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WHO PROTECTS THE PALESTINIANS IN GAZA?

Analysis of the legal basis for responsibility of the international community and obstacles to its implementation

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Abstract

The question this paper addresses is "Who should protect the people of Gaza and on which legal basis?". The question refers to the heated debate about the application of the Responsibility to Protect regime in Palestine in general, and Gaza in particular, and the obstacles to its implementation.

The essay starts with a brief overview of the history behind the emergence of the RtoP doctrine, which finds its roots in a nearly revolutionary development of the concept of state sovereignty. Two of the most controversial cases linked to the application of the regime, namely Libya and Syria, are mentioned with the purpose of introducing and analysing some of the problems that lie at the heart of RtoP. These, in particular, concern primarily the lack of consensus about the meaning of certain elements of the doctrine and the "legal emptiness" of this innovative framework, which is, both for its origins and for its functioning, of a mainly political nature.

In the second chapter, then, the essay investigates what could be the international legal basis for applying the regime of RtoP to the Gaza Strip, with particular reference to alleged violations of International Humanitarian Law by all sides of the conflict. The third and final chapter aims at assessing whether the doctrine of RtoP applies to Gaza and why it has not been implemented yet. Finally, the essay concludes by summing up the weaknesses and limits of RtoP and describing the obstacles that are yet to be overcome in order for RtoP to develop into a tool of international law that can impede the loss of life from unreasonable violence.

“Governments that block the aspirations of their people, that steal or are corrupt, that oppress and torture or that deny freedom of expression and human rights should bear in mind that they will find it increasingly hard to escape the judgement of their own people, or where warranted, the reach of international law”.

W. Hague

INTRODUCTION

"We should move from an era of legislation to one of implementation".
United Nations Secretary General Kofi Annan

In the years following the dramatic events of the 1990s, with particular reference to the genocidal conflicts in Rwanda, Kosovo and Bosnia-Herzegovina, the international community realized that it was time to shape and implement a framework of rules establishing measures of prevention and intervention, based on solidaristic purposes of justice and principles of humanity. The regime that emerged, however, was also partially rooted in the idea that certain severe violations of international law and human rights affect all states and can endanger international security. Furthermore, the new doctrine was based on a developing conception of state sovereignty as responsibility rather than mere power, which was to be limited and even suspended in the eventuality of a state's incapability or unwillingness to protect its own population from severe harm and suffering. This led to the "blurring of the distinction between the international and domestic realms"[1].

The emergence of the "Responsibility to Protect" doctrine is conventionally dated back to 2001, when the Canadian-sponsored International Commission for Intervention and State Sovereignty released a decisive report. Since then, the new regime has been put through a number of crucial tests, which have demonstrated a susceptibility to pronounced bias when it comes to implementation. This essay will briefly refer, in particular, to the opposite reactions of the international community, represented by the Security Council of the United Nations, towards the sanguinary crises erupted in Libya and Syria in recent years. These exemplary situations led to accusations of political double standard in the implementation of a regime that started to appear like nothing more than a new, modern form of Western imperialism.

As outlined by Secretary General Ban-Ki Moon in his report "Implementing the Responsibility to Protect", and by the World Summit Outcome Document published by the United Nations in 2005, the doctrine envisages three elements, which are called

[1] E. Newman, "R2P: Implications for World Order", *Global Responsibility to Protect*, vol. 5, 2013, p. 244.

"pillars". The first pillar concerns "the enduring responsibility of the State to protect its populations (…) from genocide, war crimes, ethnic cleansing and crimes against humanity"[2], while the second is "the international community's responsibility to assist and encourage states to fulfil their responsibility to protect, particularly by helping them to address the underlying causes of genocide and mass atrocities, build the capacity to prevent these crimes, and address problems before they escalate"[3]. Finally, the third pillar refers to "the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection"[4].

It appears clear that the focus of the newly emerged doctrine is on the State, which is the primary holder of the responsibility to protect, and on prevention. The main controversies and sources of scepticism, however, arise from the third pillar, which is the residual responsibility of the international community to intervene through peaceful or coercive measures to end ongoing atrocities and situations of mass suffering and severe harm of civilian populations. Many states, indeed, were and still are afraid that this element would represent a *carte blanche* for Western powerful states to intervene in the domestic affairs of less powerful, developing countries. This essay, however, will use the case of Gaza as an illustrative example that "over the last decade, we have witnessed not too much but rather too little armed force to protect human lives"[5].

In the present essay, indeed, solid sources of evidence will be analysed to argue that war crimes and crimes against humanity are being committed against the population of Gaza by Israel, Hamas and other Palestinian armed groups. Both the occupying power and the *de facto* authority over the territory, consequently, appear to be manifestly failing to uphold to their responsibility to protect, and the responsibility of the international community to collectively respond to provide protection to the population against

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[2] United Nations Secretary General, *2009 Report: Implementing the Responsibility to Protect*, 12 January 2009, A/63/677, http://www.responsibilitytoprotect.org/index.php/about-rtop/core-rtop-documents (accessed 08 July 2015), p. 8, para. 11a).
[3] United Nations General Assembly, *2005 World Summit Outcome*, 24 October 2005, A/RES/60/1, http://www.ifrc.org/docs/idrl/I520EN.pdf (accessed 08 July 2015), p. 30, para. 138-139.
[4] United Nations Secretary General, *2009 Report: Implementing the Responsibility to Protect*, 12 January 2009, A/63/677, p. 9, para. 11c).
[5] T. G. Weiss, "RtoP Alive and Well after Libya", *Ethics & International Affairs*, vol. 25, no. 3, 2011, p. 289.

atrocities and crimes is therefore called into question. According to the above-mentioned documents, indeed, the Member States of the United Nations have the obligation to take measures to stop the violence and to end impunity. Yet, this is far from happening, and the population of Gaza still suffers from violations of fundamental rights deriving from the occupation and blockade imposed by Israel – respectively since 1967 and 2007 -, and from sanguinary violence originating from the military operations carried out in the recent years, in particular "Cast Lead" in 2009 and "Protective Edge" in 2014.

Why is this happening? Why is the international community ignoring the cries of the people of Gaza and tolerating the repeated violations of International Humanitarian Law and the Rome Statute perpetrated in Gaza, despite the idealistic and promising statements of altruism and solidarity from which the framework of RtoP emerged and developed? This is what the present essay intends to investigate.

In particular, it will be argued that, at present, "most cases are sufficiently complex to allow states to accept the need for action but at the same time argue on prudential grounds about the most appropriate form of action, limiting the frequency of 'timely and decisive' action"[6]. This deleterious selectivity is why RtoP remains a limited and even suspicious political framework rather than a hard norm of international law, and needs to be overcome through the implementation of clear standards and uniform criteria of evaluation and implementation, unrelated to the political will and interests of the world's dominant states.

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[6] A. J. Bellamy, "Libya and the Responsibility to Protect: the Exception and the Norm", *Ethics & International Affairs*, vol. 25, no. 3, 2011, p. 267.

CHAPTER 1 – THE EMERGENCE OF THE RtoP DOCTRINE

"The rights of every man are diminished when the rights of one man are threatened".
John F. Kennedy

1.1. THE TRANSFORMATION OF THE CONCEPT OF SOVEREIGNTY

The history of the emergence of the Responsibility to Protect doctrine starts with a shift in the concept of state sovereignty. Being a "hallmark of statehood"[7], territorial sovereignty has historically been the foundation of international law and international relations. The power of exclusive jurisdiction of one state over all the citizens within its territory is the means to ensure the legal equality of all states and, through that principle, the protection and maintenance of international peace and security. The first and main consequence of the obligation of all states to respect each other's sovereignty is the principle of non-interference in a state's domestic affairs. Such a principle is rooted in customary international law and has been recognized by all members of the international community in article 2.7 of the United Nations (UN) Charter[8].

During the past few decades, however, the concept has evolved and states have become aware that territorial sovereignty is not and cannot be considered an absolute principle anymore. The horror and suffering that characterized the history of the 20th century, and in particular the 1990s, together with the development of international human rights law, made it astonishingly clear that sovereignty often became a weapon in the hands of authoritarian governments against the citizens of their own states. The international community started to realize that the respect of territorial sovereignty of one state could no longer be an excuse for other states or powerful actors not to intervene in situations of grave violations of human rights or mass atrocity crimes.

The individual and its protection started to emerge in international law, and with that, the "clash between the norm of state sovereignty and egregious human suffering"[9] became

[7] T. G. Weiss, *Humanitarian Intervention: Ideas in Action*, Cambridge, Polity Press, 2007, p. 15.

[8] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, http://www.un.org/en/documents/charter (accessed 20 May 2015), art. 2.4: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter".

[9] T. G. Weiss, *Humanitarian Intervention: Ideas in Action*, Cambridge, Polity Press, 2007, p. 18.

evident. It also became evident that the starting point for overcoming this clash and the consequent protection deficits was the definition of sovereignty, which "was to be upheld, but at the same time, it was to be interpreted in the light of modern developments"[10].

The emergence of human rights and the commitment of the international community to respect and protect them made states reflect on the idea that human rights claims should not be confined within the territorial boundaries of single states. Rather than left only in the hands of the relative governments, they were meant to be taken as a responsibility of all members of the international community. Their ethical and moral content, therefore, started to overturn the legal and political principle of non-interference, and state sovereignty became seen as a rule that, however fundamental, was to be subject to limitations in certain cases. The driving force of this overturn was the conviction, finally reached, that a new concept of international law was to be developed, based on the protection of the individual rather than on the interest of the state, and that the rights to be respected and safeguarded were primarily those belonging to *humans*, not necessarily to *citizens*.

1.2. THE ADVENT OF THE RtoP DOCTRINE

It was precisely to "square the circle of state sovereignty and human rights"[11] that, in the year 2000, Canada decided to sponsor an International Commission on Intervention and State Sovereignty (ICISS). Chaired by Gareth Evans and Mohammed Sahnoun, the commission aimed at developing a new system of rules regarding intervention, and issued an important report that has become the foundation of the doctrine.

The wording of paragraph 2.4 of the ICISS report reveals an ongoing evolution in the approach towards the rules surrounding sovereignty and non-intervention. The report, indeed, does not speak of a "*right* to intervene" anymore, but of a "*responsibility* to protect"[12]. Preventing and halting grave and systematic violations of human rights had

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[10] P. Hilpold, "Intervening in the Name of Humanity: R2P and the Power of Ideas", *Journal of Conflict and Security Law*, vol. 17, no. 1, 2012, p. 10.

[11] T. G. Weiss, *Humanitarian Intervention: Ideas in Action*, Cambridge, Polity Press, 2007, p. 88.

[12] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001, http://www.responsibilitytoprotect.org/index.php/about-rtop/core-rtop-documents, (accessed 20 May 2015), p. XI, para 2.4: "We prefer to talk not of a 'right to intervene' but of a 'responsibility to protect'".

finally become a duty, being moral and political in nature, but developing from existing legal obligations[13]. Lack of political will or confusion about implementation could not, at least in theory, be taken as excuses to act as bystanders of mass atrocities.

Various questions, however, arose from this shift of paradigm, and the report and successive documents on RtoP did their best to address them and clarify a number of disputed issues. The principles of territorial sovereignty and non-interference, indeed, remained at the very heart of international law and politics. The issue, now, was to balance the obligation to intervene in certain cases with the principle of non-intervention in the domestic affairs of member states.

The concept of sovereignty, indeed, had not disappeared nor had states the intention to deny such a fundamental principle. A change, however, had taken place with regard to the way sovereignty was thought of, with the state coming to be regarded as "nothing but a collective political unit created and owned by its citizens"[14], at the service of its people and holding responsibility towards them rather than mere power. This fundamental change is what makes that balance of principles easier to achieve. Indeed, when sovereignty is misused or abused to justify brutality against citizens and violations of human rights, the authority of the state is temporarily suspended, and the international community can and shall "invoke individual sovereignty to protect citizens from large-scale killings, tortures and repressions"[15]. Moreover, the ICISS's report is very clear in stating that the responsibility of protection lies primarily upon the state itself, and only when the state is unable or unwilling to protect its citizens does the responsibility to protect pass on to the international community[16].

[13] G. Zyberi, "Sharing the Responsibility to Protect: taking stock and moving forward", in G. Zyberi, *An Institutional Approach to the Responsibility to Protect*, Cambridge, Cambridge University Press, 2013, p. 512-3: "…this responsibility reflects obligations under international law such as the treaty and customary obligations to prevent and punish genocide, to respect and ensure respect of international humanitarian law, and the 'duty to respect, protect and fulfil' under international human rights law".

[14] M. Nuruzzaman, "The 'Responsibility to Protect' Doctrine: Revived in Libya, Buried in Syria", *Insight Turkey*, vol. 15, no. 2, 2013, p. 59.

[15] *Idem.*

[16] P. Hilpold, "Intervening in the Name of Humanity: R2P and the Power of Ideas", *Journal of Conflict and Security Law*, vol. 17, no. 1, 2012, p. 11: "Sovereignty is no longer interpreted in the traditional Westphalian sense as the 'supreme authority within a territory' but as a concept based on human security and implying, as a consequence, also responsibilities. Framed in these terms R2P conveys the idea of an international society providing for well-structured procedures to prevent human rights abuses, to guarantee intervention in case of urgent need and to rebuild the civil infrastructure where it has been destroyed by an avoidable conflict".

The fact that protection of the population is primarily a responsibility of the state within whose territory such a population resides is not only a manifestation of the respect paid to the principles of territorial sovereignty but also a reflection of "the practical reality that domestic authorities are best placed to take steps to guarantee respect for fundamental rights"[17]. On the other hand, however, "the responsibility to protect asserts that the lawfulness of authority (…) flows from the factual capacity and willingness to guarantee protection to the inhabitants of a territory"[18], and where this capacity (or willingness) is missing[19], the sovereign authority of the state is suspended[20].

