LAW, JUSTICE AND MASS ATROCITY CRIMES

Don Dunstan Foundation and Oxfam Australia 2012 Human Rights Oration by Professor the Hon Gareth Evans AC QC, Chancellor of the Australian National University and Co-Chair of the International Advisory Board of the Global Centre for the Responsibility to Protect, Adelaide, 10 July 2012

For anyone who came of political age in Australia in the 1960s, with any kind of reformist or social justice blood in his veins, Don Dunstan was a hero. He certainly was to me then, he remained so during all my own years as a would-be law reformer (although in terms of legislative achievement matching ambition I was much less successful than he was), and he remains so to this day. Dunstan was not a wet-finger-in-the-air political leader. He had strong convictions, and he pursued them passionately in both opposition and government, seeing even the fiercest opposition as a challenge to be overcome, not a reason for retreat. And every one of his core convictions was grounded in manifest human decency: whether the issue was criminal justice for indigenous Australians, police powers, capital punishment, electoral democracy, free speech and association, equal pay, homosexual law reform or the campaign against apartheid.

What moved me above all was his hatred of racism in every shape and form, and in that context above all his national political leadership – with Gough Whitlam – of the campaign to bury the disgraceful White Australia immigration policy, with the greatest resistance coming within the ALP itself from diehards like Arthur Calwell, who railed that it was "only cranks, long-hairs, academics and do-gooders" who wanted change. Calwell may well have been right, but in those days at least that was pretty good company to be in.

It is wonderful that the Don Dunstan Foundation flourishes to this day, keeping alive not only our memory of the man, but creating a forum for the principled discussion of the kind of issues on which we know, were he still with us, he would be intensely engaged both intellectually and emotionally. It is a pleasure and a privilege for me to giving this address tonight, under the auspices not only of the Foundation, but Oxfam, not only one of the world's most effective humanitarian agencies but also a preeminent intellectual contributor to many of the world's great continuing human rights debates. And it is one of the most important of all those debates – how we should react, as an international community, to the most grotesque and indefensible of all human rights violations, and in particular the role of international criminal justice in that context – that I will open up with you this evening.

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As we look back at not only what has been happening in recent months in Syria, but over recent decades, and indeed over the whole 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, cast, class, ideology or opinion.

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 laid 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 all the developments in international human rights law and international humanitarian law which followed the War – 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 taking forward international humanitarian law 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 authorize 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 (an unhappily familiar story again over the last year, in the context of Syria, as I will come back to below). 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 has now convicted and imprisoned Charles Taylor and the Cambodian tribunal now trying three of the 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 — 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 still 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 other legal strategies, 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.

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In the last decade we have in fact taken a giant stride forward in addressing that question of political will with the birth and evolution, of the new principle of "the responsibility to protect" (R2P or RtoP for short). I do not pretend for a moment that we have yet solved the

problem of mass atrocity crimes once and for all – how could I in the face of the totally unresolved mess in Syria? And there are innumerable implementation problems that will continue to arise every time the principle is invoked (some of which I will address in this talk, like the peace v. justice dilemma). But the reality is that we are closer to consensus now on the nature and extent of the international responsibility to respond to these crimes than we have ever been.

The responsibility to protect principle was born out the series of conscience shocking cases in the Balkans and Africa to which I have already referred, 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.

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. In its 2001 report of that name, the Commission came up with the idea of “the responsibility to protect”, 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 changing the language of the debate: turning “the right to intervene” into “ the responsibility to protect”, and re-characterizing 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.

Secondly, by broadening the range of actors in the frame. Whereas “the right to intervene” focused just on the international response – and by those capable and willing to apply military force – the new formulation spread the responsibility. It started by recognizing 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 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.

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 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 – after multiple criteria were satisfied – contemplating coercive military force.

Articulated this way, R2P 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 scores, maybe hundreds, of PhDs, with many 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 fairly quickly described.

Within four years, in 2005, after some intense and sustained diplomacy in multiple forums, the core elements of the concept were unanimously endorsed by the more than 150 heads of state and government meeting as the UN General Assembly at the World Summit celebrating the UN's 60th anniversary: it was made clear beyond doubt that genocide, war crimes, ethnic cleansing and crimes against humanity were not no-one else's business but everyone's. And within another year concept had been embraced in a formal Security Council resolution. These formal statements were in themselves rather breathtaking achievements, since what was involved here conceptually was nothing less than, as the British historian Martin Gilbert has put it, "the most significant adjustment to national sovereignty in 360 years".

