Transcript

Responding to Mass Atrocity Crimes: The 'Responsibility to Protect' After Libya

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Elizabeth Wilmshurst:

Before I introduce our speaker, let me say that I'm Elizabeth Wilmshurst, Associate Fellow in International Law here at Chatham House.

We're very glad indeed and privileged to welcome Gareth Evans here to talk on the international responsibility to protect. He was of course the Co-Chairman of the International Commission on Intervention and State Sovereignty in 2000-2001 which really initiated this concept of the responsibility to protect. He was appointed as a Chancellor of the Australian National University last year and he's President Emeritus of the International Crisis Group which of course he led from 2000-2009. He was a member of the Australian Parliament for 21 years and a cabinet minister in the Hawke and Keating Labour governments for 13.

I know that in many of our minds we're wondering whether the military intervention in Libya this year was a high point, a benchmark, a high-water mark of the international responsibility to protect, and now who better to talk about it than Gareth Evans. Thank you.

Gareth Evans:

Thank you Elizabeth for that introduction and it is a pleasure to be here as always.

Martin Gilbert has described the responsibility to protect as the most significant adjustment to sovereignty in 360 years. That's a pretty big call but there's actually a good argument to be made that he was right.

There had been some nibbling away at more absolutist Westphalian notions of sovereignty in the last half century, not least in the aftermath of the Second World War by the Universal Declaration and a miscellany of other instruments aimed at protecting group and individual rights but it really was quite something for more than 150 heads of state and government to declare unanimously, as they did on the occasion of the 60th UN anniversary World Summit in 2005, not only that sovereign states had the responsibility to protect their own people from genocide, ethnic cleansing, crimes against humanity and war crimes but if they didn't, the wider international community had a responsibility to act in a timely and decisive manner, if necessary under the coercive provisions of Chapter 7 of the UN Charter, to ensure that they did. And it was quite something for, not just the UN General Assembly but the Security Council with no dissenting voices, albeit not with the unanimous affirmative vote, to approve in specific real world cases the use of coercive

military force for the explicit purpose of protecting civilians at risk of mass atrocity crimes.

Peace-keeping forces have been for some time now given the Chapter 7 mandates to react forcefully in various threat contingencies but the Côte d'Ivoire and above all the Libya resolutions early this year took us to a place we haven't been before. But is this a place we're not likely to be in again? Does this reach [inaudible] a veto in the Security Council by Russia and China of a much watered down condemnatory Resolution on Syria mean that Libya, so far from being the new benchmark against which future international action will be measured and from which doctrine and practice will move further forward in future or will it prove to be simply the high-water mark of responsibility to protect from which the tide will now rapidly recede?

To appreciate how far we've come and what's at stake here, it's important to start by remembering where we were just a decade ago at the end of the 1990s and despite those post-war innovations – the recognition of crimes against humanity in the Nuremberg Tribunal Charter, the Genocide Convention, the Universal Declaration, the International Covenants, the new Geneva Conventions on the Protection of Civilians, and despite the end of the Cold War giving new hope for consensus on how to respond to mass atrocity crimes, the decade of the 1990s, as most people here will remember, saw an almost unending series of reminders that the Holocaust was not an unrepeatable aberration; that genocide, ethnic cleansing and other large scale war crimes, crimes against humanity, was something that could, given sufficiently combustible circumstances erupt any time, on any continent, in countries of any degree of development and that there was absolutely no international consensus about how to respond.

So we had in the 1990s the debacle of Somalia, in 1993 the catastrophe of the Rwandan genocide, in 1994 the almost unbelievable default in Srebrenica in Bosnia just a year later in 1995, and when action was taken in Kosovo in 1999 we had the absence of Security Council authority for it because of the then threatened Russian veto.

And throughout the decade, as was evidenced in bitter and divisive debates in the General Assembly and elsewhere, we had a fundamental conceptual gulf evident between those largely in the global north who rallied to the banner of humanitarian intervention or the right to intervene – *le droit d'ingérence* in Bernard Kouchner's influential formulation – and those on the other side, largely in the global south, who defended the traditional prerogatives of state sovereignty in all their absolutist majesty arguing that

internal events, however horrific, were simply none of the rest of the world's business.

