

CRIMES AGAINST HUMANITY: DOES THE RESPONSIBILITY TO PROTECT HAVE A FUTURE?

2018 Annual Michael Kirby Justice Oration by Professor the Hon Gareth Evans AC QC,
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Michael Kirby and I go back to a time whereof the memory of man runneth not to the contrary – to be more precise, the early 1960s. He wasn't exactly a '60s person, or student leader, anything like the rest of us activists or flower-children. Full of the most majestic *pietas*, *gravitas* and *dignitas*, both monarchist and committed Anglican, he always wore very formal double-breasted suits, and was apparently as monastic in his social habits as he was unbelievably industrious in his work ones. But, for all those handicaps, a student leader he was, and one of great distinction, competence and influence, not only on his own Sydney campus but around the country. And, as all his student generation knew and the world now knows, a man of enormous human decency and relentlessly high principle.

Michael's decency and high principles were never feigned. But we now know – because he has been very comfortable telling us himself in recent years – that his monasticism certainly was. Indeed he went so far as to announce last year, at a book launch event we were doing together, that what had prompted his interest in me all those years ago was not just my mind, as I had always happily and naively thought. And of course also feigned, wickedly so, was a lot of his formally-suited *dignitas* and *gravitas*: he just loved, as he still does, playing the part. The late Robert Holmes a Court captured it perfectly in telling me once of his first encounter with the great man, in an intervarsity debate: "He stood up in his pinstripes, looked over his half-glasses, and said with the full Kirby modulation, 'If there is one thing I cannot abide, it is affectation'".

Michael Kirby, as you will all know, has made innumerable contributions to law and policy: it took 35 chapters and 900 pages to begin to summarise them in the festschrift honouring his retirement from the High Court in 2009. His public life really began with his role as full-time Chairman of the Australian Law Reform Commission, where I had the pleasure of working with him in the mid-'70s – and where he claims, deeply implausibly, that it was only my encouragement and instruction that persuaded his deeply reluctant and reticent self to embrace the dark arts of media management. His energy and creativity made him a delight to work with, and were certainly a huge encouragement to the reforming zeal which I brought to the role of Attorney-General in 1983 (rather unwisely, as it turned out, but that's another story)– when I said that, with Michael still head of the ALRC, I hoped that Evans and Kirby "would be to law-making what Butch Cassidy and the Sundance Kid were to law-breaking".

Of all Michael Kirby's multiple incarnations, from Commission head, to appellate judge, to Chairman of the International Commission of Jurists, to world-travelling lecturer and adviser to many intergovernmental organisations, the dimension of his legacy that has touched me most immediately is his absolutely ingrained internationalism – his total commitment, as he himself has put it, to seeing "the challenges of our time through the world's eye." That has taken the form not only of an indefatigable determination to import an understanding of international and comparative law into our own domestic lawmaking, but a huge range of contributions of his own to the international development and application of good policy, and above all fundamental human rights principles.

Those contribution have extended to areas ranging from health to drugs and crime to biotechnology to the environment to education, but the Kirby human rights efforts that have moved me most of all, because they align with so many of my own preoccupations in recent decades, have been his work on crimes against humanity: either trying to establish normality after their perpetration (as with his work as Special Representative of the UN Secretary General for Human Rights in Cambodia) or calling them out for what they are when still being perpetrated (as with his role as Chair of the Human Rights Council's Commission of Enquiry into North Korea). So to honour Michael Kirby's legacy tonight, I want to explore just how far the world has come – and how far we still have to go – in ridding the world of the worst of all human rights violations: the mass atrocity crimes of genocide, ethnic cleansing, other crimes against humanity and major war crimes.

The principle of the 'Responsibility to Protect' populations against such crimes was initiated in 2001 in the report of that name of the International Commission on Intervention and State Sovereignty, which Canada sponsored and asked me to co-chair. When, less than five years later, 'R2P' (the abbreviation for which, for better or worse, the responsibility to protect has become universally known) was unanimously embraced by the world's heads of state and government when they assembled for the UN's 60th Anniversary World Summit, this was seen by a great many people at the time as a huge conceptual breakthrough.

