

VALUES, INTERESTS AND MASS ATROCITY CRIMES: DOES THE RESPONSIBILITY TO PROTECT HAVE A FUTURE?

Address by Professor the Hon Gareth Evans AC QC FASSA FAIIA to Relaunch the Australian Institute of International Affairs, Tasmanian Branch, Government House, Hobart, 7 November 2014

I am delighted that Professor Peter Boyce has taken this initiative to relaunch the Tasmanian arm of the Australian Institute of International Affairs, and to have been graciously invited to celebrate the rebirth here with you at Government House by the Lieutenant-Governor, Chief Justice Alan Blow and his wife Margaret.

The only tinge of sadness about this evening is that Peter Underwood, who as Governor had originally offered to host this event and who so warmly supported this whole enterprise, is no longer with us to share the occasion. Peter Underwood will be remembered for many things by the people of Tasmania, but he will also be fondly remembered around Australia by a great many of us for his splendid Anzac Day speech this year challenging any temptation to glorify the horrors of war, and calling for this centenary of the outbreak of World War I to be declared a Year of Peace.

The quality of public debate on issues of peace and war, and international relations generally, has never been breathtakingly high in this country, and it has never been more necessary for intelligent and principled voices to be heard – voices like that of the late Peter Underwood, and those whom the AIIA exists to encourage. We heard one such voice earlier this week, although it didn't get as much mainstream media attention as it deserved, in the statement of the National President of the AIIA, John McCarthy, lamenting that the Australian Government succumbed to intense pressure from Washington in declining China's offer for us to become a founding member of its new Asian Infrastructure Development Bank, saying that "We have lost our way on Asia", and that we are now seen in the region simply as a United States satrap, or subordinate.

And this from a man who speaks with the authority not only of his AIIA office, but as one of this country's all time outstanding diplomats, having served with huge distinction as our ambassador to Vietnam, Mexico, Thailand, Japan, India – and the United States. My own view, after years of exposure to that kind of pressure when I was Foreign Minister, is that unthinking reflex commitment to America's perceived interests, of the kind we have just seen again with this decision is never likely to be reciprocated with reflex commitment to our own, and that if we are to successfully protect and advance our own interests, we must be a much less subservient and more independent alliance partner than we have again become. It is neither dignified nor intelligent to approach this relationship with pink tummy exposed, four paws waving and tongue lolling.

There is much more to be said about this and other bilateral relationships, but I want to focus in this talk on the multilateral dimension of Australian, and indeed global foreign policy, not least because it has become so apparent that so many problems that impact upon us – whether they involve terrorism, or the proliferation of weapons of mass destruction, or health pandemics or people or drug trafficking or environmental catastrophes – are simply incapable of resolution by any country, however big or powerful, acting alone. There is an extraordinary amount of attention being given now to what are variously described as transnational issues, or non-traditional threats to security, or global public goods or protection of global commons issues, and the kind of cooperative diplomacy that is necessary to successfully address them.

Australia's record on these issues over recent decades has not been too bad, but it has waxed and waned with different governments and their varying ideological preoccupations. Despite the instinctive aversion to multilateralism which Tony Abbott brought to the Prime Ministership, like John Howard before him, he has quickly learned on the job – in his case with the need to forge an effective international response to the downing of MH17 in Ukraine – and it is fair to say that, with the help of some very professional diplomacy from our representatives in New York, Australia has emerged with real credit from our two-year term on the UN Security Council.

But what I find missing from our approach to multilateral affairs under the present government, neither it nor Australia has been at all alone in this respect, is any kind of guiding philosophy articulating with any coherence why we do what we do, and don't do. We have a tendency to lurch from one ad hoc response to next: generous with cyclone and earthquake relief; cautious to point of callousness in our initial response to Ebola; totally reluctant starters on climate change; clear in our humanitarian response in Syria, but confused in our response to the emergence of Da'esh (or ISIL, ISIS or IS) in Iraq. Sometimes 'Australian values' are invoked; sometimes there is a clear yielding to alliance pressure; sometimes there is just inarticulate confusion.