It was this gulf that the responsibility to protect concept was designed to bridge as first articulated in the 2001 report, which Elizabeth has mentioned at the International Commission on Intervention and State Sovereignty which I co-chaired with Mohamed Sahnoun, and as finally emerging in evolved form, presentationally a little different but not substantively, in which it was endorsed by the 2005 World Summit. The core elements of responsibility to protect and the crucial differences between this and humanitarian intervention I think need to be reiterated on occasions like this because the differences do get constantly blurred by those with short memories or a cynical or sceptical disposition.

Whereas humanitarian intervention was all about coercive military responses to extreme threat situations and only about that, responsibility to protect is much more nuanced, much more multi-dimensional. The first thing about R2P for short – responsibility to protect – is that it involves a presentational shift from the language of the right to intervene to the language of responsibility to protect; so you no longer talk about the right of the big guys or anyone else to throw their weight around but the responsibility of everyone to prevent these atrocities occurring; you talk not in terms of intervention as the key idea but protection, so you shift the paradigm, the way of looking at this away from the interveners to the victims, those who suffer – death, rape, displacement, violence, horror – in these situations.

And that's not just a linguistic device to shift the focus in this way. It does require a fundamental mindset change and the reason for inventing this language, utilising this language, is that we did want to produce a new mindset among those debating this issue so that we could get away from that horrifically divisive debate.

The second thing about the responsibility concept is that it involves the idea of a sequence of 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. Humanitarian intervention by contrast is focused entirely on the external players. If there's a problem with actual or impending mass atrocity crimes it's the responsibility of the international community to fix it.

The third thing about responsibility to protect, characteristic of this new concept, is that it involves a sequence of responses. Whereas again humanitarian intervention was one dimension – the military – with

responsibility to protect there are multiple dimensions in the response continuum. You start conceptually with the idea of prevention, long-term structural as well short-term operational prevention.

When prevention looks like failing internally, you look first to the international community's role in supporting and assisting a state to exercise its responsibility including military support if that's what the state in question needs and wants and is prepared to accept. When prevention fails, manifestly fails and further measures become necessary, you look first to persuasion and only then to coercion and then, when it does come finally to coercion because you've still got a horrible situation staring you in the face, you look first under the doctrine at non-military means like diplomatic isolation, sanctions, threats of International Criminal Court prosecution and only as a last resort to the use of military force.

Security Council Resolutions 1970 and 1973 this year were textbook examples of the last stages of that sequence, the first of those Resolutions on Libya condemning the violence and applying coercive but non-military measures – targeted sanctions, threat of ICC prosecution and so on – and the second Resolution 3 weeks later after these measures and threats had failed to concentrate Gaddafi's mind then, but only then, picking up the military option.

How that military mandate was actually exercised in Libya has of course become very controversial – and I'll shortly come to the question that I posed at the outset as to the implications of what happened there for the future of responsibility to protect – but what needs to be appreciated, and this is an unequivocally good news story for R2P supporters, is how much of this basic conceptual package as I've just described it is now embedded in international discourse and increasingly in international practice, although there still remain plenty of challenges.

The best proof of acceptance of responsibility to protect in international discourse actually lies in a series of debates almost wholly unreported in the media that have taken place in the UN General Assembly now in 2009, 2010 and again post Libya in July 2011, in which it's become apparent that the basic responsibility to protect doctrine is alive and well, whatever the caution may be that's still widely evident about how it should be applied, particularly in really extreme cases when all other options except the coercive military one seem to have been exhausted or appear unachievable.

