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On the Depraved Legal Debate over the Responsibility to Protect in Gaza

عن انحطاط النقاش القانوني بشأن مسؤولية حماية المدنيين في غزة

Abstract: This paper investigates the legal debate over the relevance and applicability of the Responsibility to Protect (R2P) principle to the Gaza Strip and the Occupied Palestinian Territories. The paper argues that some issues have been dismissed from this legal debate, including whether R2P applies to an occupied territory and population upon which the occupier does not exercise control on the ground, while the occupied population has neither a state nor sovereignty. The legal debate also neglects that R2P requires the approval of the Security Council without a veto. Consequently, the question of the appropriate authority to authorize R2P and to intervene is elided. The presumed impossibility of the United States, and its allies in the Security Council, allowing the application of R2P to Gaza and the interest-based, political, and ideological biases that lend support to this position drain the legal debate of any substance. However, in this R2P debate about Gaza, there seems to be nothing solid to rely on, despite the urgent need for the application of the principle following the events of 7 October 2023.

Keywords: Responsibility to Protect; the Gaza Strip; Occupied Palestinian Territories; Security Council.

ملخص: تبحث هذه المقالة في النقاش القانوني بشأن أهمية مبدأ مسؤولية الحماية وقابلية تطبيقه في قطاع غزة، وبقية أراضي فلسطين المحتلة. وتُجادل بأن بعض القضايا قد أُسقطت من هذا النقاش القانوني، منها إمكانية تطبيق مبدأ مسؤولية الحماية على إقليم وسكان تحت الاحتلال. ويتجاهل النقاش أيضاً أن هذا المبدأ يشترط الحصول على موافقة مجلس الأمن من دون استعمال حق النقض، وهكذا تسقط من النقاش مسألة السلطة الملائمة لمنح الإذن بتطبيق المبدأ والتدخل. ثم إن استحالة سماح الولايات المتحدة الأميركية وحلفائها في مجلس الأمن بتطبيق مبدأ مسؤولية الحماية على حالة غزة، والانحيازات المصلحية والسياسية والأيدولوجية إلى هذا الموقف، تُفرض النقاش القانوني بشأن المسألة من محتواه. ولا يبدو أن ثمة شيئاً يُعوّل عليه في هذا الضرب من النقاش القانوني بشأن مبدأ مسؤولية الحماية في غزة، مبدأ لا يُمكن تصوّر أن لتطبيقه لحظةً أشدّ نضجاً من هذه التي تلت 7 تشرين الأول/ أكتوبر 2023.

كلمات مفتاحية: مبدأ مسؤولية الحماية؛ قطاع غزة؛ الأراضي الفلسطينية المحتلة؛ مجلس الأمن.

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From Libya to Gaza: Where Has R2P Gone?

In an article published on Al-Jazeera website, “Where is the ‘Responsibility to Protect’ in Gaza”,¹ Abdelwahab El-Affendi denounces those who yesterday championed R2P – namely, the United States and European countries – and today have become the most fervent cheerleaders of the genocidal war waged by the Israeli occupation state against civilians in the Gaza Strip, despite warnings and reports that the region is on “the precipice of a humanitarian catastrophe” and calls for an immediate ceasefire.² The Global Centre for the Responsibility to Protect is one of the most prominent sources of these appeals, and almost all of them have explicitly classified the atrocities of the Israeli war into various broadly synonymous boxes: crimes against humanity, war crimes, genocide, forced displacement, ethnic cleansing, and collective punishment. These designations are also found in the United Nations General Assembly resolution that adopted the 2005 World Summit Outcome, specifically under the subheading of “Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.³ But the United States and its European allies steadfastly persist in calling all such acts “self-defence”, and are merely advocating “a humanitarian pause”.⁴ What they mean by this ludicrous formulation is not a truce, but literally a short respite to let Israeli occupation forces catch their breath before resuming their aggressive actions.

It has become evident that compliance with and enforcement of the rules of international law is selective and consistently subject to double standards. R2P is no exception. It is widely understood that when it comes to the conduct of the major powers in international politics, the invocation or exclusion of these rules is purely a matter of political and economic interests. Examining each of the cases in which R2P has been invoked, one can easily deduce the relevant context and justifications, whether it is Darfur, Côte d’Ivoire, Yemen, or Libya. The same applies to cases in which it has been ruled out, in Syria, Myanmar, or occupied Palestine. But occupied Palestine is another story.