But words on UN paper are one thing, implementation something else. The next five years – from 2005 through to the end of 2010, which I think of as R2P's adolescence period – saw not a great deal of effective action, but much tortured argument about R2P's scope and limits: whether and how it should apply in cases like Darfur, the Congo, Sri Lanka, the response to the cyclone in Myanmar, and Russia's invasion of South Ossetia. That said, efforts made in the General Assembly during this period by a number of spoiler-countries – notably Nicaragua, Venezuela, Sudan and Cuba – to turn back the clock on the 2005 consensus were rebuffed, and there were some clear-cut practical success stories, most of all in Kenya in early 2008, where in the context of a Rwanda-like explosion of ethnic-focused violence in the aftermath of a contested election, and with a major genocide feared, a diplomatic mission led by Kofi Annan under the auspices of the UN and African Union and explicitly invoking R2P successfully defused the situation – demonstrating in the process that even in the most extreme cases, R2P was not just about military intervention.

It was not until 2011 that the UN Security Council itself took action explicitly under the R2P banner. But when it did so, in the cases of Cote d'Ivoire and Libya, this was widely heralded as the coming of age of the responsibility to protect. Libya especially, at least in February and March last year, was a textbook example of how R2P is supposed to work in the face of a rapidly unfolding mass atrocity situation during which early-stage prevention measures no longer have any relevance. In February, Gaddafi's forces responded to the initial peaceful protests against the excesses of his regime, inspired by the Arab Spring revolutions in Tunisia and Egypt, by massacring at least several hundred of his own people. That led to the unanimous UN Security Council Resolution 1970, which specifically invoked 'the Libyan authorities' responsibility to protect its population", condemned its violence against civilians,

demanded that this stop and sought to concentrate Gaddafi's mind by applying targeted sanctions, an arms embargo and the threat of ICC prosecution for crimes against humanity.

Then, as it became apparent that Gaddafi was not only ignoring that resolution but planning a major assault on Benghazi in which "no mercy or pity" would be shown to perceived opponents, armed or otherwise—his reference to "cockroaches" having a special resonance for those who remembered how Tutsis were being described before the 1994 genocide in Rwanda—the Security Council followed up with Resolution 1973, also invoking R2P, which, by majority vote with no Russian or Chinese veto or other dissenting voices, explicitly authorized "all necessary measures", i.e. military intervention by member states, "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 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 the weeks and months wore 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. The merits of the argument are finely balanced, with much to be said both for those who say that all-out war against the Gaddafi regime was the only way to protect Libyans from it, and those who insist that diplomatic solutions should have continued to be explored and the Council given a serious opportunity to reconsider the scope of its mandate as events evolved.

For present purposes the most important result of this continuing dispute, and all the distrust it has engendered, has been its 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 threatened vetoes from Russia and China, and continuing unhappiness by the other BRICS members, the Council found itself long unable to agree even on a formal condemnatory statement, and is now as far away as ever from agreeing on more robust measures like sanctions, an arms embargo, or the threat of ICC prosecution.

No-one has made a compelling case that R2P demands coercive military intervention in Syria – for multiple reasons, the cost-benefit calculation is very different to that which applied in Libya – but the paralysis of the Council when it has come to putting any other pressure on the Assad regime has unquestionably strengthened its hand immeasurably. We now have a situation which has been, as feared, deteriorating into full-scale civil war, with no evident solution in sight other than a possible diplomatic one should Russia finally decide to lend its weight to the process – persuading enough senior officials in the Syrian regime to change course, with enough safe exits for the most divisive figures, to enable the situation to stabilize and reform to start. But we shouldn't be holding our breath: as former US National Security Advisor Brent Scowcroft said last month, "Just because there's a problem doesn't mean there's a solution".

That said, just as any celebration about the triumph of the R2P principle would have been premature after the Libyan resolutions would have been premature last year, so too would be despair now about its future. Nobody suggests that the geopolitics of ensuring effective civilian protection is ever going to be easy, especially in cases where early-stage prevention, if any, has manifestly failed. What has to be accepted, and treated as a challenge rather than

cause for despair, is that there is always going to be tough debate about the really hard cases, where violations that are occurring are so extreme that the question of coercive military force comes into play as something which, prima facie at least, might have to be seriously contemplated as the only way to halt or avert the harm that is occurring or feared. The higher the stakes, the higher the emotion and the more that realpolitik will come into play.