I have long argued that the only way of approaching these multilateral issues which has a chance of being intellectually coherent, morally credible and politically persuasive is to embrace the concept of 'good international citizenship' -- and more particularly to embrace the idea that being, and being seen to be, a good international citizen is right up there as a mainstream national *interest*, alongside the traditional duo with which everyone is familiar and everyone invokes, ie geopolitical/strategic/security interests and economic interests.

Prime Minister Abbott does on occasion use 'good international citizen' terminology, but invariably just as some variation on the theme that Australia stands generally for 'decency and good values'. The usage which I have advocated, and which was adopted quite explicitly by the Hawke-Keating and Rudd-Gillard Governments, is much more sharp-edged. It is that 'purposes beyond ourselves', in Hedley Bull's wonderful phrase -- be they concerns about poverty alleviation, or environmental problems, or nuclear arms control, or faraway human rights atrocities or other issues which seem to have no immediate security or economic consequences for a particular country -- are really at the heart of that country's core national interests, rather than being some kind of boy-scout-good-deeds afterthought to the real business of state.

The argument is that there is a hard-headed return for any state in being and being seen to be a good international citizen, respecting international law and actively engaged in finding cooperative solutions to these kinds of problems. First, enhancement of that state's international *reputation*, which is bound to work, over time, to its economic and security advantage: think of squeaky-clean Sweden becoming one of the world's biggest armaments sellers! And second, getting the benefit of *reciprocity*: foreign policymakers are no more immune to ordinary human instincts than anyone else, and if I take your problems seriously, you are that much more likely to help me solve mine.

In short, the idea of good international citizenship as a national interest squares the circle between realists and idealists by making the point that idealism can in fact be realistic. If good international behaviour is simply some kind of charitable impulse, we know from hard experience that this is an impulse that will often have difficulty surviving the rigours of domestic political debate. Politics is a cynical, as well as bloody and dangerous, trade, often with very limited tolerance for embracing what cannot be described in hard-headed national interest terms.

The particular context in which I want to test this approach is that of the proper international response to mass atrocity crimes – genocide, ethnic cleansing, other crimes against humanity and major war crimes – an issue around which policymakers have long been struggling, and are still struggling today, particularly in Syria and Iraq.

Both President Obama and Prime Minister Abbott, in justifying the decision to use military force against the marauding genocidal forces of Da'esh, have overwhelmingly invoked the terrorist threat posed by them, in the region but also very much in the West, for the obvious reason that this can be linked to very traditional national security interests. This even though it has long been obvious that the 'war on terror' cannot be won from the air backed by only limited ground support – and that successfully meeting terrorist threats depends ultimately on a rather different set of responses: international cooperation in intelligence and policing, and winning, not alienating, relevant community support.

The much more credible rationale for military action, because it has a finite rationale, narrower operational objectives, and a much better chance of winning and retaining support in the relevant communities, is simply acting to protect – if they manifestly can't be protected any other way – people at risk of genocide or other mass atrocity crimes. This humanitarian objective was articulated, in these terms, by Obama, Abbott and others when military action was first mobilized to protect the Yazidi people fleeing from Da'esh in August, but it has since dropped out of sight. And that, I suspect, is because political leaders have enormous difficulty in casting these enterprises in the kind of traditional national interest terms they think they need to: "Our values are not our interests" as Senator John McCain keeps saying, and too many people, including the present Australian government, seem to believe him.

If we can only get it into our policymakers heads, and get them to argue persuasively to their publics, that our values *are* our interests, in the way that I have tried to express, I continue to believe that not only mass atrocity crime cases, but many other kinds of global good cause, would be much more systematically and effectively addressed.

There is of course another logical step in the argument that has to be filled in if responding effectively to mass atrocity crimes – including in extreme cases through the use of coercive military force – is in fact to count as an exercise in good international citizenship, and to generate reputational and reciprocity returns of the kind I have described. And that is to establish that preventing and responding to such crimes is an international obligation. If they are really none of the rest of the world’s business, especially when committed behind sovereign state borders, there won’t be much practical return for doing the right moral thing in trying to halt or avert them. The extraordinary thing is that, until very recently, not much more than a decade ago, the prevailing majority view was that sovereignty trumped morality, and that these crimes *were* none of the world’s business.