Sovereignty as responsibility has a "threefold significance"[21]. The primary element of RtoP, indeed, is the responsibility to *prevent*, which entails putting into place a number of measures of political, economic, military or legal nature, aimed at addressing the root causes of deadly conflicts. Secondly, the doctrine entails the international community's responsibility to *react*, that is to answer situations of compelling human need with coercive measures and, in extreme cases, military intervention. Finally, the last element of the principle is the responsibility to *rebuild*, meaning to provide "full assistance with recovery, reconstruction and reconciliation"[22], in particular regarding the aspects of security, justice, reconciliation and development.

The element of responsibility to react is the most disputed and controversial one, and therefore entails a series of precautionary principles derived from the just war doctrine,

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[17] T. G. Weiss, *Humanitarian Intervention: Ideas in Action*, Cambridge, Polity Press, 2007, p. 101.

[18] A. Orford, "Rethinking the Significance of the Responsibility to Protect Concept", *American Society of International Law Proceedings*, vol. 106, no. 27, 2012, p. 29.

[19] A. Hehir, "The Permanence of Inconstistency – Libya, the Security Council, and the Responsibility to Protect", *International Security*, vol. 38, no. 1, 2013, p. 147: "R2P comprises an implicit acknowledgement that not all states will be either willing or able to abide by their domestic responsibility; hence the guidelines on the international community's responsibility to protect".

[20] A. M. Gallagher, "A Clash of Responsibilities: Engaging with Realist Critiques of the R2P", *Global Responsibility to Protect*, vol. 4, 2012, p. 345: "In theory, state elites should not (in the moral sense) and cannot (in the legal sense) act as bystanders when they have the capacity to help states fulfil their R2P". However, whether or not this obligation can (already) be defined as legal it is for later chapters of this paper to explore.

[21] D. Amnéus, "The coining and evolution of responsibility to protect: the protection responsibilities of the States", in G. Zyberi, *An Institutional Approach to the Responsibility to Protect*, Cambridge, Cambridge University Press, 2013, p. 8.

[22] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001, http://www.responsibilitytoprotect.org/index.php/about-rtop/core-rtop-documents, (accessed 20 May 2015), p. XI.

which encompass right intention, use of force only as a last resort, proportional means, reasonable prospects of success, right authority.

The concept of RtoP was reiterated by the 2005 World Summit of the United Nations, which came out with a re-elaborated version of the doctrine. This summit, which consisted of the biggest meeting of Head of States and Governments that had ever taken place, fully upheld the emerging principle of RtoP in its final resolution. The 2005 World Summit Outcome Document (WSOD), indeed, draws heavily on the ICISS's report, but is more prudent when considering the scope and application of the principle. The main emphasis is placed "on the need to implement RtoP through peaceful means"[23], in order to mitigate the concerns of some states with regard to the military aspect of the doctrine, certainly the most problematic and controversial one.

It must be underlined that the ICISS's report foresees application of RtoP in any situation of "serious harm"[24] encompassing "large scale loss of life"[25] and "large scale ethnic cleansing"[26], while the WSOD limits the scope of application to the four most serious and conscience-shocking crimes under international law, namely genocide, war crimes, crimes against humanity and ethnic cleansing[27]. Moreover, "the Outcome Document drops the ICISS's suggested guidelines on the use of force – the "just cause" threshold and the precautionary principle"[28].

The difference between the content of the doctrine as developed by the ICISS and as upheld by the World Summit is one obvious problem of RtoP. It causes, indeed, notable confusion about how and when the norm should be invoked and applied, and creates "different interpretation of what exactly the norm requires the international community to do in response to humanitarian crises"[29].

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[23] D. Amnéus, "The coining and evolution of responsibility to protect: the protection responsibilities of the States", in G. Zyberi, *An Institutional Approach to the Responsibility to Protect*, Cambridge, Cambridge University Press, 2013, p. 7.

[24] ICISS Report, p. XI, para. 1b).

[25] *Ibidem*, p. XII, para. 1a).

[26] *Ibidem*, p. XII, para. 1b).

[27] United Nations General Assembly, *2005 World Summit Outcome*, 24 October 2005, A/RES/60/1, http://www.ifrc.org/docs/idrl/I520EN.pdf (accessed 08 July 2015), p. 30, para. 138.

[28] Ved P. Nanda, "The Future Under International Law of the Responsibility to Protect after Libya and Syria", *Michigan State International Law Review*, vol. 21, no.1, 2013, p. 8.

[29] N. Shawki, "Responsibility to Protect: The Evolution of an International Norm", *Global Responsibility to Protect*, vol. 3, 2011, p. 184.

The RtoP principle was later embraced and reinforced by the "Secretary-General's Report on the Implementation of RtoP", which was presented on 12 January 2009 with the aim "to forge a common strategy and renewed political commitment"[30]. Based on the principle's elaboration in the WSOD, Ban Ki-Moon's report devised a framework of RtoP that "substitutes the ICISS report's 'three pillars' with its own 'three pillar strategy'"[31]. The first pillar is the protection responsibility of the state, the second is the assistance and support of the international community and the third one is timely and decisive response[32].

These elements were not equally welcomed by States, which were keen on accepting the aspects of prevention and support ensued in the first and second pillar, but were reluctant on accepting pillar three and agreeing on its implementation[33]. The problem, in particular, concerned the question of military intervention and the use of force. Even though "it should be noted that pillar three places a strong focus on non-military forms of response"[34], indeed, the primary focus of most discussions about RtoP concerns the issue of military intervention, which is undoubtedly the most controversial element of the doctrine. According to Graubart, moreover, when it comes to RtoP the tendency is "to evaluate and assess the effectiveness of the norm primarily, or even exclusively, in terms of whether a military response to a specific crisis took place and whether the military response was effective"[35].

With regard to the implementation of pillar three, in fact, the less powerful states were (and in many cases still are) afraid that this norm could be used as a means and excuse to

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[30] D. Amnéus, "The coining and evolution of responsibility to protect: the protection responsibilities of the States", in G. Zyberi, *An Institutional Approach to the Responsibility to Protect*, Cambridge, Cambridge University Press, 2013, p. 11.
[31] D. Chandler, "R2P of Not R2P? More statebuilding, Less Responsibility", *Global Responsibility to Protect*, vol. 2, 2010, p. 163.
[32] United Nations Secretary General, *2009 Report: Implementing the Responsibility to Protect*, 12 January 2009, A/63/677, http://www.responsibilitytoprotect.org/index.php/about-rtop/core-rtop-documents (accessed 20 May 2015).
[33] D. Amnéus, "The coining and evolution of responsibility to protect: the protection responsibilities of the States", in G. Zyberi, *An Institutional Approach to the Responsibility to Protect*, Cambridge, Cambridge University Press, 2013, p. 12.
[34] A. M. Gallagher, "A Clash of Responsibilities: Engaging with Realist Critiques of the R2P", *Global Responsibility to Protect*, vol. 4, 2012, p. 348.
[35] N. Shawki, "Responsibility to Protect: The Evolution of an International Norm", *Global Responsibility to Protect*, vol. 3, 2011, p. 180.

justify intervention and abuse by leading countries[36]. On the other hand, the Western powers feared and were reluctant to the displacement of forces and resources that an obligation to get involved would entail[37]. The Secretary General's report and subsequent documents on the topic, however, were very clear in underlining the importance of pillar one and two, acknowledging that "the State remains the bedrock of the RtoP principle"[38] and that "by helping states to meet their core protection responsibilities, the responsibility to protect seeks to strengthen sovereignty, not weaken it"[39].

Therefore, since "the protection of populations is a defining attribute of sovereignty and Statehood in the twenty-first century"[40], the international community only has a residual and ancillary obligation to support the single state in the exercise of its sovereignty and protection responsibility. Accordingly, only in extreme and dramatic cases does the reaction pillar need to be implemented.

Moreover, the third pillar includes a number of elements and possibilities (such as, for example, economic and diplomatic sanctions) that only encompass forcible intervention as a last resort. The (at least theoretical) idea, indeed, is that what is needed to impede that sovereignty be used as an excuse for breaching international obligations and violate human rights is a much broader and more preventive strategy of dealing with situations of suffering and harm *before* they reach the level of enormity[41].

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[36] E. Newman, "R2P: Implications for World Order", *Global Responsibility to Protect*, vol. 5, 2013, p. 240: "A number of influential non-Western states have expressed concern about the manner in which the R2P agenda has been dominated by liberal, Western centres of power".

[37] J. Graubart, "R2P and Pragmatic Liberal Interventionism: Values in the Service of Interests", *Human Rights Quarterly*, vol. 35, no. 1, 2013, p. 73. According to Graubart, some of the main obstacles to full acceptance and implementation of the doctrine are: "zealous regard in much of the global South to preserving sovereignty, fears of US great power abuses, an undeveloped institutional architecture, and the lack of political will from the West to commit serious resources".

[38] D. Amnéus, "The coining and evolution of responsibility to protect: the protection responsibilities of the States", in G. Zyberi, *An Institutional Approach to the Responsibility to Protect*, Cambridge, Cambridge University Press, 2013, p. 12.

[39] United Nations Secretary General, *2009 Report: Implementing the Responsibility to Protect*, 12 January 2009, A/63/677, http://www.responsibilitytoprotect.org/index.php/about-rtop/core-rtop-documents (accessed 20 May 2015), p. 7, para. 10.

[40] D. Amnéus, "The coining and evolution of responsibility to protect: the protection responsibilities of the States", in G. Zyberi, *An Institutional Approach to the Responsibility to Protect*, Cambridge, Cambridge University Press, 2013, p. 12.

[41] J. Janzekovic and D. Silander, *Responsibility to Protect and Prevent*, London, Anthem Press, 2013, p. 56.

There still are, however, a number of significant misunderstandings about the doctrine of RtoP, which cause "a tendency among both the supporters and opponents of the norm to reduce it to the issue of a military response to humanitarian crises"[42]. But RtoP is actually much more than that. In the words of Axworthy and Rock, if used in the right way, it could (and should) represent the bridge "between global challenges that require a collective solution and a world governed by a system of individual nation states"[43].

1.3. LIBYA AND SYRIA: DOUBLE STANDARD AND POLITICAL SCEPTICISM

After the WSOD and the Secretary General's report on RtoP, time had come for words to become actions. With a number of lost challenges for the doctrine (such as Darfur, Somalia and Yemen, just to name a few), indeed, RtoP was brought back under the spotlight in 2011 when the so-called "Arab Spring" arose in Libya and the human rights violations that Gaddafi's oppressive regime was committing were brought to the attention of the international community.

To respond to the Libyan tragedy, the Security Council passed Resolution 1973, which established a no-fly zone and other measures to protect civilians under threat of attack. According to some, this represented the first time in history in which the United Nations had mandated "military intervention in a sovereign state against the express will of that state's government"[44], and was therefore a very successful step in the evolution of the RtoP regime. Yet, according to other authors, even though "Resolution 1973 certainly coheres with the spirit of R2P, (…) the 'responsibility to protect' cited is that of the host state. The legitimate basis for action (…) is Chapter 7 of the UN Charter; there is no mention of the international community's 'responsibility to protect' of the action being a function of, or even informed by, this responsibility"[45].

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[42] N. Shawki, "Responsibility to Protect: The Evolution of an International Norm", *Global Responsibility to Protect*, vol. 3, 2011, p. 186.

[43] L. Axworthy and A. Rock, "R2P: A New and Unfinished Agenda", *Global Responsibility to Protect*, vol. 1, 2009, p. 56.

[44] J. Morris, "Libya and Syria: R2P and the spectre of the swinging pendulum", *International Affairs*, vol. 89, no. 5, 2013, p. 1271.

[45] A. Hehir, "The Permanence of Inconstistency – Libya, the Security Council, and the Responsibility to Protect", *International Security*, vol. 38, no. 1, 2013, p. 147.

Moreover, the very fast reaction by the Security Council to the situation in Libya was surprising and raised suspicions that the intervention had been carried out for reasons different from the will to protect the Libyan civilian population but rather connected to the geopolitical interest of the Western powers in the area. The immediate use of force, in particular, seemed to go against the principles agreed upon in the WSOD in 2005, specifically to the criterion of resorting to military intervention only as a final option. Therefore, even though many scholars consider the intervention in Libya as a successful application of the newly developed RtoP doctrine, it appears that this particular case could just as much be considered a failure of that same principle, with the states missing the chance to demonstrate that protection of suffering populations is unlinked from any kind of geopolitical consideration. According to many scholars, indeed, NATO's goal was not the protection of innocent civilians but rather a change of regime and Gaddafi's fall[46].

A situation in which, on the other hand, the international community has proven unwilling to intervene is the current humanitarian catastrophe in Syria. The different approach by states towards these two situations has reasonably given rise to political scepticism towards the principle or RtoP. Serious doubts about the "double standard" that Western countries seem to apply in their intervention policies were strengthened.

According to some authors, and in particular Roland Paris, however, reasons not to intervene in Syria might have been of a prudential nature, based on the risk of causing even greater harm. It is hard to believe that these reasons were the primary criteria in the minds of the Western countries and in particular the United States, but in any case, according to Paris, these reasons are not incompatible with the doctrine, because RtoP calls for intervention only in a number of specific cases, not in every situation of mass atrocity. Whether justified or not, however, the "jarring discrepancy between the forceful reaction to abuses in Libya and the comparatively anaemic international response to the crisis in Syria (…) raised doubts about the credibility and legitimacy of both R2P and the Security Council"[47].

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[46] J. Graubart, "R2P and Pragmatic Liberal Interventionism: Values in the Service of Interests", *Human Rights Quarterly*, vol. 35, no. 1, 2013, p. 82.

[47] R. Paris, "The 'Responsibility to Protect' and the Structural Problems of Preventive Humanitarian Intervention", *International Peacekeeping*, vol. 21, no. 5, 2014, p. 588.