What we do know, on the evidence of the major debates on R2P that have taken place in UN General Assembly in each of the last three years is that, even at the height of the concern last year about claimed over-reach of the Security Council's mandate in Libya, the overwhelming majority of member states remain fully supportive of the new norm. Secretary-General Ban Ki-Moon was not exaggerating when he said last September, 'Our debates are about how, not whether, to implement the Responsibility to Protect. No government questions the principle'.

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What is the role for law and justice in all of this? When it comes to how to implement R2P, where does law fit in? The Responsibility to Protect principle was never really conceived in legal terms, as creating some new international law obligation. The raison d'etre of R2P, in the minds of my Commission which invented it 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, including under international humanitarian law, that already exist. And when it comes to preventing or reacting to harm rather than doing it, R2P 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 the case of *Bosnia v Serbia.*

But I would not try to argue that R2P, insofar as it describes the responsibility of other states to assist a focus-state struggling to protect its own people, or the responsibility of other 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. With the weight of the 2005 General Assembly resolution behind it, and everything that has happened since, RtoP can reasonably 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.

All that said, there are a number of ways in which law, lawyers and legal institutions can advance RtoP, and help end mass atrocity crimes. 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 transitional 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. It has arisen again now with demands for the prosecution of President Bashar Assad of Syria, and it 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 – as human rights lawyer by training and instinct, but one very much in the business of conflict resolution.

No case raised the dilemma more sharply than that of Charles Taylor, the murderous former President of Liberia who left a trail of human rights wreckage behind him in the civil wars in that country and Sierra Leone around the turn of this century. With thousands more deaths feared if his threatened final assault on Monrovia had proceeded in 2003, it was not unreasonable from a conflict prevention perspective for Nigeria to forestall that by offering him asylum. But was it reasonable for Nigeria to then succumb, three years later, to intense international pressure to hand Taylor over, through Liberia, to be tried in the Sierra Leone Special Court, without producing any evidence that he had breached his asylum conditions? The understandable joy this generated among human rights lawyers around the world should be tempered by the appreciation that this sent a very unhelpful message to some other serial human rights violators who might otherwise have been tempted to end their depredations in return for a safe haven and soft landing: Zimbabwe's Robert Mugabe certainly among them, with Syria's President Assad perhaps now another.

I think one can work through the dilemma of whether to ever preference peace over justice by having regard to three important principles that must govern any such decision. 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, if such a decision has to be made, it is a political one – and the pressure and weight of expectations should be taken off the prosecutor's shoulders in this respect.

And the third principle is that deals made in good faith should be fully honoured. One can't have it both ways – granting asylum to secure peace, then overturning the asylum to secure a conviction. Or, perhaps more precisely, one can have it both ways, but not if one hopes to be ever able to make such deals again in the future in cases that may justify them.

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A variation of the peace v. justice problem in the case of ongoing conflicts is the issue of accountability v. reconciliation in the case of conflicts that have reached some stage of resolution. There is the same potential for legal purists to take the position that justice must be pursued come what may, and the same need in practice to make careful case-by-case judgements based on the characteristics of each particular situation.

In post-conflict societies – like Libya right now – trying to rebuild themselves after mass atrocity crimes have been committed (often, as in the case of Rwanda, by very large numbers of people, not just isolated psychopaths), both national leaders and internationals trying to advise and assist them face hugely difficult dilemmas in deciding how, on the one hand, to ensure accountability for those crimes but, on the other, somehow to achieve social reconciliation. In one society investigations of mass murder and prosecutions of those responsible for it in national, international, or hybrid courts may well be thought to contribute to a sense of political catharsis that clears the air, relaxes tensions, and opens the door to restorative justice. But in another it may be seen as increasing instability and deepening hostility among adversarial groups: Mozambique and Namibia are among many examples where reconciliation was pursued to the exclusion of accountability.

Between the polar extremes of emphasizing retributive justice through trial and punishment, and hoping that time itself will be sufficient to heal the wounds and memories of past atrocities, there lie several other options, a number containing elements of both approaches.

