LAW, JUSTICE AND MASS ATROCITY CRIMES

Address by Professor the Hon Gareth Evans AO QC, Chancellor of Australian National University, to UNSW, UTS and University of Sydney Law, Governance and Social Justice Public Discussion Series, Sydney, 23 November 2011

The problem:

As we look back over the course of human history one of the most depressing, and distressing, realities we have to acknowledge has been our inability to prevent or halt the apparently endlessly recurring horror 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. And what I’m afraid we also have to acknowledge is, at least until very recently, how small a role international law has played in the prevention of and reaction to such crimes.

What is in some ways hardest of all to believe is how little changed in the decades after World War II. One might have thought that Hitler’s atrocities within Germany and in the states under Nazi occupation would have led to rest once and for all the notion – predominant in international law and practice since the emergence of modern nation states in the 17th century – that what happens within state borders is nobody else’s business: to put it starkly, that sovereignty is essentially a license to kill.

But even with the Nuremberg Tribunal Charter and its recognition of “crimes against humanity” which could be committed by a government against its own people; even with the recognition of individual and group rights in the UN Charter, and more grandly in the Universal Declaration of Human Rights and the subsequent International Covenants; even with the new Geneva Conventions on the protection of civilians; and even after the Genocide Convention signed in 1948 – aimed at preventing and punishing the worst of all crimes against humanity, attempting to destroy whole groups simply on the basis of their race, ethnicity, religion or nationality – the killing still went on.

Why didn’t things fundamentally change? Essentially because 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 that which prevailed right through the Cold War years, was, more than any of the human rights provisions, Article 2(7) of the UN Charter: "Nothing should authorise intervention in matters essentially within the domestic jurisdiction of any State".

The state of mind that even massive atrocity crimes like those of the Cambodian killing fields were just not the rest of the world's business was dominant throughout the UN's first half-century of existence: Vietnam's invasion of Cambodia in 1978, which stopped the Khmer Rouge in its tracks, was universally attacked as a violation of state sovereignty, not applauded. And Tanzania had to justify its overthrow of Uganda's Idi Amin in 1979 by invoking 'self-defence', not any larger human rights justification. The same had been true of India’s intervention in East Pakistan in 1971.

With the arrival of the 1990s, and the end of the Cold War, the prevailing complacent assumptions about non-intervention did at last come under challenge as never before. The quintessential peace and security problem – before 9/11 came along to change the focus to terrorism – became not interstate war, but civil war and internal violence perpetrated on a
massive scale. With the break-up of various Cold War state structures, and the removal of some superpower constraints, conscience-shocking situations repeatedly arose, above all in the former Yugoslavia and in Africa.

But old habits of non-intervention died very hard. Even when situations cried out for some kind of response, and the international community did react through the UN, it was too often erratically, incompletely or counter-productively, as in the debacle of Somalia in 1993, the catastrophe of Rwandan genocide in 1994, and the almost unbelievable default in Srebrenica in Bosnia just a year later, in 1995.

Then the killing and ethnic cleansing started all over again in Kosovo in 1999. Not everyone, but certainly most people, and governments, accepted quite rapidly that external military intervention was the only way to stop it. But again the Security Council failed to act, this time in the face of a threatened veto by Russia. The action that needed to be taken was eventually taken, by a coalition of the willing, but without the authority of the Security Council, thus challenging the integrity of the whole international security system (just as did the invasion of Iraq four years later in far less defensible circumstances).

Part of the institutional problem – the absence of international courts and tribunals with the jurisdiction, and resources, to try and punish those accused of major crimes against humanity and war crimes — has been remedied in recent years. There have been some significant applications of the exercise within national court systems of “universal jurisdiction”, with the prosecution and conviction in 2001 in a Belgian court of Rwandan nuns charged with complicity in the Rwandan genocide an important demonstration of this option. There has been the development of a number of specialist national courts with international assistance, like the Special Court for Sierra Leone which is currently trying Charles Taylor and the Cambodian tribunal now trying the four most senior Khmer Rouge cadres still alive (including Khieu Samphan, one of my key interlocutors when I was negotiating the Cambodia peace process in the late 1980s). There has been the establishment (following the example of the International Military Tribunal set up Nuremberg in 1945) of specialist tribunals to deal with war crimes committed in specific conflicts— in particular for the former Yugoslavia and Rwanda.