The good news is that there has been a fundamental change in the global normative environment over the last decade with the emergence of the ‘responsibility to protect’ (‘R2P’) norm. The not quite so good news is that after the apparent triumph of its application in Libya in 2011 – with unanimous resolutions by the Security Council invoking the concept – R2P has been going through something of a mid-life crisis, with paralysis over its application in Syria, and not much more agreement as to how it should be applied in Iraq. In the remainder of this talk, I want to explain the importance of R2P, trace its evolution to date, and explore whether it does indeed have a future after Syria and Iraq.

It may be going too far to suggest, as I confess I often have, that under the Westphalian system, when it came to internal human rights violations, states had so much respect for the principle of non-intervention in each other’s affairs, and so little a sense of *any* limits to their authority, that sovereignty was effectively a “license to kill”. But if there was some sense of accountability, to God, or the people, or on occasion to the wider international community, for many centuries it made little discernible difference to state behaviour.

Even in the aftermath of Hitler’s Holocaust, when many new formal constraints on state power in this context came into play, with the recognition of individual and group human rights in the UN Charter and, more grandly, in the Universal Declaration of Human Rights; the recognition by the Nuremberg Tribunal Charter in 1945 of the concept of “crimes against humanity”; the signing of the Genocide Convention in 1948; and the new Geneva Conventions of 1949 none of these treaty constraints seemed to make much difference when it came to states’ willingness in subsequent years to perpetrate mass atrocity crimes, and the wider international community’s willingness to treat these gross human rights violations as none of their business, as for example in Cambodia, Uganda and East Pakistan.

The overwhelming preoccupation of those who founded the UN 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, was, more than any of the human-rights provisions, Article 2.7 of the UN Charter: ‘Nothing... shall authorise [intervention] in matters which are essentially within the domestic jurisdiction of any State’.

The issue did come to centre stage in the 1990s when, following the break-up of various Cold War state structures, conscience-shocking situations repeatedly arose, above all in the former Yugoslavia and in Africa. But no consensus at all could be reached between those in the

global North who rallied to the flag of “humanitarian intervention” or the “right to intervene”, and those in the global South who were determined to defend the traditional prerogatives of state sovereignty as they saw them. Overwhelmingly the many new states born out of decolonisation were intensely proud of their new-won sovereignty, very conscious of their fragility, all too conscious of the way in which they had been on the receiving end in the past of not very benign interventions from the imperial and colonial powers, and not at all keen to acknowledge the right of such powers to intervene again, whatever the circumstances.

This was the environment which drove UN Secretary-General Kofi Annan to make his despairing and heartfelt plea to the General Assembly in his 2000 *Millennium Report*:

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 it was in response to this challenge that the Canadian Government appointed the ICISS Commission to which I have referred, with me as co-chair, whose 2001 report conceived the idea of “the responsibility to protect” as a potential circuit breaker. After a difficult four-year gestation – but, in the context of the history of ideas, still representing a remarkably swift take-up – the core themes of our Commission report were unanimously endorsed at the 2005 World Summit by more than 150 heads of state and government sitting as the UN General Assembly on its 60th anniversary. The new doctrine that was thus endorsed changed the course of the international debate in three main ways.

The first innovation was presentational: recharacterising the ‘the right to intervene’ as ‘the responsibility to protect’, and in the process restating the issue as not being about the ‘right’ of any states, particularly large and powerful ones, to throw their weight around militarily, but rather the ‘responsibility’ of all states to act to protect their own and other peoples at risk of suffering from mass atrocity crimes.

