

How Many Have to Die? Iraq and the Scale of the Crime

Written by Adrian Gallagher

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ADRIAN GALLAGHER, JUN 25 2014

The graphic images of the executions by the Islamic State in Iraq and Syria have raised the question, is it time for a decisive response to protect civilians in Iraq under the Responsibility to Protect (R2P)?[1] The logic is straightforward. The R2P agreement as set out in 2005 embodies a three-fold responsibility:

1. 'Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.
2. Second, 'the international community should as appropriate, encourage and help states to exercise this responsibility'.
3. Third, if the state in question is deemed to be 'manifestly failing' to protect its population from GWCE then the international community, 'through the United Nations' has a responsibility to use coercive and non-coercive measures in a 'timely and decisive manner' under Chapters VI, VII, and VIII of the UN Charter on a 'case-by-case' basis.[2]

Against this background, one can clearly see why the actions by ISIS raise R2P concerns with UN estimates suggesting ISIS are responsible for killing 1000 people and injuring another 1000 at 'a minimum' in the first two weeks of June 2014.[3] Yet, whilst the shocking nature of the images presented create somewhat of a moral reflex to a) do something, and b) find the policy framework that will justify our response, this author asks us to pause and consider whether the R2P should get bogged down in tackling each and every case of genocide, war crimes, crimes against humanity, and ethnic cleansing?

Can a small scale example of an R2P crime occur without requiring an R2P response? A literal reading of the 2005 World Summit Outcome Document clearly implies that the international community has a responsibility to consider all examples of genocide, war crimes, crimes against humanity, and ethnic cleansing, albeit on a 'case-by-case' basis. But here it is necessary to differentiate between the letter of the law and the spirit of the law.[4] Whereas the former upholds an explicit interpretation based on the exact wording of the agreement under scrutiny, the latter offers more of an implicit interpretation as it asks us to read between the lines.

Within the context of the R2P (which is not a legal agreement as such but is built on pre-existing international legal foundations[5]) are we to seriously suggest that every single example of mass violence should be put on the table of the UN Security Council? An explicit reading of the agreement may lead you to conclude, yes. The R2P is set up to tackle the four crimes of genocide, war crimes, crimes against humanity, and ethnic cleansing – not just some of them. The problem with this viewpoint is that it sets the threshold for R2P action very low. Consider that crimes such as genocide and war crimes can take place without anyone being killed. Furthermore, even if some people are killed, for example, a small group of hostages, this could constitute genocide (if a range of other factors are met[6]) but it is difficult to conceive that the world would be demanding an R2P response.

This is why scholars such as Robert Pape, in his rejection of R2P, call for a more pragmatic approach which does not set the bar as low as the R2P.[7] Although this author rejects his rejection of the R2P on the grounds that his concerns can be met through the R2P approach, he puts the issue of scale in context when he asks: '[w]hat kind of war crime?' and '[w]hat kind of ethnic cleansing?' requires international action.[8] It is with this thinking in mind that this author suggests that there is a legitimate discussion over whether the R2P is meant to address each and every

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case of genocide, war crimes, crimes against humanity, and ethnic cleansing. After all, it was set up to try and prevent another Holocaust, Rwanda and Srebrenica which clearly set the bar higher than the low level violence conducted by actors such as ISIS.

To put the issue of scale into context let us consider Gareth Evans, Co-Chair of the original 2001 report on the Responsibility to Protect, to the question, *A Responsibility to Protect Iraqis?*^[9]

based on the evidence currently available, it would be premature to conclude that violence against the defenseless has already occurred – or is imminent – on the scale necessary to justify outside military intervention.

Evans argues that based on the level of knowledge that we have to date, the acts committed by ISIS do not reach the scale required for a military intervention. Of course, other R2P action could be taken, but for now, let us remain focused on the scale of the crime. On the one hand, ISIS have ‘almost certainly’ committed war crimes^[10] which falls under R2P (in a literal reading) yet, on the other, Evans implies that the level of violence has not yet reached the scale required for action. But what is interesting here is Evans’ use of language as he refers to the four crimes:

Only one possible justification – moral, political, or military – exists for renewed Western or other external military intervention in Iraq: meeting the international responsibility to protect victims, or potential victims, of mass atrocity crimes – genocide, ethnic cleansing, other crimes against humanity, or major war crimes.