The 2009 debate in the General Assembly, the initial one in this series of follow-ups to 2005, was seen as a real opportunity to overturn the 2005 World

Summit consensus by those considerable number of states who'd never accepted it and a major attack was in fact mounted by the spoilers. But even then it became apparent by the conclusion of that debate that out of the whole UN membership there were only four states who wanted to go that far, to completely reverse the 2005 consensus and those four interestingly were Nicaragua, Venezuela, Cuba and Sudan. Since then opposition voices have been even more muted. Although supporters of responsibility to protect, not least the UN Secretary General's special adviser, Ed Luck, went into this year's debate with a great deal of trepidation given the widespread concern that NATO forces were overreaching their Security Council mandate in Libya and this was giving ammunition all over again to the spoilers.

Notwithstanding that trepidation, the anxiety proved absolution unwarranted. No serious objection was mounted by anyone to the responsibility to protect principle. The only issue debated was the way in which it was being implemented.

And again in the ministerial contributions to this year's General Assembly general debate – the ministerial stuff that happens in late September/early October – more countries than ever, 18 at the last count, actually went out of their way, in a general debate where this is not the subject matter, to refer to responsibility to protect and its importance with again no direct challenge being mounted to the existence and legitimacy of the norm by anyone other than the ever reliably incorrigible Nicaragua.

Two of the most fascinating acknowledgements I think that responsibility to protect was here to stay came, it must be acknowledged from a couple of rather unlikely sources.

The representative from Zimbabwe said with what one might or might not accept as touching concern: 'Bilateral hatred and quarrels or ulterior motives must not be allowed to creep into considerations of matters pertaining to threats to international peace and security or to the principle of the responsibility to protect.' Don't the bilateral quarrels and hatreds interfere with the principle?

And again we had Syria's representative saying, whether believably or not: 'Syria exercised its responsibility to protect its citizens; it acted to guarantee their safety and stability.' Well it all goes, to me, to support the accuracy of Ban Ki-moon, the Secretary General's assessment in a speech he gave a couple of weeks ago that: 'It's a sign of progress that our debates are now about *how*, not *whether*, to implement responsibility to protect – no government questions the principle.'

So I really do think it's fair to claim that responsibility to protect really is a new international norm with genuinely universal reach and application and in its fundamental elements for all practical purposes universally accepted. The way the world thinks about these issues has changed.

But of course getting this kind of agreement in general principle is only the beginnings, not the end, of the story. What matters is effective implementation of the principle in practise and here there remain, as has been the case from the beginning, three big challenges – conceptual, institutional and political.

The conceptual challenge is to get agreement on what real world situations actually count as cases of responsibility to protect concern. Here I think we're making real progress. There's much less confused conceptual debate now than there was in the first years after 2005 about what are and what are not responsibility to protect situations and how they should be distinguished from conflict situations more generally or human-rights violation cases more generally.

At the outset for example there was genuine confusion about whether the apparent foot dragging of the Burmese generals after Cyclone Nagis in 2008 was or could have become a responsibility to protect situation. Again the indefensible ugliness of the military action taken by the Sri Lankan army against the last hold-out of the Tamil Tigers and civilians caught in the middle was complicated by the government's claim, with which many internationally were in sympathy, that it was simply doing what it had to do to defeat a terrorist insurgency.

Russia further blurred the argument by claiming, with no more justification than the coalition which invaded Iraq in 2003, that there was an R2P, a responsibility to protect rationale for its invasion of Georgia in 2008.

So there was confusion, there was muddle, there was conceptual debate about these sort of claims and counterclaims and cases but by and large as the debate, the discussion has gone on, that has drifted away and it really has been difficult for anyone to claim confusion about the events in Kenya for example in early 2008 or Côte d'Ivoire at the beginning of this year or I strongly believe Libya, certainly in the context of Benghazi where Gaddafi talked in language which was eerily reminiscent of the Rwanda Génocidaires of showing no mercy or pity for the cockroaches who had risen against him.

I have to say in parenthesis there's been a bit of second guessing going on about whether or not Benghazi really was a situation of potential catastrophe. All I can say is we sure as hell would not have had the Arab League supporting this intervention, for all the other agendas they had and the

distaste they had for Gaddafi, they certainly would not have come aboard in support of military action had they not believed that there was a genuine catastrophe facing them right there and then, and that's certainly a factor I know that govern the response of Russia and China and others who are congenital foot-draggers on these matters.

