

R2P in Gaza: A Long Overdue Debate

Written by Coralie Hindawi

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CORALIE HINDAWI, AUG 4 2014

While Palestine has been mostly absent from the debate on the doctrine of Responsibility to Protect (R2P), and while, as has been noted by Aidan Hehir, it took some time until the usual supporters of the doctrine reacted publicly to the recent outbreak of violence in and around Gaza, a discussion has finally started on the relevance of the concept to the conflict. It is a welcome development that could, in the long run, have a positive impact both on the Israeli-Palestinian conflict and, more broadly, on the concept of R2P.

Discussing R2P's Applicability to Gaza

One of the arguments presented by a couple of authors is that R2P is only applicable to intra-state conflicts. According to them, the applicability of the doctrine to the situation in Gaza depends upon the legal status of the strip. Megan Schmidt, Senior Program Officer at the International Coalition for the Responsibility to Protect, explains that "the question of Gaza's standing as either an occupied or independent entity" is "central to understanding R2P's applicability in this present crisis". Quoting the recent statement released by the International Coalition for the Responsibility to Protect, Schmidt argues that, should one consider that Israel's unilateral disengagement from Gaza in 2005 ended its occupation of the territory, and that the conflict opposing Israel to the Palestinians from Gaza is of international nature, "R2P would not be applicable for the protection of civilians across borders in the crisis." In such a case, International Humanitarian Law (IHL) would be the only body of law applicable.

This is a rather bizarre argument. From the first, one should recall that, far from being disconnected from IHL and existing international law, the R2P doctrine essentially reinforces already existing norms. While war crimes are violations of IHL, they are also international crimes covered by the Responsibility to Protect. The same can be said of the crime of genocide: genocide is not only one of the mass atrocity crimes triggering R2P, it is also prohibited by the 1948 Genocide convention, and is widely considered to be one of the peremptory norms of international law – the equivalent of "super" norms of customary international law that do not allow for any derogation. Second of all, the argument of R2P being inapplicable, given the international character of the conflict, sounds a bit Kafkaian if one recalls that the concept was born out of a concern to better protect populations against the worst crimes, even if committed within the borders of a country. Does the international conflict argument mean that genocide, war crimes, ethnic cleansing, or crimes against humanity do not trigger R2P when occurring during a conflict that might be labeled as "international"? It takes only one absurd example to realize the fallacy of this argument.

What if – God forbid – French authorities or citizens started slaughtering the inhabitants of Monaco? Would one refrain from calling this a genocide triggering R2P, simply because it is occurring across national borders? What R2P has been all about is signaling a universal consensus on the fact that whenever mass atrocities occur, whatever the context, something should be done to protect populations. Furthermore, the doctrine justifies various forms of international interventions if the state(s) in charge is (are) not able or not willing to protect the threatened populations. Arguing that R2P does not apply to Gaza because the conflict is international rather than national seems to cynically distort R2P's spirit under the pretext of legal orthodoxy. As Alex Bellamy reminded us in his recent post, "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 applies everywhere, all the time."

And even if – for the sake of the argument – one agreed that R2P might not be applicable in some cases, R2P's so

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called 'non applicability' to the conflict in Gaza would not make sense either: given Israel's almost total control over the strip, it is widely considered to have the status of an occupying power in Gaza, in spite of its 2005 withdrawal. As such, the conflict opposing Israel to the Palestinians in Gaza cannot be labeled as "international", and Israel is, together with the Palestinian Authority and Hamas, the state that has the primary responsibility to ensure the protection of the Gazan population.

Relevance of R2P to Palestine/Israel

Usually, the Israeli-Palestinian conflict is presented as particularly political and contentious. As Cecilia Jacob argues, "the historically contingent nature of the conflict between Israel and Palestine" which "predates R2P by over half a century" might explain some people's difficulty in applying to this conflict a doctrine that tends to be ahistoric and to focus on the deadly impact of belligerent policies, rather than its – complex – origin. It is true indeed that the situation in Palestine/Israel is "deeply politicized". But, as Michael Kerney suggests, all conflicts are politicized in their own way. This, one may add, does not diminish the significance of the R2P doctrine whose very purpose is to push for the termination or prevention of mass atrocities in the context of politicized conflicts.

As such, the R2P doctrine seems to be particularly relevant for the conflict still raging between Israel and the Palestinians, sixty-six years after the creation of the former state. Furthermore, the doctrine's significance does not stop at the most recent massive use of military force by the belligerents in the Palestinian and Israeli territories, and at the description of practices that, UN agencies and Human Rights organizations warn, may well constitute war crimes. While some quickly dismiss as completely ridiculous the mere idea that Israel might be engaging in ethnic cleansing, crimes against humanity, or genocide in its dealing with Palestinians, the scholarship of Israeli historian Ilan Pappé documents in numerous academic publications what he labeled in 2007 as "genocide in Gaza" and "ethnic cleansing in the West Bank". Whereas the use of such strong concepts will certainly lead some to feel uncomfortable, it is obvious that the progressive extension of the Israeli state could only occur at the expense of a corresponding shrinking of originally Palestinian land. One only needs to recall that out of the more than 1.5 million people currently living in Gaza, 1.2 million are refugees from what used to be Palestinian territory, to realize that there is a strong link between the still-unfolding conflict and the violent manner in which the Israeli state was able to expand.