1.4. NO MORE IF AND WHY, BUT WHEN AND HOW

According to some authors, RtoP is trapped in its own internal logic, because selectivity of application is unavoidable, and often justified. Not all cases of mass atrocities and human suffering, indeed, meet the criteria that justify (and impose) intervention and considerations about the displacement of resources by the intervening states is comprehensible[48].

It seems, however, that this selectivity does not always derive from elements of the regime such as those based on the "just war" doctrine, nor from considerations of the risk to cause even greater suffering. Quite differently, it is hard not to see how reasons for non-intervention are usually political in nature, and based on logics of power and international order rooted in political self-interest. This is particularly true when it comes to the process of decision-making by the Security Council, whose authorization is still seen by many (but not by all) as an absolute and fundamental requirement for a legitimate (or rather, *legal*) intervention.

According to Hehir, in particular, "this selectivity is in keeping with the Security Council's record of inconsistency, a record that predates R2P. Given that R2P has not altered the decision making process, or powers, of the Security Council, it is difficult to believe that wholesale change of the scale proclaimed by some in the wake of Resolution 1973 is imminent"[49].

In Hehir's words, we have a first glimpse of one of the most problematic aspects of the doctrine, that is the way in which decisions about implementation of the responsibility to protect are taken. Who decides what the threshold of human suffering which triggers such a responsibility is? Who is the holder of this responsibility and in which ways should this entity accomplish its duty to intervene? In the absence of clear rules and directions about

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[48] Very interesting, in particular, R. Paris, "The 'Responsibility to Protect' and the Structural Problems of Preventive Humanitarian Intervention", *International Peacekeeping*, vol. 21, no. 5, 2014, p. 588: "Responding forcefully to one emergency may create an expectation of similarly robust action elsewhere, but in many if not most cases such hopes will not be met because selectivity is unavoidable. Paradoxically, therefore, the more R2P is used as a basis for coercive military action, the more likely it is to attract criticism as a hypocritical doctrine. This appears to be what happened in the case of Syria following the Libya intervention".

[49] A. Hehir, "The Permanence of Inconstistency – Libya, the Security Council, and the Responsibility to Protect", *International Security*, vol. 38, no. 1, 2013, p. 158.

implementation, it seems that these questions go to very heart of politics rather than being answered by law.

At the moment, the importance of the principle at the heart of RtoP is clear to all members of the international community, and the acceptance of the doctrine is quite vast and general. The issues still to be addressed, however, concern the way in which these regime should be implemented, with particular reference not only to the matter of the double standard and selectivity demonstrated by Western powers, but also to the requirement of authorization by the Security Council. This body, indeed, is the most authentic expression of the self-interested political delineation of the world's most powerful states.

To conclude, the point to be underlined is that "few opponents of humanitarian intervention argue that sovereignty is more important in the abstract than stopping mass atrocities. The debate lies in whether an effective and desirable regime is possible under the present global order"[50] and the main challenge of the present is not anymore acceptance of RtoP, but agreement and consent about its meaning and application[51].

[50] J. Graubart, "R2P and Pragmatic Liberal Interventionism: Values in the Service of Interests", *Human Rights Quarterly*, vol. 35, no. 1, 2013, p. 75.

[51] P. Hilpold, "Intervening in the Name of Humanity: R2P and the Power of Ideas", *Journal of Conflict and Security Law*, vol. 17, no. 1, 2012, p. 16.

CHAPTER 2 – "NO SAFE PLACE": VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN GAZA

"I want aggressiveness – if there's someone suspicious on the upper floor of a house, we'll shell it. If we have suspicions about a house, we'll take it down"[52].

2.1. DISRESPECT OF RtoP BY ISRAEL AND THE *DE FACTO* ADMINISTRATION

The occupation of the Palestinian territories by Israel started in 1967, and has continued ever since. It is beyond the scope of this paper, however, to describe the reasons and origins of the complicated dispute over this tormented land. The purpose of the present work, instead, is to affirm the responsibility to protect the Palestinian population held by Israel and by the *de facto* administration, and their repeated violations of it. In the following chapter, therefore, we will analyse some sources of evidence of the reiterated violations of human rights and International Humanitarian Law in the so-called Occupied Palestinian Territories, and in particular in Gaza.

2.2. THE BLOCKADE - *APARTHEID* AND COLLECTIVE PUNISHMENT

The blockade over the territory of Gaza started in June 2007, and immediately caused restrictions to the freedom of movement of the population (with severe limitations on the circulation in and out of the Gaza Strip) and an emblematic denial of the right to development, effectuated through the agonizing restrictions on exports and imports. Aside from these manifest and prominent consequences, the blockade is also the root cause of a number of other tragic violations of the most basic rights of the residents of Gaza.

According to the United Nations, indeed, the humanitarian situation has deteriorated since June 2013, mainly due to "severe power shortages, resulting in shutdowns of sewage treatment facilities, and disruptions to specialized health services, such as kidney dialysis, operating theatres, blood banks, intensive care units and incubators, putting the lives of vulnerable patients in Gaza at risk"[53].

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[52] An Israeli company commander in a security briefing to soldiers during Operation "Cast Lead".

[53] Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk*, 13 January 2014, A/HRC/25/67, p. 14, para. 49.

Not only, therefore, there is evidence of massive violations of the right to life and right to health of the people of Gaza, but also there are also solid grounds to believe that these acts and violations are part of a widespread and systematic attack perpetrated against the civilian population of the territories under occupation. As will be argued, these acts amount to *apartheid* and collective punishment, and are in clear and undeniable violation of the most fundamental principles of international law.

The International Convention on the Suppression and Punishment of the Crime of *Apartheid*, emanated by the United Nations and entered into force in 1976, establishes three requirements for the occurrence of such crime. Firstly, there must be two distinct "racial groups"; secondly, an "inhumane act" must be committed by one group against the other; thirdly and lastly, the act must be committed "for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them"[54].

The first of these elements might appear very problematic, given the questionable concept of "race" and its meaninglessness in international law. It is not so, however, in consideration of the fact that the International Criminal Court, the International Tribunal for Former Yugoslavia and the International Tribunal for Rwanda have developed criteria of distinction based on sociological rather than biological issues, deriving from national or ethnic origin, or descent. As Professors Dugard and Reynold affirm, therefore, "vis-à-vis Jewish Israelis, the Palestinians emerge as a separate group by virtue of ethnic indicators including a distinct language and culture, as well as claims to self-determination and indigeneity in territory occupied by Israel"[55].

The second article of the Convention, on the other hand, contains a list of enumerated acts that can amount to the crime of *apartheid*, including violations of the right to life and liberty, the imposition of living conditions designed to cause destruction of the group in whole or in part, the enactment of measures calculated to prevent the participation of members of the group in the political, social, economic and cultural life of the country, and "any measures including legislative measures, designed to divide the population

[54] United Nations General Assembly, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, A/RES/3068(XXVIII), art. 2.

[55] J. Dugard and J. Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory", *European Journal of International Law*, vol. 24, no. 3, 2013, p. 18.

along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups"[56]. It is tragically evident that all of these acts are being perpetrated in the Occupied Palestinian Territory, and that the crime of *apartheid* is therefore being committed. It is undeniable, indeed, that "Gaza effectively amounts to a besieged Palestinian ghetto, with the 'open-air' analogy repeatedly invoked"[57], and that the subjective element of the crime, which is the purpose of domination of one group over the other, is manifest in the actions perpetrated by the Israeli government[58].

As far as the accusation of inflicting collective punishment to the civilian population of Gaza is concerned, instead, Article 33 of the IV Geneva Convention relative to the Protection of Civilian Persons in Times of War of 12 August 1949 (hereinafter "IV Geneva Convention") states that: "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible". This provision not only encapsulates the fundamental principle of law according to which criminal liability is personal in character, but more specifically prohibits "penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed"[59]. The purpose of this norm is to prevent a belligerent country to put in place intimidating acts against the other side of the conflict with a purpose of deterrence and prevention of rebellious acts. Far from being respectful of any principle of justice, these measures would indeed strike at responsible and innocent alike, and nourish sentiments of resistance and hostility. Unfortunately, however, that seems to be exactly the policy carried out by Israel.

It is difficult, indeed, to refute the conclusion that the restrictive measures of the blockade and the resulting violations of the rights to life, movement, health, education and development of the Gazan population are nothing but Israel's government's means to

[56] United Nations General Assembly, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, A/RES/3068(XXVIII), art. 2(d).
[57] J. Dugard and J. Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory", *European Journal of International Law*, vo. 24, no. 3, 2013, p. 23.
[58] *Ibidem*, p. 27: "This regime is founded on a discriminatory ideology that elevates Jewish to a higher status and accords separate and unequal treatment to Palestinians (…) it becomes impossible to refute the conclusion that the purpose of discrimination is domination".
[59] https://www.icrc.org/ihl/com/380-600038 (accessed 27 May 2015).

terrorize the population, establish domination and prevent them from joining or supporting Hamas or similar armed groups[60].

As asserted above, however, these measures commonly have the counterproductive effect of nurturing resistance and resentment, and it can be argued that this is exactly what happens in Palestine, too. The self-defence argument often used by Israel as a justifying ground for its military operations, indeed, is based on the attacks and crimes committed by the Palestinian (so-defined) terrorist group Hamas. This, in theory, is officially an element of a "just cause of war" and use of force, according to article 51 of the Charter of the United Nations[61].

However, under international law, the threat posed to the state recurring to self-defence must be immediate, the action taken must proportionate and force must be used only as a last resort. Not only, as will be seen further in this chapter, the Israeli government is violating all of these requirements, but a very difficult moral dilemma arises in this particular case. The question must be asked, indeed, if an argument of self-defence is still valid when the state claiming it is responsible for the occupation and oppression that are the root causes of the terrorist acts directed against it. According to Slater, for example, "a state that occupies and represses another people has forfeited its claim to self-defence when its victims turn to armed resistance, even when their means, terrorism, is also morally wrong – at least so long as there is good reason to believe that the terrorism would end if the repression that engendered it ended"[62]. This very interesting view is only one of the matters of discussion that arise from the complexities of this war.

In any case, "actions taken by belligerent forces in the course of hostilities are not dependent on "reciprocity". The fact that Palestinian armed groups may have breached

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[60] J. Slater, "Just War Moral Philosophy and the 2008–09 Israeli Campaign in Gaza", *International Security*, vol. 37, no. 2, p. 78: "From the outset, a central component of the iron wall strategy has been to directly attack civilians, or their institutions, or both – partly as revenge or punishment for Arab attacks on Israelis, but more fundamentally for the purposes of what the Israelis see as 'deterrence'. The premise is that the more the pain, the greater the likelihood that the Arab peoples will force their states or militant organizations to end their conflict with Israel".

[61] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, http://www.un.org/en/documents/charter (accessed 30 May 2015), art. 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security".

[62] J. Slater, "Just War Moral Philosophy and the 2008–09 Israeli Campaign in Gaza", *International Security*, vol. 37, no. 2, p. 57.

international law does not constitute a *carte blanche* for Israeli forces with regard to their obligations under international law"[63].

On these bases, it is evident that the argument of self-defence is invalid, and that the purpose of the blockade imposed by Israel and of the military operations regularly carried out is the maintenance of control and domination over Gaza "through economic and military warfare (…) that repeatedly provoked resistance and retaliation"[64] and that amount to collective punishment as prohibited by Article 33 of the IV Geneva Convention.

2.3. OPERATION "CAST LEAD"

Since the beginning of the blockade, the population of Gaza survived a number of deadly military operations carried out by the IDF (Israel Defence Forces). One of these operations was launched with the codename of "Operation Cast Lead" and started, without warning, at 11.30 am on 27 December 2008. The stated aim of the operation was to "end rocket attacks into Israel by armed groups affiliated with Hamas and other Palestinian factions"[65]. Therefore, Israeli's claim for self-defence and invocation of Article 51 of the United Nations Charter was the legal alibi behind this action. Article 51, indeed, is the bedrock of *ius ad bellum*, which is defined as the law regulating the use of force by Member States under international law.

Even without considering Israel's claim of self-defence in the merit, however, it must be noted that, in a context of prolonged occupation such as the one in which Operation Cast Lead was carried out, the time for invocation of the rules of *ius ad bellum* has passed. Indeed, since the resort to force has already taken place and armed conflict and occupation are ongoing, "the framework of international law applicable (…) is international humanitarian law, which forms the basis of *jus in bello* – the laws regulating the means and methods of armed conflict"[66].

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[63] International Federation for Human Rights (FIDH), *Trapped and Punished: The Gaza Civilian Population under Operation Protective Edge*, October 2014, p. 68.

[64] J. Slater, "Just War Moral Philosophy and the 2008–09 Israeli Campaign in Gaza", *International Security*, vol. 37, no. 2, p. 57.

[65] Amnesty International, *Operation 'Cast Lead': 22 Days of Death and Destruction*, July 2009, p. 1.

[66] "Operation Cast Lead and the Distortion of International Law - A Legal Analysis of Israel's Claim to Self-Defence under Article 51 of the UN Charter", *Al-Haq Position Paper*, April 2009,

Consequently, "any attacks by Israel against the Gaza Strip, or response to attacks emanating from the Gaza Strip, must conform to the principles of international humanitarian law"[67], which imposes restrictions on the means and methods that all parties to a conflict are tolerated to engage in during any attack or military operation.

Under the applicable International Humanitarian Law, therefore, any military operation must be justified on the grounds of military necessity. This means that an attack against legitimate military targets and the collateral damages that this might implied can be justified in consideration of the military advantage that the state perpetrating the operation might gain from it. This rule is a reminder that "even under the laws of war, winning the war or battle is a legitimate consideration, though it must be put alongside other considerations of IHL"[68].