The second innovation was to broaden the range of actors in the frame. Whereas ‘the right to intervene’ focused just on international actors able and willing to apply military force, the new R2P formulation spread the responsibility. It started by recognising and insisting upon the responsibility of each sovereign state itself to protect its people from harm; moved from there to the responsibility of other states to assist them if they were having difficulty and were willing to be assisted; and only then – if a state was manifestly failing, as a result of either incapacity or ill-will, to protect its own people – shifted to the responsibility of the wider international community to respond more robustly.

The third innovation was to dramatically broaden the range of responses. Whereas humanitarian intervention focused one-dimensionally on military reaction, R2P involved multiple elements in 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 recognizing the legitimacy of coercive military force, provided this was consistent with the UN Charter.

There was a fourth innovation of the Commission, which has not yet been adopted formally by any UN body but which nonetheless has become well-embedded in current international discourse. This was to clarify the prudential principles which should govern that last, hard choice. Five criteria were identified as together determining when it might be right to fight: seriousness of the harm being threatened (which would need to involve large scale loss of life or ethnic cleansing to *prima facie* justify something as extreme as military action); the motivation or primary purpose of the proposed military action; whether there were reasonably available peaceful alternatives; the proportionality of the response; and the balance of consequences (whether more good than harm would be done by the intervention).

With the 2005 UN General Assembly resolution, R2P was finally, officially, born. The world seemed well on its way, at last, to seeing the end, once and for all, of mass atrocity crimes: the murder, torture, rape, starvation, expulsion, destruction of property and life opportunities of others for no other reason than their race, ethnicity, religion, nationality, class or ideology. But words on UN paper are one thing, implementation something else. There were political rear-guard actions to fight off, conceptual challenges to resolve, and practical institutional changes to make, and all this took time. It took three more years of often-tortured argument about R2P's scope and limits before the new norm first showed its bite in 2008 in Kenya, and another three before it seemed to have finally come of age with its application by the UN Security Council in the critical cases of Côte d'Ivoire and Libya in 2011.

The best demonstration to date of R2P at work in precisely the way intended (at least so far as its reactive dimension was concerned) has undoubtedly been the UN Security Council's Resolution 1973 of 17 March 2011 on Libya, specifically invoking R2P, which, by majority vote with no veto or other dissenting voices explicitly authorised 'all necessary measures', that is military intervention by member states, 'to protect civilians and civilian populated areas under threat of attack'. Acting under this authorisation, NATO-led forces took immediate action, and the massacre of tens of thousands of civilians feared imminent in Benghazi 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.

The unhappy reality since mid-2011, however, is that this Security Council consensus has not been sustained. As subsequent weeks and months wore on, the Western-led coercive military intervention – which concluded finally only with the capture of Gaddafi and comprehensive defeat of his forces in October 2011 – 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, a criticism which had considerable justification. The US, UK and France (P3) could have made something of the argument that the mandated civilian protection could, in practice, only have been achieved by completely ousting the regime, but made no serious attempt to persuade their Council colleagues at any stage – reigniting the old charge that if ever the P3 was given an inch it would take a mile.

This continuing dispute and all the distrust it engendered had, unfortunately, a major impact on the Security Council's response to Syria, where the one-sided violence by the regime was by mid-2011 manifestly worse even than that which had triggered the Libyan intervention. In the face of vetoes from Russia and China, and continuing unhappiness by the other BRICS members, the Council found itself for many months unable to agree even on a formal condemnatory statement, let more robust measures like sanctions, an arms embargo, or the threat of International Criminal Court prosecution. And, save for a humanitarian access resolution negotiated largely by Australia earlier this year, that paralysis very largely continues to this day in Syria, and has been repeated – at least so far as Security Council resolutions are concerned, in Iraq.

But just as any celebration about the triumph of the R2P principle would have been premature after the Libyan resolutions in early 2011, so too would be despair now about its future. There are three reasons for believing that the whole R2P project, with all its implications for the status of state sovereignty, has not been irreversibly tarnished, and that, even for the hardest cases, Security Council consensus in the future is not unimaginable

The first is that there is effectively universal consensus on basic R2P principles, and a great deal of work going on in practice (albeit probably less in our region than elsewhere) to give them operational effect, for example through the development in many states, and intergovernmental organizations, of early warning and response mechanisms. Whatever the difficulties being experienced in the Security Council, the underlying norm is in remarkably good shape in the wider international community. The best evidence of this is in the annual debates on R2P in the General Assembly since 2009, even those occurring in the aftermath of the strong disagreements over Libya.

