

The Responsibility to Protect and the 2014 Conflict in Gaza

Written by Alex J. Bellamy

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ALEX J. BELLAMY, JUL 22 2014

Few conflicts excite the passions more than those between Palestine and Israel or appear so complicated and deep rooted. As in 2009, the eruption of violence between Israel and Hamas in Gaza has prompted questions about what the Responsibility to Protect (R2P) principle has to say. This note is my attempt to identify some basic principles stemming from R2P and how they relate to the current crisis. Because the situation is so fluid, and the internet jammed with claims and counter-claims, some of which may prove to be true and others utterly false, I have avoided wading into specific questions about who did what to who and when.

First, R2P is relevant to the current situation in and around Gaza. There should be no question about whether R2P 'applies' or not. In fact, posing that very question mistakes what states agreed about R2P in 2005. R2P is not conditional. It does not arise or evaporate with circumstance. It is universal and enduring; it applies everywhere, all the time. The UN Secretary-General made precisely this point in his 2012 report on R2P. We should therefore ask not whether R2P 'applies' – falsely implying that there are situations where there is no responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity (collectively labeled 'atrocities crimes' hereafter) – but rather how best to realize its objectives in any given situation. That is the unique perspective that R2P brings to a situation such as that in Gaza: a singular focus on the protection of populations from atrocity crimes. Of course, this is not the only relevant perspective, but it is an important one. R2P prompts us to take the victims of atrocity crimes and those threatened by these crimes as our starting point and to focus on their protection.

Second, all the parties involved have legal and political obligations relating to R2P. None are doing a good job in fulfilling them. The complex governance situation that Gaza finds itself in should not distract us from attributing legal and political responsibilities associated with R2P to the parties concerned. Israel is acknowledged as an occupying power, with all the special legal responsibilities entailed therein by the Geneva Conventions. The Palestinian Authority has *de jure* authority over Gaza and therefore has responsibilities associated with that fact. Hamas is a military organization that exercises effective control over Gaza. Control entails responsibilities. In effect, aspects of sovereignty over Gaza are shared amongst these three actors. As a result, the responsibilities entailed by sovereignty are also shared. This means that the primary responsibility to protect Palestinians in Gaza is one that is shared between Israel, the Palestinian Authority, and Hamas.

What is entailed by this primary responsibility to protect?

First and foremost, there is the legal obligation derived from International Humanitarian Law not to commit the four atrocity crimes identified by R2P. On this score, neither of the primary belligerents is performing well.

Each and every rocket that Hamas fires into Israel, aimed as they are at civilian neighborhoods rather than military objectives, is an actual or potential crime. Much is made of the uneven civilian death toll in this conflict, but this unevenness has nothing to do with the benign intent of Hamas. Almost all of the 1,000+ rockets fired into Israel with the apparent intention of hitting civilian areas have either missed their target or been intercepted. If only some of those rockets had found their targets, the civilian toll would be more balanced. What is more, the locating of military installations in civilian areas by Hamas and use of civilians as 'human shields' can constitute war crimes. When

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civilians die as a result of an attack on a military installation housed in a civilian building or neighborhood, the legal and moral culpability for those deaths is, at the very least, shared between those who killed the civilians and those who put them in harm's way.

Although Israel has caused far more civilian destruction than has Hamas, its culpability for war crimes is somewhat more difficult to determine at this point. That is primarily because it is not *prima facie* obvious that the Israeli Defense Force (IDF) is *intentionally* targeting non-combatants in the same way that Hamas is. That is why the IDF's actions need to be thoroughly and independently investigated in order to ascertain the facts. Here, I have in mind the sort of exercise undertaken by the UN Fact Finding Mission led by Justice Richard Goldstone after 2009, but would stress that this process ought to require (1) the full cooperation of the IDF and (2) accountability for those crimes that are identified.

There are at least four principles of the Laws of War that, if media reporting is correct, may have been violated by elements of the IDF.

(a) Targeting. The Laws of War insist that where doubt exists as to the military or civilian characteristic of a potential target, that target must be regarded as civilian in nature. In other words, where there is *any* doubt as to the military nature of a potential target, that target must not be attacked. To do otherwise would be to commit a war crime.