And, by far most importantly, there has been the establishment by treaty – the Rome Statute of 1998 – of the International Criminal Court (after surviving a baptism of fire from the Bush administration) — setting up a permanent court to hear cases of genocide, crimes against humanity, and war crimes, with no time limitation on its ability to prosecute. The ICC has jurisdiction where a crime is alleged to have taken place on the territory of a state party to the statute, where the accused is a national of a state party, where a country has specifically accepted the ICC’s jurisdiction, and where a case has been referred to the ICC by the UN Security Council or by a state party.

But all international law – as much as it pains international lawyers to confront this reality – is ultimately politics. International courts and tribunals don’t get established and resourced without political commitment; states don’t become party to them without political decision (of the kind for which the U.S., for one, has found impossible to make in the case of the ICC); cases don’t get referred, by a state party or the Security Council, without political decision; with no international marshals services, indictees can’t be arrested and transferred to the courts without the cooperation of relevant states; court decisions rely wholly on individual states for their implementation.

All of which means that while the international courts and tribunals – and a raft of other law-related measures to which I’ll return before closing – are important elements in the
mass atrocity prevention and reaction *toolbox*, whether these tools are actually applied depends on political will – on international consensus about the relevant norms, and international cooperation in applying them. And it is that element of political will, and the practical cooperation which it makes possible, which has been profoundly lacking, not just for decades but for centuries, in the case of mass atrocity crimes.

The issue came to a head in the 1990s with the series of conscience shocking cases in the Balkans and Africa, which produced not consensus but fierce doctrinal, and essentially ideological, argument. On the one hand, there were advocates, mostly in the global North, of "humanitarian intervention" - the doctrine that there was a "right to intervene" militarily, against the will of the government of the country in question, in these cases. On the other hand there were defenders of the traditional prerogatives of state sovereignty, who made the familiar case that internal events were none of the rest of the world's business. It was very much a North-South debate, with the many new states born out of decolonization being very proud of their new won sovereignty, very conscious of their fragility, and 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 very keen to acknowledge their right to do so again, whatever the circumstances.

The Solution: The Responsibility to Protect

This was the environment which led Kofi Annan to issue his now famous challenge to the General Assembly in 1999, and again 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?

And it was this challenge to which the Canadian-government responded by appointing the International Commission on Intervention and State Sovereignty (ICISS), which I was asked to co-chair. This Commission came up in 2001 with the idea of “the responsibility to protect”, in its report of that name, which took the whole debate in a new, and what is now acknowledged to be much more productive, direction. It did so in three main ways:

First, *presentationally*, by turning ‘the right to intervene’ into the ‘responsibility to protect’: re-characterizing the issue as not being about the ‘right’ of states to do anything, but rather the ‘responsibility’ of all states to act to protect their own and other peoples at risk of suffering from mass atrocity crimes.

Secondly, by broadening the range of *actors* in the frame. Whereas ‘the right to intervene’ focused just on the international response, the new formulation spread the responsibility – starting with the spotlight on the sovereign state itself and its responsibilities and only then shifting to the responsibility of the wider international community.

And thirdly, by dramatically broadening the range of *responses*. Whereas the right to intervene, or humanitarian intervention, focused one-dimensionally on military reaction, the responsibility to protect involves 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. The ‘reaction’ element was itself a nuanced continuum, beginning with persuasion, moving from there to non-military forms of coercion of varying degrees of intensity, and only as an absolute last resort – after multiple criteria were satisfied – contemplating coercive military force.
Articulated this way, RtoP had an extraordinarily rapid take-up, almost unprecedented in the history of ideas. Its evolution is a long and complicated story – already the subject of hundreds of PhDs, with hundreds more in the pipeline (I know because most of the candidates around the world seem to have chased me for interviews!) – but the milestones can be quickly stated.