The presence of military necessity, indeed, can in no way justify the violations of other principles of International Humanitarian Law, such as, primarily, the principles of proportionality and distinction, both rooted in customary international law. The former principle requires the use of force employed during an operation to be proportional to the military advantage to be obtained. As a consequence, "even an attack aimed at the military weakening of the enemy must not cause harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage anticipated"[69]. The principle of distinction, on the other hand, states that: "The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects"[70].

According to a number of reliable sources, however, all of these principles have been violated in Gaza. Not only, as seen above, the claim of self-defence was unjustified, but also the principles of last resort, necessity, proportionality and most importantly

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http://www.alhaq.org/attachments/article/225/OperationCastLeadandtheDistortionofInternationalLaw.pdf (accessed 30 May 2015).

[67] *Idem.*

[68] F. Hampson, "Military Necessity", 2011, http://www.crimesofwar.org/a-z-guide/military-necessity/, (accessed 30 May 2015).

[69] *Idem.*

[70] International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, 2005, Volume I: Rules, Chapter 2, Rule 7, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter2_rule7 (accessed 30 May 2015).

distinction were tragically disrespected. As observed by Slater, indeed, "even if Israel had a genuine claim to the just cause principle of self-defence, Cast Lead would have violated another crucial just war requirement – that the use of force is allowable only as a last resort after all nonviolent alternatives have been exhausted. As the record shows, Israel broke a series of cease-fires with Hamas and refused even to explore Hamas's offers for a long-term truce and possibly even for a political settlement of the Israeli-Palestinian conflict"[71].

Moreover, according to the findings of the investigation carried out by Amnesty International, "hundreds of civilians were killed in attacks carried out using high-precision weapons – airdelivered bombs and missiles, and tank shells. Others, including women and children, were shot at short range when posing no threat to the lives of the Israeli soldiers. Aerial bombardments launched from Israeli F-16 combat aircraft targeted and destroyed civilian homes without warning, killing and injuring scores of their inhabitants, often while they slept"[72]. It is hard to consider these casualties as "collateral damage", given the circumstances under which they took place. Indeed, the report continues by defining the attacks on civilians as "direct" and "indiscriminate", in evident and total violation of the most fundamental principles of International Humanitarian Law[73].

2.3.1. The Goldstone Report and the principle of distinction

On 3 April 2009, the United Nations established a Fact Finding Mission on the Gaza Conflict with the mandate to "investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after"[74]. In a very detailed

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[71] J. Slater, "Just War Moral Philosophy and the 2008-09 Israeli Campaign in Gaza", *International Security*, vol. 37, no. 2, 2012, p. 79.

[72] Amnesty International, *Operation 'Cast Lead': 22 Days of Death and Destruction*, July 2009, p.1.

[73] *Idem*: "Much of the destruction (…) resulted from direct attacks on civilian objects as well as indiscriminate attacks that failed to distinguish between legitimate military targets and civilian objects. Such attacks violated fundamental provisions of international humanitarian law, notably the prohibition on direct attacks on civilians and civilian objects (the principle of distinction), the prohibition on indiscriminate or disproportionate attacks, and the prohibition on collective punishment".

[74] Human Rights Council, *Human Rights in Palestine and other Occupied Arab Territories - Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 25 September 2009, A/HRC/12/48, p. 13.

and exhaustive report, commonly referred to as the "Goldstone Report" and issued by the Human Rights Council on 25 September 2009, the Mission observed that "the Israeli armed forces discharged their obligation to take all feasible precautions to protect the civilian population of Gaza"[75].

The Mission collected evidence of indiscriminate, disproportionate and unjustified attacks carried out by the IDF and resulting in loss of life and injuries to civilians. Moreover, they reported proof of deliberate attacks against the civilian population, including the killing of civilians in the attempt of leaving their house to walk to safer areas[76]. In particular, the report observes that the destruction of industrial infrastructure, food production, water installations, sewage treatment plants and housing constitutes an attack on the foundations of the civilian life in Gaza, with no military justification[77]. The Report reminds that "unlawful and wanton destruction which is not justified by military necessity amounts to a war crime"[78] and that destruction perpetrated with the aim of denying sustenance to the population is "a violation of customary international law and may constitute a war crime"[79].

In addition, the report collects evidence and information concerning the instructions given to the Israeli armed forces with regard to the opening of fire against civilians and that "provided for a low threshold for the use of lethal fire against the civilian population"[80].

For the purposes of the present discussion, the most relevant conclusion achieved by the Mission is that "the repeated failure to distinguish between combatants and civilians appears to the Mission to have been the result of deliberate guidance issued to soldiers, as described by some of them, and not the result of occasional lapses"[81].

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[75] Human Rights Council, *Human Rights in Palestine and other Occupied Arab Territories - Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 25 September 2009, A/HRC/12/48, p. 18, para. 37.

[76] *Ibidem*, p. 158.

[77] *Ibidem*, p. 199.

[78] *Ibidem*, p. 21, para. 50.

[79] *Idem*.

[80] *Ibidem*, p.180, para. 802.

[81] *Ibidem*, p. 407, para. 1889.

See also "Operation Cast Lead and the Distortion of International Law - A Legal Analysis of Israel's Claim to Self-Defence under Article 51 of the UN Charter", *Al-Haq Position Paper*, April 2009, http://www.alhaq.org/attachments/article/225/OperationCastLeadandtheDistortionofInternationalLaw.pdf (accessed 30 May 2015), p. 4: "A prominent feature of 'Operation Cast Lead' was disproportionate and often indiscriminate military attacks against densely populated civilian centres throughout the Gaza Strip. Al-Haq fieldworkers extensively documented the systematic failure of Israel to effectively distinguish

On these grounds, it is inconceivable to refute the conclusion that the main targets of the operation were not, as declared, Hamas' military objectives. Rather, the purpose was to annihilate the population to ensure domination and weaken resistance.

With its 1300 to 1450 Palestinian victims - among which 300 children and hundreds of other unarmed civilians[82] – and the effect of leaving thousands homeless and the already troublesome economic situation in ruins[83], Operation Cast Lead was deliberately drafted to provoke a high number of civilian casualties[84] and can, therefore, be considered to amount to a "planned humanitarian disaster"[85].

2.4. OPERATION PROTECTIVE EDGE – "NO SAFE PLACE"

After these events, the population of Gaza thought that the worst was over. They relied on the fact that the international community would not turn their back against actions of such tragic consequences of death, destruction and suffering. They hoped that Israel would never be allowed to carry out any more violent, unnecessary and illegal military operation[86]. Unfortunately, they were wrong.

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between civilian and military objectives during attacks and a clearly identifiable lack of proportionality between the death and injury of civilians, destruction of civilian property and the concrete military advantage offered from such attacks. Indiscriminate and disproportionate attacks constitute war crimes, where they result in wilful killing and extensive unlawful destruction of property, such attacks may amount to grave breaches of the Fourth Geneva Convention, entailing individual criminal liability for those who planned, ordered or executed such operations".

[82] Human Rights Council, *Human Rights in Palestine and other Occupied Arab Territories - Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 25 September 2009, A/HRC/12/48, p. 90.

[83] Amnesty International, *Operation 'Cast Lead': 22 Days of Death and Destruction*, July 2009, p. 1.

[84] Jerome Slater, "Just War Moral Philosophy and the 2008-09 Israeli Campaign in Gaza", *International Security*, vol. 37, no. 2, 2012, pp. 79-80: "Operation Cast Lead (…) violated every principle governing morally acceptable methods of warfare, because Israel's deliberate destruction of Gazan political, economic, ad societal infrastructures and institutions was, at minimum, grossly indiscriminate. (…) The overwhelming evidence of how Israel has implemented the iron wall strategy throughout its history, as well as the unrefuted and detailed evidence of its behavior in Cast Lead, makes it difficult to avoid the conclusion that Israel's policies in Gaza constituted an intentional violation of the most important and widely accepted moral principle that seek to minimize the destructiveness of warfare: that innocent civilians may never be the intended object of military attack whether directly or indirectly, as in attacks on civilian institutions and infrastructures".

[85] M. Chossudovsky, "The Invasion of Gaza: 'Operation Cast Lead', Part of a Broader Israeli Military-Intelligence Agenda", *Global Research*, 4 January 2009, www.globalresearch.ca/the-invasion-of-gaza-operation-cast-lead-part-of-a-broader-israeli-military-intelligence-agenda/11606 (accessed 30 May 2015).

[86] See R. Sourani's opinion "History is repeated as the international community turns its back on Gaza", 17 November 2012, www.aljazeera.com/indepth/opinion/2012/11/20121117115136211403 (accessed 31 May 2015).

A second massive warfare campaign, indeed, was launched against Gaza on 8 July 2014, breaking the ceasefire agreement that had been in place since the end of operation "Pillar of Defence" in November 2012.

The sparkle of the tension was the kidnapping of three Israeli teenagers in Southern West Bank on 12 June. Even though there was no evidence that the disappearance of the three youths could be attributed to Hamas, Israel had no hesitation to blame it on the Palestinian terrorist group.

Once more, the stated objective of "Protective Edge" was the destruction of Hamas's infrastructure and the prevention of Palestinian rockets from firing into Southern Israel[87].

The report by the International Federation for Human Rights (FIDH), issued following the operation, analyses the events by dividing its seven weeks into three phases and relying on the data provided by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA). According to these data, the intensity of the operations was increasing day by day, and "while the first days of the conflict exhibited a daily average of over 27 fatalities, OCHA's daily updates saw that number rise to the hundreds, mostly civilians"[88]. The number of Internally Displaced Persons (IDPs), as reported by the United Nations, was also increasing daily[89]. Not only was the force used to hit Gaza more intense than during the two previous operations – "Cast Lead" in 2009 and "Pillar of Defence" in 2012 – but operation "Protective Edge" is recorded as the deadliest and most devastating escalation since the very beginning of the occupation, in 1967.

Civilian casualties and physical and psychological suffering are the perhaps inevitable side-effect of any belligerent conflict. As mentioned above, however, rules have been developed to limit the disastrous consequences of war and protect the non-combatants. These rules, in particular, are codified by customary and treaty-based International Humanitarian Law, in particular the Geneva Conventions of 1949. According to Article 8 of the Statute of the International Criminal Court[90], moreover, the violations of these

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[87] International Federation for Human Rights (FIDH), *Trapped and Punished: The Gaza Civilian Population under Operation Protective Edge*, October 2014, p. 9.

[88] *Ibidem*, p. 11.

[89] *Ibidem*, p. 13: "By the end of August, the UN reported over 18,000 housing units to have been destroyed or severely damaged in Gaza, leaving approximately 108,000 Palestinian people homeless".

[90] It must be underlined that, even though the Rome Statute would be a useful parameter by itself, being its provisions considered the codification of already existing customary law, its relevance has become even

rules constitute a war crime[91]. Evidence suggests that, during operation “Protective Edge”, the Israeli forces have once again violated the most fundamental rules of International Humanitarian Law and are therefore liable for perpetration of war crimes.

In particular, the attacks in densely populated residential areas, with their direct consequences of death and destruction, are impossible to consider “collateral damages” of a lawfully fought war, and rather fall under the scope of application of articles 8.2.a)i), 8.2.a)iii), 8.2.a)iv) of the Rome Statute. These provisions, indeed, are based on the customary principles of distinction, necessity and proportionality, and respectively outlaw the wilful killing, the wilful causing of great suffering, and the extensive destruction and appropriation of property, not justified by military necessity, carried out unlawfully and wantonly perpetrated “against persons or property protected under the provisions of the relevant Geneva Convention”[92].

Article 8.2.b) of the Statute also applies, given that it proscribes “other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law”. Some of the acts prohibited, indeed, are “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”[93], “intentionally directing attacks against civilian objects, that is, objects which are not military objectives”[94] and “attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives”[95]. Indeed, both the report of the FIDH and the report issued by an independent medical fact-finding mission, entitled “Gaza 2014”, report evidence of

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more prominent since 1 January 2015. On that day, indeed, “the Government of Palestine lodged a declaration under article 12(3) of the Rome Statute accepting the jurisdiction of the International Criminal Court (ICC) over alleged crimes committed ‘in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014’. On 2 January 2015, the Government of Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General”. (www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/palestine/Pages/palestine.aspx, accessed 1 June 2015).
Accordingly, on 16 January, the Prosecutor of the ICC opened a preliminary investigation over the situation of Palestine, to verify conditions of jurisdiction and admissibility.

[91] United Nations General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, art. 8.2: “For the purpose of this Statute, ‘war crimes’ means: a) Grave breaches of the Geneva Conventions of 12 August 1949”.

[92] *Idem*.

[93] *Ibidem*, art. 8.2.b)i).

[94] *Ibidem*, art. 8.2.b)ii).

[95] *Ibidem*, art. 8.2.b)v).

repeated attacks on hospitals, ambulances, medical personnel and health facilities, in addition to targeting of rescue crews, in violation of Articles 14-20 of the IV Geneva Convention and Articles 8.2.b)ix) and 8.2.b)xiv) of the Rome Statute. Attacks against structures providing shelter to IDPs – including those of the United Nations - have also been recorded[96], causing psychological distress among the (already traumatized) population and contributing to aggravate the residents' perception that there was "no safe place" on the territory of Gaza.

A number of reports also describe attacks on objects indispensable for civilian survival, as proscribed by Article 8.2.a)iv), which classifies them as war crimes[97]. According to FIDH and OCHA, indeed, the Gaza Strip's only electrical power plant, located in the north-east of the Al Nuseirat refugee camp, was repeatedly attacked as part of "a widespread and systematic policy of attacking electricity and water infrastructure as well as other means of subsistence"[98]. Such policy had devastating consequences for the already critical living conditions of the civilian population. It caused, indeed, a "rapid deterioration in the humanitarian conditions in the Gaza Strip"[99], especially due to the consequences on water and food supplies. The sewage treatment was also affected, with enormous repercussions in terms of health and hygiene, and "hospitals and other vital facilities faced extreme difficulties in carrying out their duties"[100].