The point is that these were all situations which everyone can see were heading rapidly into that shameful talismanic never-again territory of the Holocaust, Cambodia, Rwanda, Srebrenica, where there were practically no voices to be heard arguing of what was happening was no-one else's business but that of the sovereign state concerned.

On the institutional challenge side there are still many challenges to overcome before one could be confident that there's sufficient international preparedness – diplomatic, civilian, military – to deal with future situations of mass atrocity crimes occurring or imminently about to occur or very likely to occur within the readily foreseeable future if perfected preventative action is not taken.

But things are happening. The UN Joint Office, bringing together special advisers on responsibility to protect and genocide is, after several years of frustrating prevarication New York style, up and running and making its voice increasingly heard as it has been for example… that office on Kenya, Kyrgyzstan, Guinea as well as Côte d'Ivoire and Libya, and as I hope it will shortly and vociferously be heard in the case of Sudan, South Kordofan, which I have to say is rapidly emerging as a current serious responsibility to protect risk situation.

Within key national governments and regional organizations, again institutional things are happening of real utility. 'Focal points' are gradually being established with officials essentially whose day job it is to worry about these issues – early warning, response to new situations as they arise – and to energize the appropriate action throughout their respective governmental organizational systems.

In the United States where this focal point innovation has in many ways been taken further than anyone else with the special unit established in the National Security Council under the direction of Samantha Power. In the US President Obama has just issued a presidential directive to work on the creation of an inter-agency atrocities prevention board to take effective whole of government responses to these situations up to a whole new level again, and I was in Washington all day yesterday talking to people about this and that's an impressive further step forward.

Although we seem not much closer than ever to establishing effective military institutional responses, effective military rapid reaction forces on a standby basis, let alone any standing international forces of the kind that have long been argued for, it is the case that key militaries – and again, largely led by the US although the Brits are doing some useful work here as well – are devoting serious time and attention now to debating and putting in place new force configuration arrangements, new doctrine, new rules of engagement and new training to run what are now being understood as really a quite separate category of activity to both traditional war fighting on the one hand and peacekeeping located on the spectrum between them; what's being increasingly described as MARO, Mass Atrocity Response Operations.

At the end of the day, however successful we are meeting the conceptual and the institutional challenges involved in taking responsibility to protect forward and embedding the norm in international practise, there will always be the political challenge of mobilizing the most relevant actors.

And that challenge is now starkly evident in the post-Libya environment as we confront the reality of this week's veto by Russia and China, after months of argument, of a not at all confrontationally drafted resolution on Syria, a resolution which condemned the violence perpetrated by the regime on civilian protesters and indicated that the Council would 'consider its options' with other unspecified measures if the situation did not improve within 30 days – that's all it did – and all this in the context of a death toll so far on UN estimates of some 2,700 people and a situation overall which is at least as bad, if not worse, than that which triggered the military intervention in Libya.

The main stated reason, apart from arguments that peace is at hand if only we can engage in diplomatic mediation rather than anything more robust, but the main stated reason for the opposition to going down a condemnatory resolution path by Russia and China and the foot-dragging of its fellow BRICS – Brazil, India, South Africa – who as they did with Libya abstained on this resolution, the last three, the stated reason is that NATO exceeded the mandate that it was given by Security Council Resolution 1973 by pursuing outright regime change and supporting the rebel side in a full scale civil war when it was only authorized to act to prevent harm to civilians. And so, the argument goes, there were risks accordingly in even indirectly flagging the possibility of other measures because it can't be assumed that that won't inexorably lead to that mandate being granted then by the Security Council or grabbed as having been granted and then misused in practise.

I have to say there is some substance in the criticism of NATO overreach with even those most generously inclined having to concede that NATO stretched its mandate to the absolute limit. For my own part I acknowledge the force of the argument that civilians were very much at risk, not only in Benghazi and other towns being attacked by Gaddafi's forces but in Tripoli and other areas under his control and that the only way these could be fully protected was by actually getting rid of Gaddafi, achieving regime change.