Commenting on the case of Libya in 2011, El-Affendi refers to the concerns expressed by Russia and China, which feared that R2P would serve as cover for international military intervention and a prelude for deliberate regime change rather than imposing peace⁵ and protecting civilians. And this is indeed what happened. Ahmed Qassem Hussein and I⁶ have already argued that investigating the reasons for NATO’s early intervention in Libya in March 2011 is a distraction. The right question is not, “Why did the intervention take place?” but rather: “To what end?” We have witnessed how the military intervention in Libya fuelled the civil war rather than extinguishing its initial spark. The responsibility assumed by the so-called representatives of the international community at the time was not, then, the responsibility to protect civilians, but to protect one specific party to a nascent civil conflict from another. The protection of civilians was merely a pretext.

It is worth recalling here that the report of the International Commission on Intervention and State Sovereignty (ICISS), which laid the foundation for the principle of R2P, stressed under the heading of “right intention” that “the primary purpose of the intervention must be to halt or avert human suffering. Any use

¹ Abdelwahab El-Affendi, “Where is the ‘Responsibility to Protect’ in Gaza?” *Al Jazeera*, 21/10/2023, accessed on 2/11/2023, at: <https://tinyurl.com/2auzn4p7>

² Ibid.

³ UN General Assembly, “Resolution Adopted by the General Assembly on 16 September 2005,” A/RES/60/1, 24 October 2005, accessed on 2/11/2023, at: <http://tinyurl.com/43ade295>

⁴ Ironically, Russia’s discourse in the UN Security Council, as reflected in its voting behaviour, showed greater awareness of this linguistic game: it justified its veto to the US resolution calling for “a humanitarian pause” saying that the situation demanded a “ceasefire”, not merely a “pause”.

⁵ El-Affendi.

⁶ Ahmed Qassem Hussein & Mohammed Hemchi, “al-Qas’a wa-Akalatuhā: al-Tadakhkhulāt al-Khārijīyya fī Lībyā Mā Ba’d al-Rabī’ al-‘Arabī,” in: Ahmed Qassem Hussein (ed.), *Lībyā: Tahaddiyāt al-Intiqāl al-Dīmuqrāfī wa-Azmat Binā’ al-Dawla* (Doha/Beirut: Arab Centre for Research and Policy Studies, 2022).

of military force that aims from the outset, for example, for the alteration of borders, or the advancement of a particular combatant group's claim to self-determination, cannot be justified. Overthrow of regimes is not, as such, a legitimate objective".⁷

From the perspective of R2P proponents, who are nowhere to be found today, Libya is an exemplary case⁸ for the application of R2P – and in fact, the only case since the adoption of the principle in 2005.⁹ For them, all questions are reducible to a single one: Does the legal text apply to the case at hand? And the answer is similarly reducible to a simple yes or no. This leads them to see Libya as a textbook case while dismissing the Palestinian case with the assertion that “the principle does not apply”. This fanatical adherence to the literality of the law not only negates its spirit, but also its moral and normative teleological purpose, which is justice.

Notes on an Example of the Debate over Responsibility to Protect in Gaza

During a symposium hosted by the Middle East Centre at the London School of Economics during the Israeli war on Gaza in July 2014,¹⁰ participants were asked the following questions: “Does the Responsibility to Protect (R2P) apply to civilians in Palestine and Israel? Why has R2P been neglected in the context of the Israeli-Palestinian conflict? Who has the responsibility to protect civilians in this ongoing war? Is the asymmetrical loss of life between Israeli and Palestinian civilians relevant? Is R2P a useful framing for the conflict?”¹¹ I shall condense the most significant of these interventions below.