[96] International Federation for Human Rights (FIDH), *Trapped and Punished: The Gaza Civilian Population under Operation Protective Edge*, October 2014, p. 45.

[97] According to *Rome Statute of the International Criminal Court*, 17 July 1998, Art. 8.2.b)iv), "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" is considered a war crime.

[98] International Federation for Human Rights (FIDH), *Trapped and Punished: The Gaza Civilian Population under Operation Protective Edge*, October 2014, p. 48.

[99] *Ibidem*, p. 51.

[100] *Idem*.

2.5. CRIMES AGAINST HUMANITY – LEGAL DEFINITION AND FACTUAL ANALYSIS

After the experience of the Nuremberg trials and the International Military Tribunal for the Far East, no international convention was drafted to specifically codify the definition and regulation of crimes against humanity. Despite the significant number of international texts containing it - including the Statute of the International Tribunal for Former Yugoslavia, the Statute of the International Tribunal for Rwanda, and the Statute of the International Criminal Court - the definition of this third category of international crimes (beside war crimes and genocide) is not precisely and completely agreed upon. Its main elements, however, are common to all the definitions in the various texts, and include: application regardless of whether the acts in question are committed in times of war or peace; an act of violence committed against persons regardless of whether nationals or non-nationals of the State committing the alleged crime; the perpetration of the act as part of a "widespread or systematic attack" against any civilian population.

This last requirement is what primarily distinguishes crimes against humanity from genocide, which instead envisages the purpose to destroy, in whole or in part, a certain (national, ethnical, racial or religious) group. The category of crimes against humanity is also partly overlapping with war crimes, but can be distinguished due to the application of the definition regardless of the belligerent or non-belligerent context of the acts committed.

For the purposes of the present analysis, it seems appropriate to take into consideration the definition contained in the Rome Statute of the International Criminal Court. Even though Israel is not a State Party, indeed, the prohibition of crimes against humanity (together with the other international crimes, namely war crimes and genocide) is considered to be a rule of *ius cogens* – that is, the highest possible standard of customary international law for which no derogation is contemplated. The provision contained in the Rome Statute, therefore, can be considered as a codification of such rule with which all States must comply, regardless of whether or not they are signatory parties to the treaty.

Article 7 of the Rome Statute, therefore, lists, in its first paragraph, a number of acts that, if all other conditions are present, can amount to crimes against humanity. Moreover, it clarifies that by "attack directed against any civilian population" the drafters meant "a

course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack"[101]. Among the acts listed there are: murder[102]; persecution[103]; *apartheid*[104]; "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health"[105]. From the evidence collected by the United Nations and other organizations and analysed above, it emerges that all of these acts have been committed by the Israeli forces in Gaza. This is indisputable especially when reading the interpretation given by the drafters of the Rome Statute to the terms "persecution" and *apartheid*. According to Article 7.2.g), indeed, "'persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"[106].

2.5.1. Mens Rea - the subjective element and the context of systematic oppression

That the deprivation of fundamental rights inflicted against the Gaza population is "intentional", "severe" and "contrary to international law" has been extensively argued upon and demonstrated. The most controversial segment of the provision, however, is the investigation of the reasons behind the perpetration of the crimes being the mere "identity of the group or collectivity". It might be argued, indeed, that the reason behind the actions of the Israeli government is a purpose of expansion and annexation of territory, rather than of targeting the Palestinians as such. However, that is only partially true. From the facts analysed and the crimes perpetrated by the IDF, indeed, it is more reasonable to draw the conclusion that the plan behind Israel's actions is to achieve an only-Jewish populated Israel that would include the Palestinian land. In order to achieve this aim in the longer term, however, Jews had to be evacuated from Gaza in order to allow it to transform into the "open-air prison" that it has become. In 2005, indeed, under the order of Prime Minister Ariel Sharon, all Jewish settlements in Gaza – illegal under

[101] United Nations General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, art. 7.2.a).
[102] *Ibidem*, art. 7.1.a).
[103] *Ibidem*, art. 7.1.h).
[104] *Ibidem*, art. 7.1.j).
[105] *Ibidem*, art. 7.1.k).
[106] *Ibidem*, art. 7.2.g).

international law - were removed, and a number of 7000 Jewish residents were evacuated. At the time, this could have been read as a victory of the Palestinians. Analysed more carefully, however, this act can be regarded as the preliminary condition to be able to perpetrate the crimes planned against the population of Gaza. In other words, the Israeli government's decision was intended to avoid the risk of Jewish inhabitants to be affected by the blockade or targeted by the IDF's operations. It is, therefore, proof of the fact that Israel intended to target only the Arab segment of the population by virtue of their identity, and is therefore liable for persecution.

Article 7.2.h) of the Rome Statute, on the other hand, describes the crime of *apartheid* as "inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime"[107]. The presence of the elements of the crime of *apartheid*, with particular regard to the purpose of maintaining a position of domination, has been analysed above with reference to the International Convention on the Suppression and Punishment of the Crime of *Apartheid*. It has been corroborated that the aim behind Israel's acts of segregation is one of subjugation, not security, and that, therefore, these acts amount to a violation of the customary rule of *ius cogens* banishing crimes against humanity as codified in Article 7 of the Rome Statute.

In conclusion, given the facts analysed in the present chapter and the definition of crimes against humanity examined, it is hard to deny that the Israeli government is responsible for the perpetration of crimes against humanity on the territory of Gaza throughout the entire course of the blockade and during the military operations "Cast Lead" in 2009 and "Protective Edge" in 2014.

[107] United Nations General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, art. 7.2.h).

2.6. UNLAWFUL AND DEADLY – VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW BY HAMAS AND OTHER PALESTINIAN ARMED GROUPS

So far, the focus of this work has been on the violations of International Criminal and Humanitarian Law committed by the Israeli forces. The situation in Gaza, however, is very complex both politically and legally. The responsibility towards the population of Gaza as described by international law, indeed, does not belong only to Israel, as the overall occupying power, but also to Hamas, which is *de facto* responsible for the administration of Gaza. In light of this, it is dutiful to investigate and report the violations and abuses committed by members of Hamas against the civilian population, in order to verify at what level the obligation to protect the Gazan population has been disregarded by the primary holders of this responsibility.

According to a comprehensive report released by Amnesty International in March 2015 under the title "Unlawful and Deadly", "Palestinian armed groups have fired rockets and mortars from the Gaza Strip into Israel since 2001, intensively during some periods and at other times on a very occasional basis"[108]. Amnesty International has found evidence that 25 civilians, including four children, were killed by rockets and mortars launched from Gaza into the territory of Southern Israel. In particular, three civilians were killed during the course of operation "Cast Lead" in 2009 and four during operation "Pillar of Defence", in 2012[109].

Even though, from the evidence collected, it appears that the Palestinian armed groups have aimed at military objectives, highly imprecise weapons such as mortars and rockets must not be used to target military objectives located in proximity to civilian areas, as happened in this case[110].

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[108] Amnesty International, *Operation 'Cast Lead': 22 Days of Death and Destruction*, July 2009, p. 8. More specifically, according the report at page 14, "Palestinians armed groups fired 4,881 rockets and 1,753 mortars towards Israel between 8 July and 26 August 2014. At least 243 of these projectiles were intercepted by Israel's Iron Dome missile defence system, while at least 31 fell short and landed within the Gaza Strip", damaging civilian property and public buildings.

[109] *Ibidem*, p. 9. The report adds that: "Many other civilians have been injured, some of them very seriously, and civilian property in Israel – including homes, businesses, schools, other public buildings and vehicles – has been damaged or destroyed".

[110] Amnesty International, *Operation 'Cast Lead': 22 Days of Death and Destruction*, July 2009, p. 16: "Military objectives are located in close proximity to civilian areas in many parts of Israel. The headquarters of the Israeli army is in a densely populated area of central Tel Aviv".

2.6.1. The principle of distinction and the Palestinian armed groups' weapons

A corollary of the principle of distinction, which compels all parties to a conflict to distinguish between combatants and non-combatants, is the obligation to direct attack only against combatants, while civilians, meaning anyone who is not member of the armed forces, are protected from attacks unless and for such time as they take a direct part in hostilities[111]. Consequently, the principle of distinction entails the prohibition of indiscriminate attacks.

International Humanitarian Law defines as "indiscriminate" those attacks that target military and civilian objectives without distinction, either because they are not directed against a specific military objective or because they "employ a method or means of combat which cannot be directed at a specific military objective [or] the effects of which cannot be limited as required by international humanitarian law"[112]. A further corollary of this principle is the prohibition of weapons that are inherently indiscriminate, which are defined as "those that cannot be directed at a military objective or whose effects cannot be limited as required by international humanitarian law"[113].

The rockets launched by the Palestinian armed groups from the territory of Gaza are nothing but unguided projectiles, impossible to direct at specific targets. For this reason, they are inherently indiscriminate, "likely to injure and kill civilians and damage civilian property"[114], and their use in contrary to International Humanitarian Law. According to Article 8.2.b)xx) of the Rome Statute, moreover, "employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict" constitutes a war crime.

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[111] International Committee of the Red Cross (ICRC), *Geneva Conventions*, 12 August 1949, Protocol I, Article 51(3); Protocol II, Article 13(3); ICRC IHL Customary Rule 6.
[112] International Committee of the Red Cross (ICRC), *Geneva Conventions*, 12 August 1949, Protocol I, Article 51(4)(a); ICRC IHL Customary Rule 12.
[113] ICRC IHL Customary Rule 71.
[114] Amnesty International, *Operation 'Cast Lead': 22 Days of Death and Destruction*, July 2009, p. 17.

2.6.2. Summary justice and extrajudicial executions

In its very recent report on the crimes committed by Palestinian armed groups, titled "Strangling Necks", Amnesty International addresses the case of summary, extrajudicial executions committed by Hamas forces against Palestinians suspected of collaborating with the Israeli enemy.

According to Amnesty's conclusions, the victims of these crimes were at least twenty-three, five of which were shot dead by firing squad outside Katiba Prison on 5 August 2014[115] and six of which were extrajudicially executed in public on 22 August[116]. Unlawful and deliberate killings are a violation of a high number of provisions of Human Rights Law[117] and International Humanitarian Law. Indeed, it must be kept in mind that, even though Gaza has been under Israeli occupation since 1967, the rules of International Humanitarian Law are applicable to all parties to a conflict, including armed groups. As correctly stated in Amnesty's report, moreover, "in the case of Gaza, such parties include the Hamas *de facto* administration and Palestinian armed groups that engage in armed conflict with Israel"[118].

Article 3 common to the Four Geneva Conventions, in particular, codifies standards of humane conduct that include the obligation to treat all persons placed *hors de combat* – by reason of sickness, wounds, detention or any other – humanely. The provision further specifies a number of acts that are prohibited, which include "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture"[119] and "outrages

[115] Amnesty International, *Strangling Necks*, May 2015, p. 14.

[116] *Ibidem*, p. 5. At page 19, the report describes the execution in detail, as described by eyewitnesses: "On the morning of 22 August, Hamas said in a statement that it had established 'revolutionary courts' and sentenced an undisclosed number of 'collaborators' to death. Masked men read out the statement at the al-Omari mosque during Friday prayers, following which other masked armed men publicly executed six men outside the mosque in front of hundreds of spectators. According to witnesses interviewed by Amnesty International, as worshippers were leaving the mosque at around 1.30pm, between 15 and 20 armed men dressed in black and wearing masks suddenly appeared amid the crowd dragging six men whose heads were covered with hoods. The men were made to kneel near a wall close to the mosque facing the crowd. One of the armed men then used a pistol to shoot one bullet into the head of each man, before spraying their corpses with fire from an AK-47 automatic rifle that he reloaded several times".

[117] Among others, for example, those of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, and the Convention against Torture.

[118] Amnesty International, *Strangling Necks*, May 2015, p. 34.

[119] International Committee of the Red Cross (ICRC), *Geneva Conventions*, 12 August 1949, common art. 3.a).

upon personal dignity, in particular humiliating and degrading treatment"[120]. According to the evidence collected by Amnesty International, Hamas and other Palestinian armed groups have committed serious violations of Article 3 common to the Four Geneva Conventions and are therefore liable for war crimes under Article 8 of the Rome Statute[121].

As noted by some media, in Hamas's eyes, the Amnesty report is dangerous, "as it equates the Palestinians with the Israelis, the executioner with the victim, the killer with the killed [and] as it further marginalizes Hamas from the international community"[122]. Despite the reality of the fact that the Israeli blockade and Operation Protective Edge have caused an incredible amount of suffering, death, destruction and displacement to the population of the Gaza Strip, however, the violations committed by the Israeli forces cannot justify the violations committed by the Palestinian armed groups, even if we considered them as acts of resistance against oppression. Violations by one party, indeed, can in no case justify violations by its opponents. This perverse logic, promoted by decades of impunity, seems to be what animates both sides of this conflict, constituting the fuel of an escalating "cycle of violations for which civilians on all sides have been paying such a heavy price"[123].

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[120] International Committee of the Red Cross (ICRC), *Geneva Conventions*, 12 August 1949, common art. 3.c).

[121] In the final part of the report, moreover, Amnesty underlines that "the Hamas *de facto* administration in Gaza has not only failed to take action to stop and prevent extrajudicial executions and other serious human rights abuses perpetrated by its forces, but sought to justify and even facilitated or encouraged them. Indeed, by affording the perpetrators total impunity, the Hamas authorities have contributed to the creation of a climate of fear and intimidation that deters many victims and their families from reporting or even disclosing abuses committed against them, suggesting that the true extent of abuses may be significantly greater than that documented by Amnesty International and other human rights groups. (…) The unlawful killings of alleged collaborators and other serious abuses during Operation Protective Edge that this report documents follow a familiar pattern echoing previous abuses committed by Hamas and Palestinian armed groups during Israel's military offensives against Gaza in 2008-2009 and 2012". Amnesty International, *Strangling Necks*, May 2015, p. 39.