But in the interests of giving no excuse to those who were always going to argue that giving the military option an inch would be bound to result in taking a mile and in the interests of preserving the maximum possible chance of consensus for action in the future when the next extreme situation arose, I would have preferred the operation to have been conducted on a much more restrained basis. Certainly doing everything necessary to establish and maintain a no-fly zone including knocking out airports and indeed some command-and-control operations and certainly directly attack concentrations of forces clearly about to put civilians at risk in Benghazi or anywhere else. But otherwise I would have preferred simply maintaining a sustained monitoring and action as a necessary operation rather than the much more sustained and wide-ranging operations that took place.

This would undoubtedly have led to a more protracted and maybe messier still civil war which would in turn have placed a real strain on domestic support within coalition members – that's true in the United States – but it would also certainly have improved the chances of Libya being seen as a wholly positive new benchmark rather than a possible high-water mark.

All that said, while there is some substance to the stated objections by Russia and the others who explained their opposition to the resolution this way, there is also a large measure of cynicism in Moscow's position given its longstanding political and economic ties to and support of the Assad regime. This was never going to be a case where the issue was addressed on its absolute objective merits and we should bear that in mind in making judgments about how much to blame the course of events in Libya for the inaction in Syria.

What we have to accept and treat as a challenge rather than a cause for despair is that there's always going to be a tough debate about the really hard cases where the violations that are occurring are so extreme that the question of coercive military force does come into play as something which, prima facie at least, might have to be seriously contemplated as the only way to halt or

revert the harm that's occurring or feared and the higher the stakes, the higher the emotion and the more that *realpolitik* will come into play.

When it comes to military action we know that some cases will always be easier to contemplate than others: where small countries are involved, not big ones; where the country in question has small and weak military force of its own, not large and professional ones; where the state in question is relatively friendless rather than with supporters in other high places; where a military intervention is not particularly likely to have wider regional ramifications as compared to cases where it almost certainly will perhaps because of crossover, ethnic or sectarian loyalties.

What's important in all of this is not to let the idea take hold that because of any one of a number of reasons, good or bad or both, it will not be possible to intervene physically, militarily, everywhere that a mass atrocity crime situation arguably justifies this then one should not intervene anywhere. Don't let that approach gain any traction.

What the Syrian case tells us I think above all also is that we somehow have to get away from the mindset that's becoming quite firmly ingrained now I fear in a number of minds, not helped, quite apart from Libya, by the rather cavalier approach that was adopted by the coalition in Iraq to the force of prior UN Resolutions – something about which Elizabeth might have a certain memory. What it tells us is we have to get away from that mindset, the mindset that the first step on a coercive response ladder [inaudible] implies a willingness and determination to go all the way to the top step of full scale coercive force, the perception that the ladder is in a sense really a moving escalator.

I think the best way to tackle this at least in the longer term – it's not a quick-fix by any means – but the best way to tackle this may be to give renewed attention to clarifying just how different coercive military action is to the other response mechanisms in the responsibility to protect firmament, to give renewed attention to just how many hurdles should have to be jumped before every authorising it, revisiting in other words all the concerns about humanitarian intervention which led to the creation of the very different kind of responsibility to protect approach making clear that humanitarian intervention, or military coercive intervention, is different, that it should only be contemplated in the most extreme and unusual circumstances.

I've long thought, and the Syrian situation to me reinforces this, that the most pressing unfinished business with respect to R2P is the need to get started the really serious debate we haven't yet had on the criteria for coercive

military intervention, criteria of legitimacy – not the criteria of legality, that's clear; Security Council support – criteria of legitimacy. If we can get a larger measure of agreement than we have at the moment as to what are the conditions, and there are a number of them, not just the last resort one, that would in principle justify this most extreme response. If we can get the Security Council to embrace, endorse and accept those guidelines as guidelines for their own decision making in the future and if we can ensure that those criteria are applied with some rigor and consistency to new situations as they arise, I suspect it will be a lot easier to avoid the kind of inevitable escalator, or to vary the metaphor, slippery slide argument, which has paralysed the Security Council response on Syria making, as we know, some countries unwilling to even foreshadow non-military measures like targeted sanctions or ICC investigation because of the concern that any inch conceded will indeed be driven a mile.