Within four years the concept was unanimously endorsed by the more than 150 heads of state and government meeting as the UN General Assembly at the 2005 World Summit. And within another year it had been embraced in a Security Council resolution. The diplomatic negotiating process resulted in some presentational refinements – in particular more precisely describing the focus of the responsibility in terms of ‘four crimes’ (‘genocide, war crimes, ethnic cleansing, and crimes against humanity’) – but nothing which undermined the core concept as I have just described it.

Of course, even with all this norm-creation accomplished so dramatically and quickly, the task was then to translate what was still essentially rhetoric into effective practice. Since 2005, there have been difficulties in that respect, and plenty remain. But, step by step, Responsibility to Protect has been gaining traction, and 2011 is the year in which it really came of age, institutionally, conceptually, and in action on the ground.

There has been much forward institutional movement to develop the preparedness–diplomatic, civilian and military – to deal with future situations of mass atrocity crimes. The UN, regional organizations and national governments have been establishing ‘focal points’, with officials whose day job it is to monitor emerging crises and energise responses. In the US, President Obama recently directed the establishment of an interagency Atrocities Prevention Board, designed to take whole of government response to these situations to a new level of effectiveness.

Conceptually, we have seen an end to most of the confused debate that plagued earlier years (e.g. in Burma, Sri Lanka and Georgia) about what are, and are not, “RtoP situations”. There has been no argument about the events in Kenya in early 2008, or those in Cote d’Ivoire early this year, or Libya in the context of Benghazi, where Gaddafi talked – in language eerily reminiscent of the Rwanda genocidaires – of showing “no mercy or pity” for the “cockroaches” who had risen against him.

Most dramatically of all, there has been real action in hard cases: this year the Security Council has now not only expressly invoked RtoP but given it effective sharp-end military application in Cote d’Ivoire and Libya. The Libyan intervention was much more prolonged, and the interpretation by the NATO-led forces of the scope of its mandate much more controversial. But it unquestionably worked – certainly in preventing a major massacre in Benghazi, and arguably in preventing many more civilian casualties elsewhere than would otherwise have been the case. If the response had been as effective in Rwanda in 1994 800,000 victims of the worst modern genocide would still be alive today.

True, there remains an ever-present political challenge to get key governments to overcome their inertia, and sometimes cynical self-interest, and respond appropriately and consistently in every conscience-shocking new situation that cries out for it. The Russian and Chinese veto of a very cautiously drafted Security Council resolution in October was
an unhappy demonstration that for every two steps forward on RtoP there is usually a step back.

But the political landscape has changed. No-one wants a return to the indifference and inaction of the past. A series of major UN General Assembly debates, most recently and importantly in July this year when the controversy about possible NATO over-reach in Libya was alive and well, have shown overwhelming commitment to the fundamental principles of RtoP. Since the Libyan resolutions the Security Council itself has invoked RtoP in resolutions on Yemen and Sudan and in a presidential statement on prevention. As UN Secretary General Ban Ki Moon put it in a speech a few weeks ago:

> It is a sign of progress that that our debates are now about how, not whether, to implement the Responsibility to Protect. No government questions the principle.

**The Responsibility to Protect, Law and Justice**

For the lawyers among you, I should perhaps make clear – particularly since the flyer for this event describes RtoP as an “international law obligation towards all populations at risk” – that the Responsibility to Protect was never really conceived in legal terms. The *raison d’etre* of RtoP, in the minds of the Commission and I think most policymakers who have embraced it since, was unequivocally action-oriented and political: to change the way policymakers thought about mass atrocity crimes, to make clear they were everybody’s business, and to cut away the excuses for inaction in the face of conscience-shocking assaults on our common humanity.

Of course, insofar as it embraces the responsibility of states to do *no harm* to their own peoples this is essentially describing multiple international law obligations that already exist. And when it comes to preventing or reacting to harm rather than doing it, RtoP also overlaps with the duty of states to prevent and punish genocide, at least to the extent of their capability, that was identified in 2007 by the International Court of Justice in *Bosnia v Serbia*.