Megan Schmidt¹² brings the debate around to the question of the legal status of Gaza: “What entities have governing authority over and responsibility for the people of Gaza?” While acknowledging that “the issue of governing authority over Gaza is one of great complexity” (she does not inquire into the origin of this complexity, but simply recognizes it and moves on), she links the applicability of R2P to Gaza to its legal status. At the outset, she notes that the applicability of R2P does not override the obligations of the parties to the conflict set forth in international humanitarian and customary law. Schmidt seems to already know the answer to her question in advance, or to be preparing the reader for the conclusion that R2P does not apply. It could, however, “provide an additional framework for understanding the crisis, as well as an additional tool for advocacy by actors seeking to prioritize civilian protection”. Also from the outset, Schmidt declines to grapple with the question of whether the Gaza Strip is an occupied territory or independent entity -as if it must be one or the other-, choosing instead to assess the applicability of the R2P standard in each of these two cases. After rehearsing the well-known arguments and counterarguments, Schmidt concludes, “If one accepts the status the Gaza as an occupied territory, the Responsibility to Protect the populations of Gaza would fall between both the occupying power, Israel, and the de facto authority, Hamas”. She adds, “The degree to which each has the responsibility to protect populations in Gaza would be determined by the test of ‘effective control’; namely, the extent of the capacity of each party to implement a particular measure to protect civilians”. Schmidt concludes

⁷ Gareth Evans et al., *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), p. 35.

⁸ Gareth Evans called it “a textbook case” of the R2P norm “working exactly as it was supposed to”. Evans is an academic and former foreign minister of Australia. He co-authored the ICISS report and is co-chair of the organization. See: Gareth Evans, “Interview: The ‘RtoP’ Balance Sheet after Libya,” *Gevans*, 2/9/2011, accessed on 2/11/2023, at: <https://tinyurl.com/5n6p3hjr>. In truth, search engines indicate that Evans has mentioned the Gaza Strip as a possible case in which R2P might apply – one of the rare mentions of Gaza. See: Gareth Evans, “The Responsibility to Protect: Where to Now?” *Amnesty International*, 23/5/2018, accessed on 2/11/2023, at: <https://tinyurl.com/4bv7ve27>

⁹ See, for example: Catherine Renshaw, “R2P: An Idea whose Time Never Comes,” *Lowy Institute*, 2/6/2021, accessed on 2/11/2023, at: <https://tinyurl.com/bdzaupuz>

¹⁰ Ribale Sleiman-Haidar, “Palestine, Israel and R2P: A Symposium,” *London School of Economics*, 22/7/2014, accessed on 2/11/2023, at: <https://tinyurl.com/4f3uu4cn>

¹¹ Sleiman-Haidar.

¹² A researcher on genocide studies and human rights and then-senior program officer at the International Coalition for the Responsibility to Protect.

her intervention by drawing a clear equivalence between the continued suffering “of the people of Gaza and Israel”, “regardless of whether R2P applies or not”.¹³

David Rieff¹⁴ distinguishes the question of R2P’s applicability to the war in Gaza from the question of whether viewing the conflict through the lens of R2P is helpful or counterproductive. To the first, he responds, “There is simply no absolutely clear-cut answer” because “R2P only applies to intra-state wars. However, as Gaza is part of the internationally recognized State of Palestine, the conflict between Israel and Hamas is formally an inter-state conflict”. Rieff ignores that the recognition of the state of Palestine does not preclude it being an occupied territory. Indeed, insofar as Palestine as a state exercises no form of sovereignty, recognition was sought as an affirmation of the existence of the occupation and the need to take a position on it, as well as for the purposes of representation in international organizations. It is inconceivable that Rieff does not know this, which makes his disregard of the point less than innocent. Conversely, he states, “A strong case can thus be made that Israel remains the de facto occupying power” but “even assuming that R2P applies to the latest round of fighting in Gaza, the disadvantages of viewing events in Gaza through its prism should be obvious”. Thus, without expanding on the arguments he cites (including that Israel is a nuclear power and that the United States would veto any UN Security Council resolution on armed intervention under R2P), Rieff’s intervention shifts into a plea against the principle in its entirety. Even if R2P is used only as a “moral and legal frame for the conflict”, he concludes that “there is simply no basis for thinking R2P is a useful frame for anything”.¹⁵