[122] A. A. Admer, "Amnesty Report causes uproar within Hamas", 3 June 2013, http://www.al-monitor.com/pulse/originals/2015/06/palestine-gaza-hamas-israel-amnesty-international-report.html (accessed 4 June 2015).

[123] Amnesty International, *Operation 'Cast Lead': 22 Days of Death and Destruction*, July 2009, p. 60.

CHAPTER 3 – SECURITY COUNCIL, WORLD ORDER AND RtoP

"But understand that there's a lot of cruelty around the world. We're not going to be able to be everywhere all the time". Senator Barack Obama

3.1. THE PROBLEMATIC IMPLEMENTATION OF RtoP

It must be reiterated that the present work does not deal with issues of *ius ad bellum* with regard to the Israeli-Palestinian conflict. The focus of the present analysis, indeed, is instead on *ius in bello*, which concerns the way in which all parties conduct hostilities rather than the issue of who is justified to use force. The reasons of the conflict and the way it originated are, in fact, irrelevant for the purpose of verifying whether violations of International Humanitarian and Criminal Law have occurred and, therefore, whether the regime of RtoP theoretically applies. It must be remembered, however, that the purpose of an armed conflict is to militarily defeat the enemy. This, as recognized by the laws of armed conflict, makes the act of murder lawful under specific circumstances, and even foresees that the eventual occurrence of civilian death can, under specific circumstances, be justified as "collateral damage" for the achievement of military goals. In other words, although every civilian death is certainly a tragedy, equally certainly not every civilian death is a crime under International Humanitarian Law.

The law, however, requires all parties to a conflict to fulfil certain obligations and abide by specific rules. The belligerent parties, indeed, must conform to the principles of military necessity (to overcome the enemy), humanity, distinction (between military and civilian targets) and proportionality. Failure to comply with any of these principles amounts to a violation of International Humanitarian Law and therefore to a war crime (and, in certain cases, to crimes against humanity).

As seen in the previous chapter of the present study, a variety of official sources of evidence exists that suggests that both the Israeli government and Hamas and other Palestinian armed groups are allegedly responsible for war crimes and crimes against humanity against the population of Gaza[124], and according to the ICISS Report on the

[124] Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict, A/HRC/29/52, 24 June 2015, http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx (accessed 24 June 2015).

Responsibility to Protect, this should be more than enough for the RtoP doctrine to apply. Yet, no step has been taken in this direction and the population of Gaza is left alone in a situation of great suffering and harm. Once more, the world seems to be indifferent towards the cries for help of the civilians and inclined to overlook the humanitarian emergency in the region, proving that the words "never again", so many times invoked loudly by the supposed advocates of justice and peace, are more often than not nothing more than a mere slogan. What are the problems with the implementation phase of RtoP? Why is the doctrine not applied to Gaza? This is what the present chapter is about to explore.

3.2. THE "MIXED MOTIVES" CONTRADICTION

The first aspect to be analysed is the so-called "mixed motives" problem. As observed by Paris, indeed, "the idea that countries have a duty to safeguard their own populations from extreme harm and that external intervention for humanitarian purposes may sometimes be warranted continues to enjoy widespread support in international affairs"[125], but the way in which this idea is ultimately translated into practice is very different. In reality, in fact, it is hard to imagine a military intervention or the implementation of a non-military measure by virtue only of humanitarian considerations. The considerations involved will always amount to a mix of motives that will almost undoubtedly include a certain level of self-interest. This element, however, is not necessarily a negative aspect and could rather be, on the contrary, desirable if not indispensable. According to Paris, for example, "unless humanitarian operations are at least partly rooted in selfinterest, intervening states may lack the political commitment and resolve to complete the humanitarian tasks they undertake, especially if these involve combat"[126].

These types of operations, however, build their credibility and legitimacy on their altruistic nature and assertive solidarity purpose. How can they reflect (and even require)

[125] R. Paris, "The 'Responsibility to Protect' and the Structural Problems of Preventive Humanitarian Intervention", *International Peacekeeping*, vol. 21, no. 5, 2014, p. 572.

[126] *Ibidem*, p. 573.

See also J. Pattison, *Humanitarian Intervention and the Responsibility to Protect – Who Should Intervene?*, Oxford, Oxford University Press, 2010, p. 59: "It may be morally desirable that an intervener *is* motivated by a degree of self-interest. A strong element of self-interest, for instance, could make it more likely that the intervener will secure the necessary commitment for effective humanitarian intervention".

such a strong element of self-interest by the interveners? There seems to be an intricate contradiction at the very heart of RtoP, which is what Paris names "the simultaneous necessity and preclusion of self-interest"[127]. The norm's implementation, therefore, is very "unlikely to be separated from competing geopolitical interests"[128], as the opposite reactions to the two cases of Libya and Syria have very vividly shown[129]. However, the fact that political will is the primary element that influences the states' decision whether or not to intervene in cases of humanitarian disaster does not necessarily imply that the norm itself is meaningless and that the regime is doomed to fail. On the other hand, it should make us reflect on the dynamics of power in a constantly changing world, and how best to ensure that this power is addressed towards the needs of the most vulnerable people and that the interests of these populations in need are prioritised in the political agenda.

The tragic events of the 1990s and some of the Security Council's resolutions enacted in response to a number of crises reflect what Weiss calls a humanitarian "impulse", which is "the laudable desire to help fellow human beings threatened by armed conflict"[130]. Despite the political momentum and the rhetorical commitment, however, it soon became clear that we were ready to rescue "some, but not all war-affected populations"[131], and that, for that to happen, humanitarian and strategic interests needed to coincide.

[127] R. Paris, "The 'Responsibility to Protect' and the Structural Problems of Preventive Humanitarian Intervention", *International Peacekeeping*, vol. 21, no. 5, 2014, p. 574.

[128] M. Almustafa, E. Cinq-Mars, M. Redding, "The Responsibility to Protect: Ensuring the Norm's Relevance after Libya, Côte d'Ivoire and Syria", *CIGI Junior Fellow Policy Brief*, no. 10, 2013, p. 5.

[129] On the case of Libya, Hehir observes that "to highlight that national, and personal, interest influenced the intervention in Libya does not mean that one adheres to a conspirational view whereby the "West", indifferent to humanitarian crisis, hatched a nefarious plan to plunder Libya's oil fields. Rather, a combination of factors, including events on the ground; the favourable regional disposition; Libya's geostrategic importance; and Qaddafi's pariah status, reputation for violence, and exceptional public declaration of murderous intent – plus doubtless myriad domestic considerations – combined to induce the leaders to push for action". A. Hehir, "The Permanence of Inconsistency - Libya, the Security Council, and the Responsibility to Protect", *International Security*, vol. 38, no. 1, 2013, p. 156.

On the other hand, regarding Syria, Almustafa, Cinq-Mars and Redding rightly observe that "the inability of the involved actors to secure a consensus on resolving the Syrian crisis and protecting civilian population is their failure, not the failure of the norm". M. Almustafa, E. Cinq-Mars, M. Redding, "The Responsibility to Protect: Ensuring the Norm's Relevance after Libya, Côte d'Ivoire and Syria", *CIGI Junior Fellow Policy Brief*, no. 10, 2013, p. 5.

[130] T. G. Weiss, "The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era", *Security Dialogue*, vol. 35, no. 2, 2004, p. 147.

[131] *Idem*.

Since "the humanitarian imperative would entail an obligation to treat all victims similarly and react to all crises consistently"[132], while the reality is that politics and political interests are often the most relevant elements to take decisions, Weiss concludes that RtoP is based on a humanitarian "impulse" rather than "imperative"[133]: permissive rather than peremptory, political rather than normative.
It is hard to contradict Weiss in front of the evidence of the fact that costs, necessary resources and geopolitical interests all have a role to play when it comes to the (in)action of the international community ahead of situations of severe harm and suffering. However, it seems too fatalistic (and rather unhelpful) to take awareness of the reality as it is without pushing for change and improvement. In other words, as Weiss himself asked in a subsequent article, "is it possible to rediscover the rhetorical passion and commitment to humanitarianism that followed our collective *mea culpa* after the tragedy in Rwanda?"[134].

3.3. THE ISSUE OF "RIGHT AUTHORITY" IN A CONSTANTLY CHANGING WORLD ORDER

There can be little doubt that the concept of RtoP needs some deep rethinking. Rather than as a norm that imposes duties, it is so far been conceived as a norm that confers powers. If we conceive the regime as normative in this sense, then it needs to be clear what are the standards and criteria that must be used in the exercise of this discretionary power by the executive authorities (and who these mandated authorities are or ought to be). Indeed, "to date, the discretionary mandate to undertake executive action in order to further the goal of protecting civilians has been exercised in a selective fashion"[135].
The reason why the implementation of RtoP is a matter of such complicated and delicate nature is that it deals with a very broad conception of international order and with the complex realities of politics and power. In the words of Newman, indeed, "RtoP exposes

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[132] T. G. Weiss, "The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era", *Security Dialogue*, vol. 35, no. 2, 2004, p. 147.
[133] *Idem*.
[134] T. G. Weiss, "RtoP Alive and Well after Libya", *Ethics & International Affairs*, vol. 25, no. 3, 2001, p. 290.
[135] A. Orford, "Rethinking the Significance of the Responsibility to Protect Concept", *American Society of International Law Proceedings*, vol. 106, no. 27, 2012, p. 30.

important tensions because it comes at a time when attitudes towards sovereignty and human rights are evolving, and when the distribution of political power is in transition. This relates not only to human rights but also to the nature of the international system"[136]. If it is true that "R2P is a reflection of an emerging assertive solidarism in international society – a 'paradigm shift' from the Westphalian notion of non-interference towards non-indifference"[137], it is also true that these solidarism and non-indifference pass through Chapter 6 of the ICISS Report on the Responsibility to Protect, which deals with the issue of "right authority".

According to it, indeed, "the UN, whatever arguments may persist about the meaning and scope of various Charter provisions, is unquestionably the principal institution for building, consolidating and using the authority of the international community"[138] and "collective intervention blessed by the UN is regarded as legitimate because it is duly authorized by a representative international body; unilateral intervention is seen as illegitimate because self-interested. Those who challenge or evade the authority of the UN as the sole legitimate guardian of international peace and security in specific instances run the risk of eroding its authority in general and also undermining the principle of a world order based on international law and universal norms"[139].

On these bases, the Report clarifies that prior authorization of the Security Council is a necessary requirement in all actions falling within the scope of RtoP that include the use of force. The World Summit Outcome Document of 2005, moreover, very similarly recognizes the Security Council of the United Nations as the sole arbiter of when the international community should react to atrocity crimes[140].

This, however, poses a number of crucial problems. The question of authorization is, indeed, very controversial, and has divided the scholarly world in those considering the Security Council's authorization as an absolute requirement and those that "suggest that

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[136] E. Newman, "R2P: Implications for World Order", *Global Responsibility to Protect*, vol. 5, 2013, p. 242.

[137] *Idem*.

[138] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001, http://www.responsibilitytoprotect.org/index.php/about-rtop/core-rtop-documents, (accessed 30 June 2015), p. 48, para. 6.8.

[139] *Ibidem*, p. 48, para. 6.9.

[140] United Nations General Assembly, *2005 World Summit Outcome*, 24 October 2005, A/RES/60/1, http://www.ifrc.org/docs/idrl/I520EN.pdf (accessed 08 July 2015), p. 30, para. 139.

this obligation is not absolute in cases of exceptional humanitarian emergencies”[141]. According to Badescu, in particular, “those arguing against an absolute requirement for UN authorization turn to customary law to support their stance in favour of the potential legality of interventions proceeding outside the Charter’s framework”[142], and “the record of interventions since the 1990s made many scholars argue that a basis exists already in customary international law to support interventions without UN authorization”[143].

The requirement for a “right authority” to authorize a coercive measure to protect civilians arises from understandable and indispensable concerns with regard to avoiding excessive flexibility in the right to interfere in a state’s domestic affairs. Even though these concerns are essential, however, the question remains as to whether the Security Council is the most appropriate body to incarnate such “exclusive source of legitimizing authority”[144]. The problem at stake, indeed, is that the Security Council is a political body that operates at the heart of a (aspiringly) legal regime. Although mandated to represent and act on behalf of the international community, indeed, the Security Council is constituted by representatives of a number of states that clearly all hold particular national interests. According to Hehir and Land, therefore, this tension between the nature of the mandate and the body’s political character has “often inhibited the enforcement of the very international laws the body is charged with enforcing”[145], in particular with respect to human rights. “The existence of a body mandated to enforce law (…) is essential for any legal system”[146], but the Security Council is not an impartial judicial body and, since its decisions are shaped by political considerations and negotiations, its undeniable record of inconsistency is almost inevitable.

The primary factor that ultimately influences the decisions of the Security Council is undoubtedly the problematic veto power of the so-called P5 (China, France, Russia, the United Kingdom and the United States) and the absence of binding rules for its exercise.