Putting things in context allows, therefore, to take the latest round of fighting for what it is: a particularly violent battle within a much broader and longer asymmetric conflict for land and resources. Against that background, applying R2P to this conflict should not only be about stopping or preventing war crimes from being committed by the belligerents in their current use of military force. Applying R2P to the Israeli-Palestinian conflict should lead the concerned states and international actors to ensure that populations are protected from all types of mass atrocities that have been universally labeled as the most serious crimes which should never be allowed to occur, and which justify external interference if the state(s) in charge prove(s) unable or unwilling to protect the populations by it/themselves.

Ultimately, thorough inquiries will have to determine exact facts and responsibilities. But in the meantime, given the urgency of the matter and the rapidly rising civilian death toll, applying the R2P doctrine to the conflict starts with making sure that attacks on hospitals, schools serving as shelter for civilians, civilian infrastructures, children playing on the beach, or simply residential areas, stop. This should be, of course, directed at both parties in the conflict, although the figures available at the time of writing (over 1700 deaths and 9000 wounded among Palestinians, 80% of them civilians; 67 deaths among Israelis, 3 of them civilians) suggest that it is Palestinians, more than Israelis, that are in dire need of protection. As none of the states/authorities in charge (Israel, Hamas, Palestinian Authority) appear to be either able or willing to protect Gazan civilians from these indiscriminate attacks, it is probably up to the international community to step in now and come up with the "timely and decisive response" commanded by the R2P doctrine. Beyond this, one should not forget that the blockade of the Gaza strip, which has been going on for the past seven years, was already responsible for a dire economic and humanitarian situation in the territory *before* the start of Operation Protective Edge.

Such practices of economic asphyxiation, whose danger one thought had been widely acknowledged following the deadly sanctions imposed on Iraq, are a form of collective punishment targeting not only Hamas, but the Gazan

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population as a whole. As such, they do not only violate the IHL and human rights obligations of the Israeli state, as has been argued by several UN Special Rapporteurs. Considered together with practices of unlawful expropriations and home demolitions, continued construction and extension of settlements on occupied territory in violation of international law – including the progressive de facto annexation of the Eastern part of Jerusalem – the construction of a wall in the West Bank that the International Court of Justice declared unlawful, the absence of any tangible progress in the so-called peace process and the calls within the Israeli political elite for a “transfer” of Israeli Palestinians to the so-called territories, the Gaza blockade, as well as the regular use of indiscriminate military force against one of the world’s most densely populated areas, could be interpreted as part of a wider project that denies the Palestinians most of the rights that people are entitled to enjoy elsewhere in the world.

To be clear, the statement made above should not be understood as calling for an implementation of the R2P concept to Israeli policies only. R2P, as with international norms in general, should be applied to all actors in an unbiased manner. So far, though, given the number of casualties on both sides and the proportion of civilians among them, the argument that the massive and, to a great extent, indiscriminate use of military force by Israel is both necessary to ensure the protection of its own population and proportional to the threat is absurd. In addition, the Israeli authorities seem capable of protecting their own population against Hamas’s indiscriminate rockets. Therefore, while the latter’s attacks might well qualify as violations of IHL, and even war crimes, and have to be condemned as such, they fortunately do not necessitate strong international action to protect civilians in Israel from mass atrocities. Those currently in need of international protection under R2P are the Palestinians. And they are most likely to continue needing this protection until a sustainable solution is found to the Israeli-Palestinian conflict, respectful of all parties’ rights.

R2P in Palestine/Israel: Useless or Vital?

While the doctrine of R2P insists on the fact that the primary responsibility for the protection of populations from mass atrocities lies with the state in charge, it is also built upon the acknowledgement that states do, at times, fail to exercise this responsibility. It is in those cases that other actors, acting as part of the ‘international community’, will step in. As Bellamy reminded us recently, states and international organizations may do so in various ways: exerting diplomatic or political pressure on the state(s) in charge to stop exactions and push for a peaceful resolution of the conflict, contributing to capacity-building and humanitarian activities... A particular responsibility is considered to rest upon the United Nations, and in particular the Security Council, as embodiments of the so-called “international community”.

In response to the indiscriminate use of military force in and around Gaza, states and international bodies have not remained idle. Numerous countries have condemned the targeting of civilians and some have recalled their ambassadors to Israel. Important diplomatic activities have been deployed to repeatedly try to mediate a truce between the belligerents. Multiple organizations, within and outside of the UN framework, are documenting and condemning in the strongest terms what they consider might constitute war crimes.