(b) The principle of due care. The law requires that combatants take steps to minimize the harm done to non-combatants. Beyond issuing occasional warnings, it is not altogether clear what measures the IDF has taken to minimize civilian harm. For instance, it has targeted 'dual use' facilities without first ensuring that civilians are out of harm's way. Failure to show due care in practice is an element of indiscriminate warfare and potentially a war crime.

(c) The principle of proportionality. Beyond the obvious macro point about the proportionality of the operation as a whole, there is the *jus in bello* question of whether individual attacks are proportionate to their immediate military objectives. Given the distinct lack of clarity as to what the objectives are, this is a difficult judgment to make, but there are serious questions to be answered as to whether specific attacks resulting in civilian deaths were proportionate to their military objectives.

(d) The use of inherently indiscriminate weapons in civilian inhabited areas. The IDF stands accused of using munitions containing metal flechettes in civilian populated areas. Flechettes are designed to cause destruction to human life over a wider area than conventional weapons. When used in areas where civilians are present, they can be inherently indiscriminate and, therefore, their use in such areas could constitute a war crime.

It is absolutely imperative that the actions of both sides be thoroughly and impartially investigated and that those found responsible for war crimes or crimes against humanity, whoever they may be, made accountable for their actions. Urgent attention should be given to the question of how to ensure accountability in this case.

The primary responsibility to protect is not exhausted by the non-commission of atrocity crimes. Those who currently share elements of sovereignty over Gaza and its surrounds also share the sovereign responsibility to protect the populations there from atrocity crimes. That is: Israel, Hamas, and the Palestinian Authority have a responsibility to take positive action to protect populations from atrocity crimes. This means that, whilst Israel has a right – and a responsibility – to protect its citizens from crimes against humanity, it also has a responsibility to do the same for Palestinians in Gaza. It is clearly failing. Likewise, Hamas has a responsibility to protect those that live in areas it controls. But far from protecting Palestinian civilians, it has willfully exposed them to greater threat. Of the three authorities involved, the Palestinian Authority has done the least to imperil the civilians of Gaza, but it lacks the capacity and authority to do much to protect these same civilians.

Third, an immediate ceasefire offers the best way to protect populations from atrocity crimes. By far the best way of ensuring that civilians are protected and not harmed by atrocity crimes or the unintended consequences of war is an immediate ceasefire. Armed conflict provides the context in which atrocity crimes are perpetrated and civilians harmed. The longer the conflict persists, the more civilians will die. A ceasefire would end the immediate killing, allow

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medical assistance to flow to those who need it, facilitate the rebuilding of shattered lives and buildings, and create a space for the serious political dialogue that is so urgently needed. Given that the parties themselves have proven unable and unwilling to agree a ceasefire, primarily because Hamas rejected a ceasefire brokered by the government of Egypt, international efforts have an important role to play. This brings us to...

Fourth, R2P bestows on the international community a responsibility to assist the parties to protect populations from atrocity crimes. This responsibility has three principal elements: encouraging states to fulfill their responsibilities and legal obligations, helping to build capacities to protect populations, and providing assistance to states in emergencies or anticipated emergencies.

What does this mean in the context of the current situation in Gaza? In terms of 'encouragement', it is a call for states and the UN to condemn war crimes and crimes against humanity where there is clear evidence of their commission; it is a demand that they use diplomatic pressure to persuade the parties to comply with their responsibilities and legal obligations, and do more to take tangible steps to protect civilians in harm's way; and it is a call for states and the UN to encourage – in the strongest terms possible – the parties to agree an immediate ceasefire and accept accountability for any crimes committed.

Many, if not most, governments and international organizations are using public diplomacy of one form or another in this way. In one example of 'encouragement', the Swedish government denied Israel's president, Shimon Peres, the use of its airspace for a visit to Norway. The UN Secretary-General has also been strident in his public diplomacy, for instance, describing the IDF's shelling of Shejaiya, which resulted in the killing of as many as 60 civilians, as an 'atrocious act'.