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[141] C. G. Badescu, “Authorizing Humanitarian Intervention: Hard Choices in Saving Strangers”, *Canadian Journal of Political Science*, vol. 40, no. 1, 2007, p. 52.
[142] *Ibidem*, p. 61.
[143] *Ibidem*, p. 52.
[144] B. W. Jentleson, “The Obama Administration and R2P: Progress, Problems, and Prospects”, *Global Responsibility to Protect*, vol. 4, 2012, p. 54.
[145] A. Hehir and A. Lang, “The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect”, *Criminal Law Forum*, no. 26, 2015, p. 159.
[146] *Idem.*

As a consequence, the permanent members hold a "discretionary entitlement" that is the ultimate cause of the Council's inconsistent response to intrastate crises, given the fact that, as history amply demonstrates, "the P5's response to any particular alleged or clear breach of the law is entirely a function of the members' respective interests"[147].
As observed by Hehir, therefore, "the application of R2P is (…) ultimately dependent on whether the members of the P5 have a collective interest in – or are at least not opposed to – halting a particular looming or actual mass atrocity"[148]. In other words, the fact that the representatives of the P5 act on the bases of their particular national interests is the primary explanation of the Security Council's record of inconsistency. Therefore, given the fact that the founding documents of RtoP have not introduced new institutional arrangements nor altered the existing ones, and that self-abnegation by the Security Council is highly implausible, the immediate future of RtoP ultimately depends on a most responsible use of the veto power. If not to be outlawed completely, a beginning point to overcome scepticism and mistrust "would be restrictions on the use of the veto when it comes to matters of civilian protection"[149]. This is the indubitably unavoidable primary condition to avoid questioning of the regime as just another form of Western colonialism.

3.4. THE ISSUE OF AUTHORIZATION BY THE SECURITY COUNCIL

Any long-term reform, however, needs to be broader and far more courageous. Even though most illustrations of RtoP tend to discourage the possibility of intervention undertaken without authorization by the Security Council, indeed, the logic behind the emergence of the doctrine seems to suggest that such authorization should not be considered dispositive. As observed by Brooks, for example, "if sovereignty involves a responsibility to protect [populations from a certain kind of egregious harm], and a state's failure to protect its own population triggers a responsibility to protect in other states, this responsibility must logically exist whether or not a politicized and highly veto-prone body

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[147] A. Hehir, "The Permanence of Inconsistency – Libya, the Security Council, and the Responsibility to Protect", *International Security*, vol. 38, no. 1, 2013, p. 152.
[148] *Ibidem*, p. 152.
[149] L. Axworthy and A. Rock, "R2P: A New and Unfinished Agenda", *Global Responsibility to Protect*, vol. 1, 2009, p. 61. In the article, the authors also observe that: "Security Council use of the veto to constrain UN action in places requiring intervention, even in cases of the most urgent preventive kind, is an abuse of the veto privilege and needs to be challenged openly and judicially".

chooses to acknowledge it or authorize particular action"[150]. Otherwise, the purpose of humanitarianism and solidarity that lies at the heart of the doctrine is susceptible to being undermined by the pursuance of national interests by the world's dominant states.

RtoP, in fact, would be a very weak and meaningless norm if lack of United Nations' authorization could be always claimed by states as a justification to escape their obligations. It seems, therefore, much more reasonable to believe that "if an obligation to respond to human tragedy exists with the Council's blessing, it also does without one"[151]. The main question, here, is what should happen if – as in the case of Gaza – both the national government and the Security Council fail to fulfil their responsibility to protect. In other words, there seems to be a legal vacuum with regard to the possibility of bypassing the Security Council in situations of inaction or lack of agreement. Perhaps, since "there is growing consensus that the requirement for UN authorization obstructs the protection of basic human rights in internal conflicts"[152], it could be time to reconsider and reform the existing legal framework of international law and finding a new source of right authority. As the ICISS itself observes, indeed, it is likely that there may be "circumstances when the Security Council fails to discharge what this Commission would regard as its responsibility to protect, in a conscience-shocking situation crying out for action. It is a real question in these circumstances where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by"[153].

3.5. INTERRELATION BETWEEN INTERNATIONAL LAW AND POLITICS – THE ISSUE OF POSITIVE OBLIGATION AND NONCOMPLIANCE

It would be easy to categorize the problematic implementation of RtoP as an issue dependant on the divergent views on the doctrine and on the lack of consensus on the matter of limitation to sovereignty and interference in domestic affairs. However, even though it is undeniable that "the divergence of positions is rooted in different approaches

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[150] R. Brooks, "Be Careful What You Wish for: Changing Doctrines, Changing Technologies and the Lower Cost of War", *Georgetown Public Law and Legal Theory Research Paper* No. 13-045, 2012, p. 3.
[151] C. G. Badescu, "Authorizing Humanitarian Intervention: Hard Choices in Saving Strangers", *Canadian Journal of Political Science*, vol. 40, no. 1, 2007, p. 52.
[152] *Ibidem*, p. 53.
[153] ICISS Report, p. 55, para. 6.37.

towards the role of international law, its sources, methods and its limits, which have been inherent in it for decades"[154], it is manifest that this divergence arises from the undeniable truth that law and politics will always be interlaced, especially at the international level. It is for this reason that, as observed by Stahn, "the stance on intervention is (…) to some extent a question of choice, to which there is no clear-cut answer. It depends not only on the object, for example, the circumstances of the respective case, but also the observational standpoint of the subject addressing the problem"[155]. As seen above, the "subject addressing the problem" is the Security Council and, in consideration of the veto power mechanism, the P5 in particular. On the basis of the mixed motives problem, which foresees self-interest as a precondition for intervention, RtoP appears as a self-contradictory semi-norm that is said to be based on solidarity and humanitarian impulse but is, instead, manipulated and moulded to serve the political interests of Russia, China, France, the United Kingdom and the United States.

At the moment, therefore, a norm that emerged as an instrument for the protection of human rights across the globe is still very vulnerable to abuse, and risks becoming a tool in the hands of the most powerful states to achieve their own goals rather than higher purposes of peace and justice. Of course, this would also be the case if there were no written requirements and conditions and if intervention and protection were left to the discretion of the single states without a centralized mechanism of evaluation and joint decision. In that scenario, in fact, the risks of abuse and neo-colonialism would arguably be even higher and more threatening, because the single nations would become the sole arbiters of the legality of their pleas to intervention.

This is exactly what causes reasonable fears and anxiety among many United Nations members[156], and is the reason why a comprehensive and innovative document such as the ICISS Report on Responsibility to Protect was written and approved. The emergence of the norm is therefore a fundamental and positive step towards a new and more just system of protection.

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[154] C. Stahn, "Between Law-Making and Law-Breaking: Syria, Humanitarian Intervention and 'What the Law Ought to Be", *Journal of Conflict & Security Law*, 2013, p. 9.
[155] *Ibidem*, p. 10.
[156] *Ibidem*, p. 12.

The problem, however, lies in the tension between the proclaimed idealistic aim of ensuring security of innocent civilians and the relationship of interdependence between the implementation of the norm and the political will of the P5.
The reality of politics and power, as a matter of fact, is what continues to render RtoP as a permissive rather than an obligatory framework, the success and impact of which depends upon the condition that the humanitarian needs of a particular civilian population coincide with the underlying political interests of the world's biggest powers (as in the case of Libya). Therefore, if we want to encourage and pursuit the (rather novel) vision according to which certain duties are connected to human security and a responsibility exists to take action against gross human rights violations[157], then this vision needs to move ahead from this rather vague and non-normative concept of solidarity towards a strictly legal system envisaging positive obligations.
If, indeed, there is widespread agreement that sovereignty can and should be limited in the face of severe human suffering and international crimes, there is still too little understanding of *how* the residual responsibility of the international community should be implemented. In particular, if it is well-established that "inaction by the host state can be remedied through collective action"[158], the crucial issue that is yet to be addressed concerns the (rather common) eventuality of states or international authorities not living up to their residual responsibility to protect: should such omissions be subject to sanction? In other words, as observed by Stahn, "if the responsibility to protect were (…) a primary legal norm of international law, it would be logical to assume that such violations should entail some form of legal sanction in case of noncompliance"[159]. Yet, none of the documents regarding RtoP determines whether inaction by international organizations entails international legal obligations, and the enforcement of RtoP remains dependant on political will, which is, by definition, changeable and context-specific.
The consequence of this is that, as observed by Hehir and Lang, "perpetrators of systematic human rights abuses can shield themselves from external censure if they have

[157] C. Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?", *American Journal of International Law*, vol. 101, no. 99, 2007, p. 115.
[158] *Ibidem*, p. 117.
[159] *Idem*.

cultivated an alliance with one of the veto-wielding P5"[160]. This runs counter to the very purpose of the doctrine, which is the protection of *individuals*, and enhances, instead, a world order in which certain *powers* can selectively increment their supremacy by manipulating the rules of international law.

If it is true, indeed, that "debates have long raged on whether international law is actually law"[161], it is also true that these debates will not move in a positive direction until it will be proven that international law is more than rhetorical speeches and political affairs. If we truly want RtoP to become a legal order rather than a guideline for political discourse, then selectivity needs to be removed from the enforcement of the doctrine, and legal consequences for noncompliance must be foreseen. This is the only way in which it will be possible to ensure that no more lives be unnecessarily lost over senseless violence.

3.6. WHY RtoP IS NOT IMPLEMENTED IN GAZA

These issues constitute the reason why the population of Gaza is still suffering. As previously examined, indeed, there are solid grounds to believe that Israel has violated the principles of distinction and proportionality under International Humanitarian Law, in complete disregard of the rights to life and security of the Palestinian population. Similarly, it is well established that "there is no legal explanation for the regime of deprivation the Palestinian population is experiencing under Israeli administration"[162]. Yet, the so-called "international community", represented by the United Nations, stands by inactively, demonstrating that RtoP is still a permissive framework – whereby intervention is allowable – rather than an obligatory condition – "whereby each individual state as well as the collective international community is obligated to respond to mass violence"[163].

This demonstrates once again that, while the doctrine envisions a number of actions and policies to respond to international crimes and mass suffering, with a strong laudable

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[160] A. Hehir and A. Lang, "The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect", *Criminal Law Forum*, no. 26, 2015, p. 175.
[161] *Ibidem*, p. 158.
[162] F. d'Alessandra, "Israel's Associated Regime: Exceptionalism, Human Rights and Alternative Legality", *Utrecht Journal of International and European Law*, vol. 30, no. 79, 2014, p. 44.
[163] J. Western, "Humanitarian Intervention, American Public Opinion, and the Future of R2P", *Global Responsibility to Protect*, vol. 1, 2009, p. 327.

focus on prevention, its real test is undoubtedly the third pillar, and in particular the possibility of coercive military intervention. It is mostly in this domain, indeed, that lack of consensus and absence of clear rules render the implementation of the norm problematic and selective.

This is not to say, however, that the response to the injustice and atrocities being committed in Gaza needs to be military. On the contrary, it is more reasonable to believe that a peaceful agreement finally envisioning a two-state solution is the only plausible answer. The question is, therefore, why the international community has not pushed Israel to move forward in this direction and put an immediate end to the fighting - or at least respect the laws of war and terminate the blockade in order to avoid further death and destruction -, as the norm of RtoP would impose.

The answer to this question is very straightforward and linked to the interrelation between law and politics analysed above. The reason why the international community does not intervene to stop Israel and the Palestinian armed groups from committing further atrocities, indeed, is that any measure enacted through the Security Council would have to circumvent the veto of the United States, which is Israel's historical protective ally.

As observed by Western, in fact, in order for a norm of international law to be successful, the support of the most powerful states in the international system is required[164]. Given that RtoP is being put forward as a norm related to the use of military power, the strategic interests of the United States – as the country with a preponderance of military power in the international system – currently have an enormous impact on its implementation[165]. It is hard not to agree with Weiss when he observes that "the exercise of military power should be based on UN authority instead of US capacity. But the two are inseparable. As its coercive capacity is always on loan, UN-led or UN-approved operations with substantial military requirements take place only when Washington approves or at least

[164] J. Western, "Humanitarian Intervention, American Public Opinion, and the Future of R2P", *Global Responsibility to Protect*, vol. 1, 2009, p. 328.
[165] *Idem*.
See also J. Graubart, "R2P and Pragmatic Liberal Interventionism: Values in the Service of Interests", *Human Rights Quarterly*, vol. 35, no.1, 2013, p. 86: "The United States has been the 'principle driver of the Security Council's agenda and decision' in the post-Cold War era".

acquiesces"[166]. However, it is harder to share his view that "the notion of reforming the UN Security Council is an illusion; the real challenge is to identify crises where Washington's tactical multilateralism kicks in"[167].

This position, indeed, portrays the political will of the P5, and in particular of the United States, as inevitably entrenched in the mechanisms of intervention under RtoP. Thus, it contravenes the very purpose of a doctrine that emerged precisely as a response to the Security Council's failure to address and respond to the tragic humanitarian crises of the 1990s, in particular Rwanda and Kosovo. It seems at this point contradictory that a legal framework created to address and resolve the uneven performance of the Security Council in maintaining international peace and security, be constructed around the decisions and negotiations within this same body. It was, indeed, the ICISS Report itself to recognize the "inherent institutional double standards with the Permanent Five veto power"[168] and the "unrepresentative membership"[169] of the Security Council. The Commission, however, did not go so far as to question its authority to decide intervention, affirming instead that "there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes"[170]. Yet, is that the truth?

3.7. WHAT IS THE SOLUTION? THE "UNITING FOR PEACE" PROCEDURE AND THE HYPOTHESES OF REFORMING OR BYPASSING THE SECURITY COUNCIL

It is undeniable that reforming the Security Council by eliminating the veto and increasing membership would be a considerable step forward. However, the difficulties of reforming a historical body that does not anymore reflect the actual distribution of power in the 21st century are enormous. Not only self-abnegation is indeed impossible, but also every option seems to open a new Pandora's box[171]. A Security Council with a larger number of members, indeed, would not necessarily entail an improvement in terms of

[166] T. G. Weiss, "The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era", *Security Dialogue*, vol. 35, no. 2, 2004, p. 141.
[167] *Ibidem*, p. 137.
[168] ICISS Report, p. 49, para. 6.13.
[169] *Idem*.
[170] *Ibidem*, para. 6.14.
[171] T. G. Weiss, "The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era", *Security Dialogue*, vol. 35, no. 2, 2004, p. 145.

effectiveness, since "the group would be too large to conduct serious negotiations, and still too small to represent the UN membership as a whole"[172]. Moreover, the hypothesis of an expansion that would include the underrepresented "global South" seems too rhetorical and sterile to be authentic[173].