One is simply postponement, delaying the day of reckoning—as essentially Chile and Argentina did, and to some extent also Cambodia, and maybe Libya now will, until the society was felt to be strong and cohesive enough to face its past and itself impose accountability for those crimes without fear of destabilizing consequences.

A second is the barring of a whole class of individuals from public employment, political participation, and the enjoyment of other civil rights—as with denazification in Germany and demilitarization in Japan (for both of which there was an administrative appeal apparatus),

and debaathification in Iraq (where there was no such process). This can work where the class in question is clearly defined and comprehensively discredited, with its members all evidently sharing some moral responsibility, but it tends to be counterproductive, generating resentment and resistance, where, as in Iraq, these conditions are not met.

The third option (and one that has been generating lively but so far unresolved debate in Libya) is a truth commission. In their pure form, such commissions are premised on the notion of fixing responsibility without attendant punishment, in effect offering amnesty in return for full disclosure (thus addressing key accountability objectives such as truth telling and delegitimization of state-sponsored violence). In the familiar South African Truth and Reconciliation Commission, there was a heavy additional emphasis on forgiveness as a key to reconciliation, and less in practice on the truth for amnesty trade-off. In fact almost no very senior figures from the apartheid regime appeared nor were any prosecuted for their failure to do so, evidently because such prosecutions could have derailed the fragile transition.

Truth commissions and court processes can also be seen as complementing each other rather than being somehow in competition. In Argentina the significant amounts of information produced by the truth commission established in 1983 were then utilized by the authorities in prosecuting members of the military junta that had ruled the country. In Sierra Leone both a truth commission and a special court were established, and they were held simultaneously for a time. Certainly trials as well as truth commissions may be pictured as vehicles of emotional expression and cathartic transformation: enabling expression of the community's abhorrence of the atrocities committed, a and placating the desire of victims for vengeance.

A fourth option is to provide reparations to victims of human rights violations, which might be either substantive (compensatory or restitutive) or symbolic. The restitutive example most often cited, and frequently touted as a success, is of the Canadians and Americans of Japanese descent who were interned during the Second World War; a good example of the symbolic approach is closer to home – the apology offered to the indigenous peoples of Australia on behalf of all Australians by Prime Minister Kevin Rudd in 2008.

A fifth option for dealing with post-conflict accountability and reconciliation issues is to rely on traditional justice mechanisms—informal tribal, local, grassroots, and/or village-level justice systems, like the "gacaca" process in Rwanda, that owe nothing to European-derived state-level justice. There are downside risks with this and many other traditional justice mechanisms, not least sometimes in reinforcing modes of governance that have been among the original causes of conflict, but – here as elsewhere – well-intentioned outsiders have to recognize that it must ultimately be a matter for the people of the distressed country itself to decide which, or what combination, they choose.

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It is impossible to offer a definitive, one-solution, answer to the dilemmas I have been describing. There just often are inherent tensions, and agonizing choices involved, between the demands of justice and those of peace, and the demands of accountability and those of reconciliation, just as there famously are between justice and equality, or freedom and equality and other competing pairs of moral principles.

The only way through the morass, I believe, is to treat justice, accountability and no-impunity as the default positions – but to recognize that they are just that, not absolute, and that in the real world cases will arise where the arguments for making exceptions really are compelling.

Human rights advocates should not feel that they are letting the side down if they accept that. Those in the conflict prevention and resolution business, and those in the business of hunting down and punishing the guilty, all ultimately want the same thing: an end to violent conflict and the horror and misery of war and mass atrocity crimes, and to ensure the dignity and common humanity of our fellow human beings.

The great new organizing principle that has united the international community as never before in responding to genocide and other mass atrocity crimes is, and remains, the responsibility to protect. The completely effective implementation of R2P is going to be work in progress for some time yet. Renewed consensus on how to implement it in the hardest of cases in future, those like Syria, is going to be hard to achieve. But I don't think there is any policymaker in the world who fails to understand that the alternative to Security Council cooperation is a return to the bad old days of Rwanda, Srebrenica and Kosovo: either total inaction in the face of mass atrocity crimes, or action outlawed by the UN Charter in defiance of every principle of a rule based international order.

After all that has been achieved over the last decade, that would be heartbreaking. And – invoking, at the end of this address as at the beginning, the ever forward-looking and upbeat shade of Don Dunstan – I'm optimist enough to believe it won't happen.

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