At the same time, a less optimistic reading of the past weeks’ reactions to the violence could insist on the lack of effective measures taken so far. Compared, for example, to the recently adopted US and EU economic sanctions against Russia for its involvement in Ukraine, the reactions to more than a thousand civilians killed in less than a month in Gaza appear relatively mild. The fact that several permanent members of the Security Council abstained or – in the case of the United States – voted against the UN Human Rights Council’s resolution establishing a Commission of Inquiry to investigate all violations of IHL and human rights law, further demonstrates the unlikelihood of decisive Security Council action to ensure the protection of civilians in Gaza. Given the strong political and military support that Israel enjoys in relatively powerful western countries, and primarily in the United States, as well as its ability to easily get away with decades-long breaches of international law, there is limited hope that the reference to R2P alone will change much for Palestinian civilians. But while this has been interpreted as proof that the R2P doctrine is too easily instrumentalized and in effect useless for this particular conflict, I would like to elaborate on another argument made by Michael Kearney in his recent contribution to the R2P in Palestine debate. Reflecting on the “capacity not to see certain massacres, while thinking that R2P might halt others”, Kearney made an extremely important point:

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One might suggest that the aims and purposes of the Boycott, Divestment, and Sanctions (BDS) movement against Israeli institutions allied to the occupation, actually chime nicely with the R2P narrative, i.e. placing sanctions on a state perpetrating widespread human rights abuses until such time as it lives up to its obligations under international law. It could then be that the function of R2P as per Palestine has operated for many years, and vigorously so, except under the grassroots BDS banner.

Concurring with Kearney's suggestion, I believe that the widespread outrage displayed by individuals and non-governmental actors throughout the world in reaction to the latest violence in Gaza shows that R2P should not be regarded solely as an artificial doctrine to which states pay lip service and which they will invoke whenever it is in their interest to do so. In particular, the reference to the R2P vocabulary by numerous protesters highlights the fact that the agreement on R2P goes far beyond diplomatic circles. When people demonstrate world-wide against what they believe to be war crimes occurring in Gaza, when seven Nobel peace prize winners call for an international arms embargo on Israel for "its war crimes and possible crimes against humanity" in Gaza, when US Jewish groups engage in civil disobedience actions to protest the "death and destruction being committed in [their] name", or when Israeli reservists refuse to serve a project they consider to be conducive to an apartheid regime responsible for repeated and very serious human rights violations and war crimes, they show that R2P is a much broader and grounded doctrine than is often argued. Other grassroots movements than the BDS movement, the Russel Tribunal on Palestine (conspicuously shortened to RtoP!), the International Solidarity Movement to which late Rachel Corrie belonged, or the movement of Israeli teenagers refusing to serve in the army in order not "to take part in the war crimes committed by [their] country" demonstrate that the international community is much more than a community of states – a point Hedley Bull was already making many decades ago.

It seems that non-state actors have a role to play, most particularly when both the state(s) in charge and the UN Security Council are unable or unwilling to take action to protect a population against the most serious international crimes. And it seems that in Palestine/Israel, they have been playing that role for a long time already. In spite of a decade-long international paralysis, the vitality of individual activism for peace and justice in Palestine/Israel points at a much-neglected dimension of R2P that deserves proper acknowledgement, credit, and encouragement. After all, didn't the UN Secretary General remind us on various occasions that the prevention of genocide is both a collective and individual responsibility? The same is certainly true of the other R2P crimes.

One could easily think that R2P will be as useless as other international norms or discourses to end the impunity with which powerful international actors might sometimes breach the most fundamental rules. But as Lisa Hajjar reminded us in "Is Gaza Still Occupied and Why Does It Matter?",

For stateless people, including those living under occupation, international law is exceptionally important because they have no national law-based alternative to assert, let alone exercise, their right of self-determination. International law provides the point of reference for that and all the other rights they can claim by virtue of being *humans*.

This is precisely what R2P is all about: protecting from the most serious crimes those who do not have access to other forms of protection. As such, the doctrine matters and the all too predictable paralysis of its official stakeholders in Gaza and elsewhere has not, and should not, prevent other actors, including individuals, from taking the UN Secretary General's words very seriously.

If R2P will not save lives as quickly as one would like it to, the application of the doctrine to the Israeli-Palestinian conflict can serve the search for a peaceful and just solution. Beyond this, it can also contribute to an important debate on the concept of R2P itself, and its implementation, insisting on the critical role to be played by agents below the state level.

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Coralie Pison Hindawi is Assistant Professor for International Law and International Relations at the American University of Beirut. The concept of Responsibility to Protect is one of her current research foci. She is the author of the book *Vingt ans dans l'ombre du Chapitre VII* (Twenty Years in the Shadow of Chapter VII), L'Harmattan, Paris, 2013, which analyses critically the use of coercion against Iraq and the role played by the UN Security Council in the progressive destruction of this country. She also recently published in the *Journal for Conflict and Security Law* a study on coercive non-conventional arms control, comparing the cases of Iraq and Iran.