In his intervention, Simon Adams¹⁶ states that “attacks on civilians and civilian property in Gaza and Israel violate international humanitarian law and may constitute war crimes”. He then explicitly describes the “indiscriminate” rocket attacks by “Palestinian armed groups” as war crimes “despite the fact that the inaccuracy of the rockets and the effectiveness of the Israeli ‘Iron Dome’ defence system had kept Israeli civilian fatalities to a minimum”. He does not describe Israeli military actions, neither indiscriminate shelling nor ground invasion, in a similarly clear-cut way, asserting only that there is “a need for a full and impartial investigation of possible war crimes that may have been committed” led by the United Nations. “While Israel had a right to defend itself against rockets raining down upon its cities, issues of proportionality and distinction (discriminating between civilian and military targets) appeared to have been repeatedly violated by the IDF”, he writes, concluding that “both the Israeli government and Hamas have a responsibility to protect civilians”.¹⁷

The most offensive intervention, titled “Gaza and Israel – A Case for International Humanitarian Law, Not R2P”, comes from James Rudolph.¹⁸ He, too, argues that R2P does not apply to civilians in Gaza, for several reasons: first, because Israel’s actions in Gaza do not amount to genocide, war crimes, crimes against humanity, or ethnic cleansing under R2P; second, because “none of these acts are occurring in Israel itself” (for him, the site of casualties is no less important than their number); third, even if Israel’s self-defence has become excessive, “this would have ramifications under the laws of war ... if anything, this is being directed at Hamas and Gaza. Stated differently, neither Israel nor Gaza is engaging in excessive force against its own population”; fourth, “the international community has been assisting both Israel and the Palestinians to fulfil their obligations under R2P”, as evidenced by recent ceasefire agreements. “Accordingly”, he states,

¹³ Megan Schmidt, “The Israeli-Gaza Crisis and the Responsibility to Protect: Does the Norm Apply?,” *London School of Economics*, 23/7/2014, accessed on 2/11/2023, at: <https://tinyurl.com/9hzvwbds>

¹⁴ Journalist, political analyst, and a previous fellow with various academic institutions.

¹⁵ David Rieff, “R2P Isn’t a Useful Framework for Gaza—or Anything,” *London School of Economics*, 25/7/2014, accessed on 2/11/2023, at: <https://tinyurl.com/2mjysav9>

¹⁶ An academic and then-executive director of the Global Centre for the Responsibility to Protect.

¹⁷ Simon Adams, “Both Israel and Hamas have a Responsibility to Protect Civilians,” *London School of Economics*, 25/7/2014, accessed on 2/11/2023, at: <https://tinyurl.com/4kx44ejm>

¹⁸ Lawyer in international law and former staff member of the US Agency for International Development.

“the use of force, which is contemplated under pillar three, is altogether inappropriate at this juncture, as it is to be used as a last resort after the state has manifestly failed to protect its own population”. For Rudolph, all of this means that R2P did not and likely will not apply in this case. Like Adams, Rudolph makes one single reference to Israeli forces’ respect for the principles of distinction and proportionality. Although he notes that a key question is whether the Gaza Strip is under occupation, he casually dismisses the issue with the remark: “Resolving this is beyond the bounds of this article; thus, it will be assumed, *arguendo*, that Gaza is not occupied and thus R2P does not apply”.¹⁹

Aidan Hehir²⁰ is the only voice that timidly breaks with the choir.²¹ He criticizes the silence of the Global Centre for R2P, the International Coalition for R2P, and the Asia Pacific Centre for R2P on key issues related to the applicability of R2P to the Israeli war on Gaza.²² Hehir poses the question: “Is Gaza in Israel?” From here, he takes issue with the argument that R2P does not apply to the population of Gaza because it does not apply to interstate conflicts. This is an odd argument, he continues, and even odder is the zealous devotion to it. Proponents of this view, illustrated in a statement from the Global Centre for R2P, argue that “Gaza is within the ‘State of Palestine’ which is recognized by 134 UN member states”. Hence, they reason, “If Gaza is not considered to be part of Israel, ‘RtoP would not be applicable to the protection of civilians *across* borders””. Questioning the logic of this argument, Hehir objects to the refusal to respond to crises based on “a narrow technical interpretation of R2P’s remit”. In response, he cites “the ambiguity surrounding the status of the State of Palestine” – namely, that Israel itself does not recognize it as an independent state. Arguments that R2P does not apply to Palestinian civilians insofar as this is an interstate conflict are therefore invalid.²³