All of a sudden, the threshold of war crimes has been raised to ‘major war crimes’. From this perspective, the R2P is not about ending all mass violence once and for all (as Evans implies in the title of his 2008 book) but instead, it is about tackling higher levels of mass violence. In so doing, he brings us back to Pape’s line of questioning ‘[w]hat kind of war crime?’ and ‘[w]hat kind of ethnic cleansing?’ requires international action. This underlines the need to get to grips with the pressing issue of whether a small scale example of an R2P crime could occur without requiring an R2P response – this author’s view is yes.

In summary, it is important to note that a short blog piece cannot do justice to the complexities involved when assessing the scale of an R2P crime. As this author has documented elsewhere, the issue of *intent* and *scale* when defining genocide, and number of killed when assessing whether the host state is ‘manifestly failing’ to protect its population from the four crimes, are key aspects which need to be considered further.^[11] Nonetheless, when one considers that the mantra of “never again” the Holocaust, Rwanda or Srebrenica is often invoked when grounding the need for the R2P in the first place, it is important to recognise that a) these three examples represent extremely different scales of mass violence and b) even the lowest of these sets the bar much higher than the current atrocities committed by ISIS. Moreover, the real challenge facing the R2P is not that there is just one example of a ‘manifest failing’ in the world: Iraq, but that there are multiple ‘manifest failings’ occurring on a range of different scales which re-enforces this author’s view that we should not expect too much from the R2P. If it is used to tackle each and every example of genocide, war crimes, crimes against humanity, and ethnic cleansing, the tools in its toolkit may soon become blunt. That said, if the levels of violence committed by ISIS escalate of course action should be taken – though we are never going to be able to pin-point a quantitative line in the sand. At which point, whether the response should be done with the consent of the current Iraqi government (Pillar II action) or without it (a Pillar III action agreed to by the UN Security Council) is for another debate and no doubt another blog.

[1] Jeremy Moses put this question to the author via @IR2PWG on Twitter. June 12 2014.

[2] See United Nations, World Summit Outcome Document UNGA Res. 60/1, 16 September 2005, paragraphs 138 and 139.

[3] UN News Centre, ‘Iraq Violence: UN confirms 2,000 people killed, injured since early June’, http://www.un.org/apps/news/story.asp?NewsID=48117#.U6q_PoVGjTo Accessed 25.06.2014. For an overview of the movement see Abouzeid R. (2014) ‘The Jihad Next Door: The Syrian roots of Iraq’s civil war’, *PoliticoMagazine*, June 23 2014. <http://www.politico.com/magazine/story/2014/06/al-qaeda-iraq-syria-108214.html#ixzz35ZFZGxol> Accessed 25.06.2014.

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- [4] See Franck, T. M. (2003) Interpretation and change in the law of humanitarian intervention, pp204–231 and Farer T. J. (2003) Humanitarian intervention before and after 9/11: legality and legitimacy, pp. 53-89, both in, J. L. Holzgrefe and R. Keohane (Eds) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge, Cambridge University Press)
- [5] Bellamy A, and Reike, R. (2010) 'The Responsibility to Protect and International Law', *Global Responsibility to Protect* (2, 3, pp. 267-286).
- [6] Schabas, W. A. (2000) *Genocide in International Law* (Cambridge: Cambridge University Press), pp. 234-240.
- [7] Robert A. Pape, (2012) 'When Duty Calls: A Pragmatic Standard for Humanitarian Intervention', *International Security* (Vol. 37. No. 1 pp. 41-80)
- [8] Evans G., Thakur, R., and Pape, R., A., (2013) 'Correspondence: Humanitarian Intervention and the Responsibility to Protect', *International Security* (Vol. 37. No. 4 pp. 199-214), p. 210.
- [9] Gareth Evans, 'A Responsibility to Protect Iraqis?', *The Syndicate*, <http://www.project-syndicate.org/commentary/gareth-evans-asks-whether-the-latest-middle-east-catastrophe-warrants-humanitarian-intervention> Accessed 24.06.2014.
- [10] This was the view of UN High Commissioner Navi Pillay, see Richard Spencer, 'Iraq crisis: UN condemns 'war crimes' as another town falls to Isis'. *The Telegraph* 16 June 2014 <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10904414/Iraq-crisis-UN-condemns-war-crimes-as-another-town-falls-to-Isis.html> Accessed 22.06.2014
- [11] Gallagher, A., (2013) *Genocide and Its Threat to Contemporary International Order* (Palgrave Macmillan, 2013), pp. 13-39. Gallagher, A., (2014) "Syria and the indicators of a 'manifest failing'", *International Journal of Human Rights* (Vol. 18, No. 1. pp. 1-19).

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