The kind of criteria we should be debating I believe are the five tests of legitimacy for the use of force in any context, not just mass atrocity crime context, that were recommended by the former Secretary General Kofi Annan and the high level panel he appointed to advise the 2005 World Summit on reforms to the global security system. The criteria were initially set in suggestion form by the International Commission but are much more clearly articulated I think in these later report documents.

There are five criteria. The first test is seriousness of risk. Is the threatened harm of such a kind, such a scale, as to at least *prima facie* justify the use of military force?

The second test is whether the primary purpose of the proposed military action is actually to halt or avert the threat in question, as distinct from being about oil or bananas or whatever. They can be secondary or tertiary considerations and they could be quite relevant in helping to mobilize otherwise sceptical domestic constituencies but the intention test has to be what's the primary motivation genuinely – is it to help or avert harm?

The third test is last resort. Has every non-military option been, if not applied in practise because that can be possibly time consuming in some cases, but has it at least been explored and found wanting and unlikely to serve the purpose.

The fourth test is one of proportionality, of a scale, the duration, the intensity of a proposed military action and the minimum necessary to meet the threat in question.

And the final and often the toughest legitimacy test is balance of consequences. Will those at risk be better or worse off as a result of such military action being taken?

If you apply those tests to the Libya case back in March when the Resolution was passed, I don't think you have any difficulty at all about ticking every one of those boxes.

The only question that's arisen about Libya I think is the test of proportionality of response in the actual conduct of the NATO operation which we've already talked about. Did it start out proportional? Yes, in terms of the Resolution. Did it continue to be proportional? Well that's a matter for argument.

In the case of Syria by contrast I don't think it's necessarily as clear at all that all of those tests, certainly some of them are satisfied but some of them, and in particular the last one, the balance of consequences test, may well not be, given a situation where not only is there a bigger, uglier army to deal with, with much wider potential implications flowing from that in terms of the scale of the dust-up you'd be getting into as compared with that in Libya. But you've also in the Syrian case of course no sign of the regional enthusiasm that we had with Libya with Arab League support and that of course raises the issue of any larger international intervention in the absence of that regional support opening up the possibility of generating wider hostility in the Arab and wider Islamic world – the sort of consideration which was very much reasonably in the Europeans and US mind before making the decision to go into Libya the Arab League support was quite crucial.

The short point that I'm making in all this without any further discussion is that if you do adopt these criterion, if you do apply them sensibly and carefully to each one of these cases in a rational way which of course is not always possible, high level Security Council and other political debate – but if you could, if you could at least get a move going towards that direction it might well take a lot of the heat, a lot of the distraction out of the present kind of argument we're hearing.

If you really make it clear that you've got to jump an awful lot of hurdles, and they're quite difficult hurdles before you can begin to justify military action, then it does I think become a lot harder to put about the argument that even just dipping a toe in a condemnatory resolution or a non-coercive threat of sanctions or something is heading up that slope, up or down whichever metaphor you like, towards inexorable military action.

So the bottom line in all of this is that responsibility to protect after Libya faces some tests but I don't think they're insuperable. The principle is absolutely

firmly established but its effective implementation is going to be a work-in-progress for a long time.

I guess the real test is what would happen if we faced right now another Cambodia, another Rwanda, another Srebrenica, the cases that really tell, as many cases in the 1990s about which we feel still so ashamed.

I frankly simply can't now see the world pretending in response to any one of these sorts of situations now that it's none of the world's business. I can't see it. I think there would have to be some kind of response and a much more effective response than we saw in the 1990s and if that's right – and this is something you will no doubt wish to debate – that is the achievement so far, that's what we have to hang on to and what we have to do is hang on to that optimism as we continue to work away at the obstacles and the disappointments that are inevitably going to occur in the years ahead as we move down this path. Thank you.