Between Fanatism and Agnosia

The cut-and-dried question of “does R2P apply or not” is the natural result of approaching a legal text as a document devoid of either spirit or purpose. It reflects a kind of agnosia – the loss of the ability to recognize objects and people or sounds and shapes. R2P either applies or does not apply, based on what Hehir calls “a narrow technical interpretation”. But a recognition of the impetus driving the call to consider the applicability of R2P, to say nothing of the call to apply it, should precede the consideration of the legal text. In practice, this has been the case in the past. NATO intervened militarily in Yugoslavia at a time when the legal text did not yet exist. Although the basis of the intervention was not R2P as such, the intervening parties nevertheless acted on their responsibility to stop the atrocities – a responsibility that was later affirmed by the principle of R2P. (In fact, the coalition was accused of violating the UN Charter because it used force without the approval of the Security Council).²⁴ The underlying impetus for the intervention was the “concern” – to use the oft-repeated phrase – about the violations to which civilians were being

¹⁹ James P. Rudolph, “Gaza and Israel—A Case for International Humanitarian Law, Not R2P,” *London School of Economics*, 23/7/2014, accessed in 2/11/2023, at: <https://tinyurl.com/6dtdkkyh>

²⁰ A reader in international relations at the University of Westminster and an expert on humanitarian intervention, responsibility to protect, transitional justice, and international law.

²¹ The same could be said of the intervention of Michael Kearney, a lecturer in law at the University of Sussex, but I chose not to focus on it because it is an example of a critique that dismisses R2P altogether, as is clear from the title. I will comment on this type of critique later, but the article merits reading and has several points of agreement with El-Affendi. See: Michael Kearney, “In Palestine, R2P Isn’t Dead. It Could Never Have Existed,” *London School of Economics*, 24/6/2023, accessed on 2/11/2023, at: <https://tinyurl.com/3ez5ad86>

²² *Ibid.* Kearney notes, for example, that the Israeli-Palestinian conflict “as a structural, long-standing problem of occupation, racism, and violence” does not “fit” mainstream international legal scholarship’s focus on distinct major crises rather than everyday life. Citing a statement by the International Coalition on Responsibility to Protect—“Questions remained as to whether invoking RtoP would have brought the desired changes to protect civilians in this deeply politicized situation”—he comments: “What’s meant here by politicized, I guess, is that ‘we don’t think we should attempt to apply a tool designed to harass bad guys, to our democratic allies’”.

²³ Aidan Hehir, “Is Gaza in Israel? R2P and Inter-State Crises,” *London School of Economics*, 23/7/2014, accessed on 2/11/2023, at: <https://tinyurl.com/bdhkc4v8>

²⁴ Renshaw.

subjected, to use the common phrase, which in the case of Gaza has become a sense of horror²⁵ at the atrocities now being committed by the Israeli occupation forces.

When are these feelings of concern and horror suppressed, and at what point does the call to act “in a timely and decisive manner”, as the legal text states, turn into hollow squabbling over legal arguments about whether or not to act at all? It happens when one is afflicted with agnosia, or when one deliberately refuses to recognize reality and loses the capacity to recognize things (homes, schools, hospitals) in shambles; people (civilians) being exterminated, ethnically cleansed, and forcibly displaced; sounds (of fighter planes, missile launchers, artillery) emanating from bombardment and voices (of civilians) crying out under the shelling; and the unmistakable shapes of “genocide, war crimes, ethnic cleansing, and crimes against humanity”, named by the text. When agnosia is wedded to fanaticism, the moral and normative purpose of the legal text – the reason and end for its existence – disappears from view and the spirit of the law dissipates. Instead of asking, “How can R2P be applied to protect civilians?” the question is posed as, “Does the principle even apply in this case?” It matters not that civilians are demonstrably in need of protection; the most important thing is whether the legal text applies to them.

In discussing the applicability of R2P, El-Affandi refers to Article 139 of the 2005 World Summit Outcome Document, which states, “We are prepared to take collective action, in a timely and decisive manner, through the Security Council...should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity”. He writes, “The case of Palestine clearly fits in this definition. For decades, there has been manifest and repeated failure by ‘national authorities’ – in this case, the occupying power, Israel – to protect the population under its authority against the atrocities listed above. The situation in Gaza now should also call for the application of R2P”.²⁶ But is the concept of the occupying power a controversial one for those whose interventions are discussed above and others? I don’t believe so. It is instead, once again, blind fanaticism.