But I would not try to argue that RtoP, in describing the responsibility of other states to assist a focus-state struggling to protect its own people, or the responsibility of states to take timely and decisive action in the event of the focus-state manifestly failing to give such protection, constitutes any kind of new rule of customary international law. Hopefully it might become one over time with the accretion of consistent state practice. At the moment I think it can, with the weight of the 2005 General Assembly resolution behind it, and everything that has happened since, RtoP can unquestionably now be described as a new norm -- a new standard of behaviour, and guide to behaviour for every state. But it would be premature to assert now that it is anything more than that.

There are a number of ways in which law, lawyers and legal institutions can advance RtoP, and help end mass atrocity crimes, which I want to mention before closing. In the prevention tray of the toolbox there are long-term measures like promoting fair constitutional structures, human rights and the rule of law, and fighting corruption, and more immediate ones like legal dispute resolution and the threat of international criminal prosecution. In the reaction tray there is the actual initiation of criminal prosecution. And in the post-crisis rebuilding compartment of the toolbox there are measure like rebuilding criminal justice systems, managing traditional justice and, where appropriate, supporting traditional justice.
For most of these measures no particular problems arise other than finding the will and resources to manage their successful implementation. But there is one particular measure – the initiation of international criminal proceedings, that does quite often generate a very significant real world dilemma, particularly given the large range of atrocity crimes now within the jurisdiction of the ICC. This is the peace versus justice problem: should the demands of justice—to bring an end once and for all to the almost universal impunity that has prevailed in relation to these crimes in the past, and to create an effective deterrent to their commission in the future—ever yield, in the case of a clash between them, to the demands of peace, namely to bring an end to some conflict that has wreaked untold destruction and misery until then and which may continue to do so if a peace agreement cannot be negotiated? It is an issue which has arisen in recent times with the threatened or actual indictments of Sudan’s President Bashir, the Ugandan Lords Revolutionary Army’s Joseph Kony, and Libya’s Muammar Ghaddafi, and can be expected to arise many times more in the future.

Despite the position which tends to be taken reflexively by human rights lawyers that peace without justice is no peace at all – that nothing is ever really lost and much gained by ensuring that there is no impunity – my own experience is unquestionably that these demands do in fact clash from time to time, and that hard choices have to be made. Above all, the problem arises when there is an ongoing conflict, and a peace negotiation is attempting to reach agreement between parties capable of perpetuating it – it is not nearly such an issue when one side or another has been clearly defeated, or has been for all practical purposes defeated and is trying to negotiate the terms of a surrender (although a problem can also arise with the competing demands of justice and accountability on the one hand against those of reconciliation on the other). Ongoing conflicts pose a real world policy dilemma, which I experienced in acute form on a number of occasions as President of the International Crisis Group – a human rights lawyer, but one very much in the business of conflict resolution.

I think one can work through the dilemma by having regard to two important principles that must govern any decision to preference peace over justice. The first is that justice is the default position, and that it is only in the most exceptional cases, where the evidence really is clear that very major peace benefits are involved, should serious consideration be given to discontinuing investigations under way or granting formal amnesties.

The second principle is that if decisions to give primacy to peace over justice do have to be made in certain hard cases, those decisions are best made not by the ICC or its prosecutor but by those with appropriate political responsibility: in the case of the ICC, the Security Council has that power, if it chooses to use Article 16 of the Rome Statute enabling it to suspend prosecutions for renewable periods of twelve months. The prosecutor’s job is to prosecute, and he should get on with it, with bulldog intensity. However difficult it may well prove to be in practice to get the Security Council to make a suspension decision, it is a political decision which it should make, and take the pressure and weight of expectations off the prosecutor’s shoulders in this respect.

For all the difficulties and dilemmas and challenges which remain, we should not downplay what has been achieved in recent years both in building the machinery of international justice, and in finding the basis for a consensual political response to the age old problem of mass atrocity crimes. We are going to have to continue to work hard to overcome the obstacles and disappointments that are inevitably going to confront us in the years ahead as we strive to replace the rhetoric of “never again” with rock-solid substance. But we are closer to getting there than we have ever been before. 

#