In the longer term, encouraging the parties to fulfill their responsibility to protect surely means reinvigorating the search for a lasting settlement to the conflict, one which recognizes the legitimate interests and concerns of Israelis and Palestinians alike. As a first step, that probably involves the Quartet appointing a new Special Envoy, one with sufficient standing to hold the trust of both sides to this dispute.

It is less clear what immediate contribution could be made by capacity-building, but over the longer term, this element of R2P should give us pause to refocus on the effort to establish a capable Palestinian Authority. This, of course, involves difficult political questions, especially with regards to the Authority's jurisdiction in Gaza, its relationship with Hamas, and the continuing Israeli blockade. These challenges notwithstanding, the prevention of atrocity crimes in the future depends upon the establishment of an Authority capable of upholding the rule of law in Gaza. It is to that end that international efforts might be profitably directed in the future.

The final element of this aspect of R2P – the provision of assistance – relates most obviously to the delivery of humanitarian aid to affected communities. There is an obvious and urgent need for humanitarian assistance, and an equally urgent need that the parties grant access to humanitarians and take active steps to protect humanitarian workers and those they assist. There are significant questions about the volume of aid required and donated to the Palestinian territories, and a clear need for foreign donors to provide what is required to satisfy immediate needs. The UN has already launched a consolidated appeal and has begun airlifting supplies into the affected areas. Over the longer term, assistance should involve greater investment in the rebuilding of Gaza's shattered infrastructure and the overcoming of obstacles to new investment.

Fifth, there is an international responsibility, exercised through the UN, to use diplomatic, humanitarian, and other peaceful means to protect populations from atrocity crimes. Should these be inadequate, and the authorities manifestly fail to protect populations, the UN Security Council has a responsibility to consider its options under Chapters VI, VII, and VIII of the UN Charter. To some, it will appear highly controversial that I am even mentioning this third pillar of R2P in the context of Gaza. Yet the reality is that the UN Security Council is already seized of the matter, having expressed 'serious concern' at the situation, calling for the protection of civilians and an immediate ceasefire. Indeed, the Council expressly backed efforts by the government of Egypt and the UN Secretary-General to broker an immediate ceasefire. The UN is also leading a major humanitarian operation in the affected areas. There is, therefore, much that is already being done to employ diplomatic, humanitarian, and other peaceful means to

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protect populations as required by R2P. And there is little question that this *ought* to be done.

What remains, though, is the question of what should happen if this effort proves inadequate and it becomes evident that the authorities are 'manifestly failing' in their responsibility to protect? R2P says that the UN Security Council has special responsibilities in these circumstances. Whilst it is unlikely that the Council would find an easy consensus on the adoption of measures in this case, R2P can contribute in at least two ways. First, by building expectations that the Security Council has protection responsibilities, R2P makes it more difficult for the Council to do nothing should the situation deteriorate. Second, as the recent Resolution 2165 on Syria shows, R2P can be part of the common ground between Security Council members when crises of protection arise. Should the crisis escalate, R2P makes it more likely that the protection of vulnerable people will be at the fore of whatever response is mustered.

What would I like to see happen? (1) A major push for an immediate ceasefire, backed by the promise of serious consequences for those who fail to comply. (2) A major humanitarian effort to bring relief to the victims of war. (3) An end to impunity through a thorough and impartial investigation, backed by measures to ensure the accountability of those found responsible for war crimes and crimes against humanity. (4) A renewed effort, backed or overseen by the UN Security Council, to negotiate and implement a peaceful settlement to this dispute along the lines established by the UN General Assembly and agreed at Oslo so many years ago.

Many more civilians will die without concerted efforts to break the cycles of impunity and escalation that have been allowed to establish themselves in Israel and Palestine. Although just one of the considerations in play, R2P zeroes in on the need to protect the vulnerable from the very worst of crimes. It calls on us to place their needs, their security, and their interests at the heart of the way we think about, and respond to, situations such as the one in Gaza right now. R2P reminds us that so much more needs to be done to marshal the resources at our disposal to the goal of protecting populations from atrocity crimes which shock the conscience of humanity. That, to my mind, is what R2P has to say about Gaza... and about every situation where atrocities stalk.

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