It certainly was unprecedentedly far-reaching for the UN General Assembly – so long the battleground for so many states asserting their sovereign right to be immune from scrutiny in their internal affairs – to unanimously agree, as it did in 2005, to what have been described as the 'three pillars' of R2P. First, that every state has a responsibility to its own people not to either commit or allow to occur within its borders mass atrocity crimes, viz. 'genocide, war crimes, ethnic cleansing and crimes against humanity' ('Pillar One'). Second, that other states have a responsibility to assist those lacking the capacity to so protect their populations ('Pillar Two'). And third, most far-reaching of all, that it was the responsibility of the international community to respond with 'timely and decisive action' – including ultimately with coercive military force if that is authorised by the Security Council – if a state is 'manifestly failing' to meet its protection responsibilities ('Pillar Three'). The historian Martin Gilbert went so far as to write in 2007 that international acceptance of the responsibility to protect in these terms was "the most significant adjustment in sovereignty in 360 years".

But that was then, and now is now. Looking back after well over a decade has passed since 2005, what have we managed to achieve? Just some fine words, or something more than that? There are plenty of cynical voices to be heard saying that the whole enterprise has been a complete waste of time, or worse. Looking no further than the ongoing catastrophe in Syria, where R2P gained no traction at all; at the horrible aftermath of the initially-successful R2P-based military intervention in Libya in 2011; at the terrible plight of Myanmar's Rohingya in since mid-2017, described by the UN High Commissioner for Human Rights as a 'textbook example of ethnic cleansing', but where the UN Security Council has remained largely mute and impotent; and at the way in which Israel has got away with its shockingly disproportionate lethal response to the demonstrations on the Gaza border in May this year – to say that R2P has been a failure and has no future might seem a hard claim 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 three months 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 my New York NGO colleagues 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 analyse 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.

And it is not only regrettable, but intolerable to the point of disgusting, for the ICC to have come under the attack it recently has from the Trump administration in the United States.

President Trump's speech to the UN General Assembly this week was uncompromisingly hostile: "As far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority. The ICC claims near-universal jurisdiction over the citizens of every country, violating all principles of justice, fairness, and due process. We will never surrender America's sovereignty to an unelected, unaccountable global bureaucracy. We reject the ideology of globalism, and we embrace the doctrine of patriotism."

National Security Adviser John Bolton's speech to the Federalist Society on 10 September, equally basking in exceptionalist self-regard and misstating the scope and extent of the ICC's powers, was even harsher and uglier, evidencing a determination to hunt down the Court and eviscerate it. "We will ban its judges and prosecutors from entering the United States. We will sanction their funds in the US financial system, and we will prosecute them in the US criminal system. We will do the same for any company or state that assists in an ICC investigation of Americans."

As Stephen Rapp, the former ambassador at large for war crimes under Obama, neatly skewered him in reply: "We can prevent the prosecution of Americans not by threatening judges, but by showing that we thoroughly investigated and found no cases where the evidence met the burden of proof".

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, its processes should be respected, and countries like Australia which can possibly claim to have at least some capacity to get the US to listen, should use every possible diplomatic tool at our disposal to ensure its continued existence

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 flavour 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. They certainly include Sri Lanka in 2009. And in Sudan,

where the original crisis in Darfur predates R2P but the situation remains unresolved and President Omar al-Bashir 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 pressure, 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 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 has been particularly limp – although I am afraid not unusually so – in responding to the Rohingya crisis, putting no effective pressure whatsoever on the Myanmar government to behave decently.

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, including torture, persecution, deportation and other inhumane acts.

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 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.

Doing just that is something Michael Kirby has always been prepared to do, in every one of his judicial and other incarnations. Endlessly criticised, sometimes outrageously so; sometimes under direct threat; but always courageous, always rigorous in his investigation and analysis, always polite – infinitely more so than I have managed to be (as I say in my memoir, I'm afraid that my temperament, unlike Michael's, is not of the cloth from which zen masters are cut). But beyond everything else, Michael Kirby has always been unfailingly human. This Oration honours a truly great Australian, and a truly great man, and may his contributions to making the world a more just and better place continue, as I am sure they will, for many years more.