One can play the game of legal texts and arguments indefinitely. Take, for example, the argument that R2P applies only to intrastate crises; the crisis in Palestine is not unambiguously an intrastate one, the argument goes, but rather an interstate conflict. The ambiguity here is not a lack of clarity; it is an incapacity to identify the obvious. Yet, Article 139 makes no reference to the fact that intervention should distinguish between atrocities committed in the context of an intrastate crisis or a crisis between two (or more) states. When the text refers to the manifest failure of national authorities “to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity”, it does not state that in order for the legal text to apply, these crimes must be committed by parties within the state, whether the national authority or other actors within the state. In other words, what about atrocities committed by one state in the territory of another state that the authorities of the latter are unable to protect their population from?

The same legal article refers to the obligation of the international community “to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity”. Even if we recognize that Palestine is a state, or that the Gaza Strip is not under de jure Israeli occupation, but rather under the de facto authority of Hamas (these are their terms), the question remains: What about helping it to protect its population from the atrocities committed by another state, Israel?

We are not discussing here defects in the legal text, the inadequacy of R2P, or loopholes in the law, but merely highlighting its spirit, which is always obscured by fanatic devotion to the literal text. Most of the interventions discussed above hold that the responsibility to protect Palestinian civilians in Gaza

²⁵ “UN Chief ‘Horrified’ by Strike on Gaza Hospital,” *UN News*, 17/10/2023, accessed on 2/11/2023, at: <https://tinyurl.com/574db443>

²⁶ El-Affendi.

lies either with Hamas alone, or with both the Israeli occupation state and Hamas. But what if, *arguendo*, Hamas is unable to protect the civilians under its authority? Let us go even further: What if Hamas is able to protect them but does not care to?²⁷ For our interlocutors, this is irrelevant. What matters is that the letter of the legal statute, its terms and precise formulation, remain tidy and intact, safe from any ethical and normative interpretation.

Issues Left Undiscussed

Amid the pain that suffuses the current mood, this may be an inauspicious moment to talk about hope – the hopes pegged on scholars of international law and the norm entrepreneurs who still hold fast to a genuine moral and normative commitment. There are, however, a few issues that are dismissed from the legal debate about the applicability of R2P to the case of Gaza:

1. Along with this empty legal sparring tinged with fanaticism and agnosia undertaken to prove that R2P is inapplicable to the case of Gaza, the debate fails to address the need to reconsider the principle of R2P itself and its supporting legal texts. Aidan Hehir timidly raises one unexamined question concerning the applicability of R2P in interstate crises,²⁸ in the process implicitly casting the conflict between the Israeli occupying state and occupied Palestine as a conflict between two states. This is not what the debate ignores, however; rather, the unasked question is whether R2P applies to a territory and population under occupation that does not represent the conventional sense of occupation, an occupation in which the occupier does not exercise control on the ground, but the occupied has neither a state nor sovereignty.
2. Everyone recognizes that the problem with applying R2P is that it requires the approval of the UN Security Council without any veto. The principle was not applied in Syria, although it was applicable, because Russia would not allow it; it was not applied in Myanmar, although it was applicable, because China would not allow it; and it will not be applied in Palestine, even if we accept its applicability for the sake of argument, because the United States has not and will not allow it. In this way, the question of the appropriate authority to authorize R2P and to intervene is elided. Where has the ICISS recommendation disappeared to? The commission sets forth two alternative options if the Security Council rejects a proposal or is unable to deal with it within a reasonable timeframe: 1) that the General Assembly consider the matter in a special emergency session under the “Uniting for Peace” procedure; and 2) that regional or subregional organizations, acting within their defined jurisdictions, take action under Chapter VIII of the UN Charter, provided that they subsequently seek the authorization of the Security Council.²⁹
3. The ICISS followed its recommendation with a warning to the Security Council: If it “fails to discharge its responsibility in conscience-shocking situations crying out for action, then it is unrealistic to expect that concerned states will rule out other means and forms of action to meet the gravity and urgency of these situations”,³⁰ as a result of which the UN will lose its standing and credibility. The commission has two pertinent messages for the Security Council here. First of all: “If collective organizations will not authorize collective intervention against regimes that flout the most elementary norms of legitimate governmental behaviour, then the pressures for intervention by ad hoc coalitions or individual states

²⁷ Or as Schmidt argues, what if the state is “unable” or “unwilling” to protect its population? Or what if it is, itself, committing the crimes? See: Schmidt.