However, the fact that the P5 act on the basis of their respective national interest, and that the hypotheses of reform of the Security Council have not been followed through so far, does not render RtoP moribund[174]. The key issue to be addressed, in fact, is how else to transform RtoP from "a loud voice in a large, disparate, chanting crowd"[175] of multiple factors affecting the decision-making calculus of states into the main framework to influence their policies and actions.

It is true that, as an alternative to the Security Council's decision-making process, the ICISS report foresees instances in which the General Assembly can take decisions to intervene, with a majority of two thirds, when the Security Council is unable or unwilling to authorize action. This emergency procedure is called "Uniting for Peace" and, according to the Commission, "would provide a high degree of legitimacy for an intervention which subsequently took place, and encourage the Security Council to rethink its position"[176].

It is the Report itself, however, to recognize the difficulty for the General Assembly to find consensus and put together a two-thirds majority "in a political environment in which there has been either no majority on the Security Council, or a veto imposed or threatened by one or more permanent members"[177]. This viewpoint mirrors the observation made by Brooks, according to whom "the politics that paralyze any decision within the Security Council would tend to have similar or worse effects on the General Assembly"[178].

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[172] T. G. Weiss, "The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era", *Security Dialogue*, vol. 35, no. 2, 2004, p. 145.
[173] *Idem.*
[174] A. Hehir, "The Permanence of Inconsistency – Libya, the Security Council, and the Responsibility to Protect", *International Security*, vol. 38, no. 1, 2013, p. 152.
[175] *Ibidem*, p. 159.
[176] ICISS Report, p. 53, para. 6.30.
[177] *Idem*.
[178] R. Brooks, "Be Careful What You Wish for: Changing Doctrines, Changing Technologies and the Lower Cost of War", *Georgetown Public Law and Legal Theory Research Paper* No. 13-045, 2012, p. 59.

The Commission, however, appears optimistic, or rather naïve, in its belief that, in any case, "the mere possibility that this action might be taken will be an important additional form of leverage on the Security Council to encourage it to act decisively and appropriately"[179].

With the limits of this residual procedure being evident, it remains to be established what happens when, in front of the inability or unwillingness of a single state to protect its own population and with the responsibility to protect passing on to the international community, the P5 act as "irresponsible sovereigns" themselves and obstacle the implementation of such responsibility. In other words, the question remains as to whether the Security Council is, or should be, "the only institution with the right to make decisions on interventions for human protection purposes"[180]. Moreover, the political nature and lack of efficacy of this body are solid sources of doubt as to whether authorization by the Security Council should (continued to) be considered an indispensable factor for the legitimacy of the intervener[181].

According to some, an ultimate solution to these complex issues is far from being reachable, and "a case-by-case treatment may ultimately provide a better methodology than a change to existing primary norms to accommodate the problems that have been inherent in formulation of the doctrine for centuries"[182].

However, it is hard to agree with this view. A "case-by-case treatment", indeed, with its historical consequences of opposed reactions to the tragedies of the 1990s and the accusations of incoherence and political double standard, is exactly what has caused doubts about the efficacy of the norm of RtoP and has rendered its implementation problematic. It seems, therefore, that what is needed now is the exact opposite, that is a shared agreement on the criteria and requirements of this emerging norm and a uniform and coherent application of its means and purposes.

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[179] ICISS Report, p. 53, para. 6.30.

[180] J. Moses, "Sovereignty as Irresponsibility? A Realist Critiques of the Responsibility to Protect", *Review of International Studies*, vol. 39, no. 1, 2013, p. 128.

[181] J. Pattison, *Humanitarian Intervention and the Responsibility to Protect – Who Should Intervene?*, Oxford, Oxford University Press, 2010, p. 57.

[182] C. Stahn, "Between Law-Making and Law-Breaking: Syria, Humanitarian Intervention and 'What the Law Ought to Be'", *Journal of Conflict & Security Law*, 2013, p. 5.

CONCLUSION

"Palestine is at the heart of the problem. There can be no peace in the region until the Palestinians have justice"[183].

The initial question the present work intended to investigate was why the emerging norm of Responsibility to Protect is not applied to the context of Gaza, where the population is withstanding undeniable suffering and is subject to violations of human rights and dignity. The present essay has argued, indeed, that the air, land and sea blockade inflicted on the Gaza Strip by Israel since 2007 constitutes collective punishment in violation of Article 33 of the IV Geneva Convention, and that the legal regime imposed on the population is very similar to *apartheid*, which is recognized as a crime under International Law and outlawed by the International Convention on the Suppression and Punishment of the Crime of *Apartheid*. Besides, some of these violations constitute crimes against humanity under Article 7 of the Rome Statute of the International Criminal Court.

The blockade, the occupation and the violations that these entail, however, are only the context of further and even more devastating crimes and atrocities. According to the Report "Operation 'Cast Lead': 22 Days of Death and Destruction" by Amnesty International, and to the so-called "Goldstone Report" by the fact-finding mission on Gaza established by the United Nations, indeed, Israel carried out indiscriminate, disproportionate, unjustified and deliberate attacks against civilians during operation "Cast Lead" in 2009. Moreover, it has caused unlawful and wanton destruction not justified by military necessity and constituting an attack on the foundations of the civilian life in Gaza, deliberately and repeatedly failing to distinguish between civilians and combatants. It is, therefore, liable for the violation of the fundamental principles of distinction and proportionality under International Humanitarian Law, and for war crimes. Furthermore, according to the International Federation for Human Rights and to the United Nations Office for the Coordination of Humanitarian Affairs, similar crimes and violations have been committed throughout operation "Protective Edge", carried out

[183] E. McCann, "Failing the Palestinians opens door to radicals", *The Irish Times,* 9 July 2015, http://www.irishtimes.com/opinion/failing-the-palestinians-opens-door-to-radicals-1.2277868, (accessed 10 July 2015).

in 2014 and considered to be the deadliest and most devastating escalation since the beginning of the occupation in 1967, in consideration of the number of casualties and IDPs.

Violations of the laws of war, however, have not been committed by one side of the conflict only. As seen in the second chapter, in fact, crimes under IHL perpetrated by Hamas and other Palestinian armed groups include the use of inherently indiscriminate weapons and extrajudicial and summary executions of individuals suspected of collaborating with Israel. These unlawful acts have been documented by the Report "Strangling Necks" by Amnesty International and by the United Nations[184], and amount to violations of the Geneva Conventions and consequently to war crimes. Having established this, the question arises as to why the international community is not intervening to put an end to atrocities and hold the perpetrators of these crimes accountable.

Throughout the present analysis, it has been established that, although the regime of RtoP foresees the enactment of a range of various measures to respond to human suffering – with a solid and commendable emphasis on prevention -, the most controversial aspect of the doctrine is undoubtedly the reaction pillar. This element, indeed, involves coercive intervention in a situation of ongoing conflict and mass suffering, and is the primary cause of reluctance by states towards full acceptance of the emerging legal regime. Being limited to the most extreme and dramatic cases, anyhow, there is no doubt that the third pillar is the element of the doctrine that ought to be applicable to the Gaza Strip. It has been demonstrated, however, that decisions regarding intervention are subject to a prominent and irrefutable double standard, exemplified in recent years by the opposite reactions to the situations of Libya - where intervention was agreed upon and carried out -, and Syria - where the sanguinary civil war continues in front of the indifferent eyes of the international community. Undoubtedly, this manifest and reprehensible double standard is what causes inaction in the face of the suffering of the Palestinian population, too.

[184] Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict, A/HRC/29/52, 24 June 2015, http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx (accessed 10 July 2015).

The question to be addressed, therefore, is how such inaction can be permissible in a world that has shouted the words "never again" on a number of tragic occasions since the end of World War II. The framework of RtoP, indeed, had emerged precisely for the purpose of finally implementing and giving a meaning to those two words, but seems to be failing to transform them into reality, leaving the world to face one more "yet again" in the case of Gaza. Why is this doctrine failing to reach its ambitious goals of justice and solidarity? What are the problems with its implementation?

It emerged from the present investigation that the answer lies in the element of "right authority" as delineated by the Report of the International Commission on Intervention and State Sovereignty, which represents the founding document of the doctrine of RtoP. The Commission, indeed, recognizes the Security Council as the primary source of "right authority" to authorize intervention, suggesting that any measure undertaken without the Security Council's authorization is to be considered illegitimate. The problem, however, is precisely the nature of the Security Council and its role within the regime of RtoP. The Council, indeed, is a *political* body placed at the heart of a *legal* framework. The contradiction is evident and constitutes the root cause of all weaknesses and bias in the implementation of RtoP. It is unquestionably true, of course, that politics and law are thoroughly intertwined, but this by no means justifies that the application of a legal norm, created to respond to humanitarian disasters and severe human suffering, be dependent on the political interests of the world's most powerful states.

The main contribution of the innovative framework of RtoP is in "shifting the burden away from the rights of outsiders to intervene toward a framing that spotlights those suffering from war and violence"[185]. This idealistic and praiseworthy achievement, however, clashes against the institutional structure of the United Nations and a mechanism of decision-making that is based on the political will of the Security Council's member states and on the power wielded by the P5. Under this framework, in fact, "the enforcement of international law – specifically the use of force for the protection of

[185] T. G. Weiss, "The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era", *Security Dialogue*, vol. 35, no. 2, 2004, p. 138.

human rights – is prey to the political exigencies of the P5”[186]. The reason why the implementation of RtoP is incoherent and problematic, therefore, is that this legal principle is nestled into a broader context of constantly changing balance of power and political will[187]. As observed by Newman, however, “it is rather incongruous to suggest that almost all states accept the principle of R2P, but disagree upon its implementation. Implementation is everything”[188]. In order to overcome the obstacles to implementation, therefore, the need for common standards and principles, with particular regard to the third pillar, is evident. The evaluation of the risks and urgency of the situation and the assessment of whether a state is failing to uphold its responsibility to protect must be carried out according to shared and uniform criteria established by law, not by politics. At present, therefore, the great challenge is to “work towards greater refinement of the parameters for the evaluation of intervention”[189], the formalistic procedures required by a rule of law being balanced with a more “flexible” approach, one “which is more open towards systemic change and adaption of the law through less formal processes”[190].

The other issue at stake is to recognize that “passing what is essentially ‘sovereign’ responsibility from a state to the Security Council (as representative of the ‘international community’) poses exactly the same problems and dangers as the holding of that power by individual states”[191]. In other words, the higher power to which the subsidiary responsibility to protect is passed on to can (and, in fact, does) disregard or abuse that power in the very same way as the individual state before it. Moreover, since the body holding this subordinate responsibility is of a political nature, the risk of abuse or

[186] A. Hehir and A. Lang, “The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect”, *Criminal Law Forum,* no. 26, 2015, p. 162.

[187] J. Western, “Humanitarian Intervention, American Public Opinion, and the Future of R2P”, *Global Responsibility to Protect*, vol. 1, 2009, p. 343: “The main obstacle to fundamental reform [of RtoP] is the structure of the United Nations and the political will of member states. Decision making within the United Nations Security Council remains a slow and laborious process with high levels of political contestation. To date, there has been very little ‘renewed commitment’ on the part of the Security Council members. Disagreement continue to plague the institution”.

[188] E. Newman, “R2P: Implications for World Order”, *Global Responsibility to Protect*, vol. 5, 2013, p. 255.

[189] C. Stahn, “Between Law-Making and Law-Breaking: Syria, Humanitarian Intervention and ‘What the Law Ought to Be”, *Journal of Conflict & Security Law*, 2013, p. 21.

[190] *Ibidem*, p. 24.

[191] J. Moses, “Sovereignty as Irresponsibility? A Realist Critiques of the Responsibility to Protect”, *Review of International Studies*, vol. 39, no. 1, 2013, p. 129.

misapplication is arguably even greater. In this regard, the issue that both the ICISS Report and the World Summit Outcome Document omit to address concerns the consequences of the international community (represented by the Security Council) failing to exercise its subsidiary responsibility. As observed by Stahn, indeed, "it is difficult to imagine what consequences noncompliance by a political body like the Security Council should entail [and] it is highly questionable whether the architects of the responsibility to protect wanted to attach any direct legal consequence to such inaction"[192]. It is equally true, however, that unless clear common standards including consequences for noncompliance are established, RtoP will remain nothing more than a political catchword, and will fail to become a hard norm of international law[193].
Whether the obstacles to a uniform application of RtoP are overcome through an alteration of the existing institutional arrangements, through a restriction to the exercise of the veto power by the P5 for purposes of humanitarian intervention and human protection, or through the creation of an alternative source of authority, is for future and further discussion. What is certain, however, is that the missing link between law and enforcement must be bridged through the adoption of common standards for evaluation and decision, and through the establishment of legal consequences in the eventuality of noncompliance. Morals, indeed, tend to unfortunately remain absent from politics, thus the removal of the mechanisms of decision-making based upon political will and national interests of the P5 is an essential condition for avoiding the deleterious selectivity that has been characterizing the application of the norm so far.

In essence, RtoP represents a great challenge for international law, and the chance must now be taken to transform a rule of power and politics into a solid normative structure within the international system. In the words of Jentleson, however, "there can be no illusions about how difficult this is. But there also is evidence that it is possible"[194]. And, as in the case of Gaza, tremendously necessary.

[192] C. Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?", *American Journal of International Law*, vol. 101, no. 99, 2007, p. 118.
[193] On this, J. Western, "Humanitarian Intervention, American Public Opinion, and the Future of R2P", *Global Responsibility to Protect*, vol. 1, 2009, p. 327: "Its success (or failure) will be dependent on the degree to which it becomes embedded as an international norm".
[194] B. W. Jentleson, "The Obama Administration and R2P: Progress, Problems, and Prospects", *Global Responsibility to Protect*, vol. 4, 2012, p. 423.

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