can never be micro-managed. But equally, there is no reason in principle or practice why broad concepts of operations, as distinct from strategy or tactics, should not be regularly debated, and questioned as necessary. Whether civilian protection can be accomplished without full-scale warfighting and regime-change is exactly such a question that the P3 should be prepared to debate. It is not necessarily a matter of establishing any new institutional mechanism – though sunset clauses, requiring formal renewal if a mission is to continue, are hardly unfamiliar in the Security Council. It is more a matter, again, of there being some real understanding that ongoing debate on mandate implementation is wholly legitimate.

If the Security Council does *not* find a way of genuinely cooperating to resolve the hardest cases, working within the nuanced and multidimensional framework of the R2P norm – hopefully extended and reinforced by some embrace of RWP or RP ideas of the kind I have been describing – the alternative *is* bleak: a return to the bad old days of Rwanda, Srebrenica and Kosovo. Which would mean, again, either total, disastrous, inaction in the face of mass atrocity crimes, or action being taken to stop them without authorization by the Security Council, in defiance of the UN Charter and every principle of a rule based international order. After all that has been achieved in the last decade, that would be heartbreaking.

But congenital optimist that I am – with that optimism just a little reinforced by the recent developments in China and Russia that I have described – I really do believe policymakers now around the world do understand the stakes much better than they used to, that no-one really wants to see a return to the bad old days when appalling crimes against humanity committed behind sovereign state walls were seen by almost everyone as nobody else's business, and that the imperative for effective cooperation that our common humanity demands will eventually prevail.

This lecture was hosted by the Asia Pacific Centre for the Responsibility to Protect. Professor the Hon. Gareth Evans has been a Patron of the Centre since its founding in 2008.

¹ Ruan Zongze, 'Responsible Protection: Building a Safer World,' China Institute of International Studies, 15 June 2012. http://www.ciis.org.cn/english/2012-06/15/content_5090912.htm

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