²⁸ Hehir.

²⁹ Evans et al., p. xiii.

³⁰ *Ibid.*, pp. xiii, 55.

will surely intensify”. Second: “If, following the failure of the Council to act, a military intervention is undertaken by an ad hoc coalition or an individual state which does fully observe and respect all the criteria we have identified, and if that intervention is carried through successfully – and is seen by world public opinion to have been carried through successfully – then this may have enduringly serious consequences for the stature and credibility of the UN itself”.³¹ These recommendations did not arise from a vacuum, but from early cases of military intervention undertaken on the pretext of protecting civilians without a mandate from the Security Council, most notably the ECOWAS intervention in Liberia (1990) and in Sierra Leone (1998), and the NATO intervention in Yugoslavia (1999).³² Ironically, NATO acted without consulting the Security Council precisely because Russia would have vetoed any resolution authorizing intervention. Everyone is certain that no one will intervene to stop the extermination of civilians in Gaza, but the presumed impossibility of the United States, and its allies in the Security Council, allowing the application of R2P to Gaza and the interest-based, political, and ideological biases that lend support to this position drain the legal debate of any substance, shutting it down before it even begins. Acceptance of this position means ceding a common ethical rule that would enable us to have any debate.

4. There are voices – and they are not new – advocating an absolute rejection of everything related to international law and the international community, including the principle of R2P. As El-Affendi so eloquently puts it: “Observing leaders of the most powerful countries ganging up to mobilize the world’s most formidable arsenals and fleets against the poorest and most oppressed inhabitants of on earth, is a lesson in moral blindness. It appears to vindicate critics of R2P who have been arguing that the doctrine has always been a subterfuge for thinly disguised imperialism under false moral pretence”.³³ El-Affendi disagrees with this assessment, as do I: It is wrong to cede the space to these voices. There are norms that have been entrenched in international politics after a long struggle, and others that remain hostage to the politics of the major powers. Norm entrepreneurs play an indispensable role in moving norms from the realm of ideas to the realm of discourse, in the hope that they will end their life cycle in the realm of practice.³⁴ Norm entrepreneurs are prominent actors (individuals, international institutions, non-governmental organizations, epistemic communities) who take the initiative to speak out about certain norms,³⁵ defend them, and persuade states of the utility of internalizing and complying with them. They assume the responsibility to fight so that norms do not die. Accordingly, those discussing R2P in Gaza and occupied Palestine, especially experts on international law, should continue to assert what the ultimate teleology of the principle dictates, not hollow out the debate of any moral significance, as we have seen in this essay.

Conclusion

People around the world who share the UN Secretary-General’s horror at what is happening in Gaza and protesting against this horror across the globe are waiting for some morality in the words of politicians and international law experts. The demand for international humanitarian law to speak and for politicians to act in order to end the atrocities of wars is mounting as the atrocities do. In the legal debate about R2P

³¹ Evans et al., pp. xiii, 55.

³² On the debate over intervention absent Security Council authorization, see: Cristina G. Badescu, “Authorizing Humanitarian Intervention: Hard Choices in Saving Strangers,” *Canadian Journal of Political Science*, vol. 40, no. 1 (2007).

³³ El-Affendi.

³⁴ Martha Finnemore & Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization*, vol. 52, no. 4 (1998).

³⁵ We should not forget the title of John Austin’s work articulating the theory of speech act. See: John L. Austin, *How to Do Things with Words* (New York: Harvard University Press, 1962).

in Gaza, there seems to be nothing solid to rely on, though no sane person could imagine a more apposite moment for the application of the principle than this. As we have seen, there is a tendency to wholly rule out its applicability out of fanaticism to the literality of the law, obliterating the law's spirit and teleology. People are not expecting military intervention based on the international community's responsibility to protect civilians in Gaza. But they are crying out for an end to the extermination of Palestinian civilians in a war with no red lines, no morality, no legality, and no norms. Until their cry echoes in the ears of the living, it looks like, truly, "only the dead have seen the end of war".

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