In these debates, the old sovereignty language, which totally permeated the discourse of the global South in the 1990s, is simply no longer heard in this context. No state is now heard to disagree 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.

Second, the Security Council itself continues to endorse the R2P principle and use its language. For all the continuing neuralgia about the Libyan intervention and the impact of that in turn on Syria, the Council had, since its March 2011 decisions on Cote d'Ivoire and Libya, by last month endorsed not only nine presidential statements, but nineteen other resolutions directly referring to R2P, including measures to confront the threat of mass atrocities in Yemen, Libya, Mali, Sudan, South Sudan and the Central African Republic, and resolutions both on the humanitarian response to the situation in Syria and recommitting to the fight against genocide on the 20th anniversary of Rwanda. There were just four Security Council resolutions prior to Libya using specific R2P language, but there have been nineteen since. While none of these have authorized a Libyan-style military intervention, together they do confirm that the rumours of R2P's death in the Security Council have been greatly

exaggerated. The kind of commitment that has been shown to supporting robust peacekeeping operations in Mali and Central African Republic in particular is very different to the kind of indifference which characterized the reaction to Rwanda and so many other cases before it.

Third, for all the division and paralysis over Libya and Syria, it is possible to see the beginning of a new dynamic in the Security Council that would over time enable the consensus that matters most – how to react in the Council on the hardest of cases – to be recreated in the future. The ice was broken in this respect by Brazil in late 2011 with its proposal 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”.

There were two core elements of the RWP proposal. First, the kind of prudential criteria I have referred to should be fully debated and taken into account before the Security Council mandated any use of military force. And second, that 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.

While the response of the P3 to the Brazilian proposal has so far remained highly sceptical, it has become increasingly clear that if a breakthrough is to be achieved – with un-vetoed majorities once again being possible in the Council in support of Chapter VII-based interventions in extreme cases – they are going to have to be more accommodating. There were some intriguing signs late last year (evident in official roundtables held in Beijing – which I attended – and in Moscow) 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. Tensions between the major players are too high at the moment – not least between the Western powers and Russia over Ukraine – for early further progress to be possible, but there is a reasonable prospect of movement over the longer term.

There are bound to be acute frustrations and disappointments and occasions for despair along the way, but that should not for a moment lead us to conclude that the whole R2P enterprise has been misconceived. There is effectively universal consensus now about its basic principles – that there are now unequivocal limits to what sovereign states can acceptably do, or allow to be done, to their own populations. The only disagreement is about how those principles are to be applied in the hardest of cases. Given the nature of the issues involved, it is hardly unexpected that such disagreements will continue to arise, and certainly to be assumed that only in the most extreme and exceptional cases will coercive military intervention be authorised by the Security Council.

R2P is going to be work in progress for some time yet. But it is my genuine belief that no-one now really wants to return to the bad old days of Rwanda, Srebrenica and Kosovo, which would mean going back to either total, disastrous, inaction in the face of mass atrocity crimes, or – alternatively – action being taken to stop them but without the authority of the UN Charter (i.e. with the consent of the state concerned; with legitimate self-defence being invoked; or direct authorisation by the Security Council).

The responsibility to protect is just one of a large number of foreign policy issues, both multilateral and bilateral, needing much more public debate in Australia than they have traditionally received. The Australian Institute of International Affairs has been for many decades the premium institution for generating that debate, with no ideological axe to grind other than to get the best possible policy outcomes, both in Australia's interests – broadly conceived – and in the interests of the world as a whole.

With the re-emergence of the Tasmanian branch of the Institute we have again a vibrant forum in this state for the debates we have to have. Thank you again for inviting me to celebrate the re-creation with you. I look forward to a stimulating discussion now on the issues I have raised, and to witnessing many more such stimulating discussions in the future.

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