

# Israel's Serial Gaza Offensives Are Offensive

Written by Ramesh Thakur

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RAMESH THAKUR, JUL 24 2014

Does the responsibility to protect (R2P) apply in Gaza? This is a silly question – of course it does. R2P is a universal principle, not a light switch to be turned on and off at whim or convenience. It is always a requirement for every state with respect to the population living in its territory, 24/7. It is also always a call on the world's conscience, taking the form of assisting the state to build its protection capacity and providing timely and decisive protection to victims whenever any state anywhere has manifestly failed in its sovereign responsibility.

The more pertinent question is: in the Gaza conflict, is R2P the best normative instrument for dealing with the critical dimensions of the crisis? Here the answer is more ambivalent. In particular, there is a real danger of slipping into an analogue of judicial romanticism, where normative tools are called into play to resolve a conflict which at core is fundamentally political. Politics explain the creation of the state of Israel, the life threatening hostility directed at it by various groups in the region, and its grim determination to defend its very existence by any means of its own choosing, stretching the boundaries of permissibility in the process by unilateral interpretation. Never again is Israel likely to outsource its moral compass on national (as in the Jewish nation, not the state of Israel) security to anyone else, friend or foe. And global politics explain the failure to hold the main conflict parties accountable for their acts of illegality and possible criminality and the self-repeating cycles of escalation and impunity.

### Israel's right to exist

History, religious nationalism, zero sum territorial claims, and local and global politics are all hopelessly entangled in this vexed conflict. Many criticise Israel's policy of creating new facts on the ground with its settlement policy. This is curious, for the original and most consequential new fact on the ground was the creation of the State of Israel back in 1948, made possible by Britain facilitating the resettlement of Jews in historic Palestine and 'consummated' with the unilateral declaration of independence backed by a military campaign when attacked by surrounding Arab regimes. Israel is a state imposed on the region by the Western powers in the dying days of their colonial dominance but now backed without qualification by the United States, surrounded by many enemies unreconciled to its existence and sworn to its destruction. In an act of brazen effrontery with few parallels in human history, Palestinians were made to pay the price of Christendom's guilt on the Jewish question and the West continues to act as the enforcer of this historically unjust redrawing of demographic equations in territorial jurisdictions. Burdened by Holocaust guilt, the West seems unable to draw any moral red lines that Israel may not cross. Instead the setting of the West's moral compass on the region's conflicts is outsourced to Israel. The result is that conduct that many Western governments would consider unacceptable for themselves or others is rationalized or not opposed when done by Israel.

Equally, because of the powerful continuing resonance of the Holocaust, the Jewish nation is not prepared to tolerate existential threats to its only homeland, nor willing to depend on others' goodwill for its survival ever again. Instead, Israel is determined to ensure its continued existence as a Jewish nation and as the only state for the Jews by its own means, including whatever brute force it takes. Thus Israel is as grimly determined to defend, protect and preserve its existence as its enemies are to destroy it. This explains the paradox of more Nobel peace prizes for efforts to resolve the Middle East conflict than for any other, but more outbreaks of war in the Middle East than anywhere else.

### Delegitimising war

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The Nobel Peace Prize is meant to acknowledge and reward the progressive delegitimisation of war. The use and non-use of force alike have empirical consequences, shape the struggle for power and help to determine the outcome of political contests. This is why the circumstances justifying any use of force by particular actors are always subject to bitter contestation and the actual use of force is intensely controversial. In the Melian Dialogue, Athens bluntly tells Melos – which seeks neutrality between Athens and Sparta – that questions of right and justice apply only to relations among equals in power. For others, 'the strong do what they can and the weak suffer what they must'.<sup>[1]</sup> The history of the Jews in the Christian West, and also of Israel–Palestinian relations in modern times, are apt illustrations of the continuing relevance of this ancient Greek wisdom. It is decades since Israel spoke and behaved as the weaker party, let alone one that fears imminent liquidation. Rather, its words and actions betray the arrogance of the strongest power in the region. In terms of deployable battlefield combat capability, Israel is the world's fourth military power. Its core policy is to try to maintain the edge of military superiority against any potential combination of its multiple enemies in the region. Its unacknowledged nuclear arsenal is a vital component of this full-spectrum escalation dominance. The policy also explains the lack of any sense of embarrassment at demanding, as a nuclear-armed state outside the Nuclear Non-Proliferation Treaty (NPT), that Iran must be stopped, by force if necessary, from getting the bomb.

A hundred years ago, war was an accepted institution with distinctive rules, etiquette, norms and stable patterns of practices. The only deterrent was the individual and, with allies, collective military might of the opponent which increased the risk of defeat for the side initiating hostilities, and the price of success even if victorious. Now there are significant restrictions on the authority of states to use force either domestically or internationally. The United Nations was an important milestone on the journey to tame the use of force as a means of settling international quarrels and since 1945 it has helped build a corpus of laws and norms that stigmatise wars of aggression and establish the normative primacy of seeking peaceful resolution of international disputes.

Created from the ashes of the Second World War with the allies determined to prevent a repeat of Adolf Hitler's horrors, for most of its existence the UN has focused far more on external aggression than internal mass killings. Yet Nazi Germany was guilty of both. Unlike aggression against other countries, the systematic and large-scale extermination of Jews with industrial efficiency was a new horror. The number of civilians killed in armed conflict, either from direct violence or from 'excess deaths'<sup>[2]</sup> caused by conflict-related hunger, disease and devastation of health and physical infrastructure, has risen over the last two centuries. In the 21<sup>st</sup> century, the UN has elevated the doctrine of preventing mass atrocities against people to the same level of collective responsibility as preventing and repelling armed aggression against states. The international community has responded to the calls to protect innocent victims by developing two parallel and mutually reinforcing norms, the protection of civilians (POC) and R2P.<sup>[3]</sup> The third sibling norm is international criminal justice, as embodied especially in the International Criminal Court (ICC), which involves punishment of perpetrators rather than protection of victims.<sup>[4]</sup> All three depend for success on substantial derogations of state sovereignty and leaders' impunity.

Unfortunately, the language of the three norms generates expectations of protection-cum-punishment that the UN and ICC often struggle to deliver. Both POC and R2P are important normative advances in the civilian protection agenda. The world would be an even more cruel place for civilian victims without them. Equally, however, the world remains cruel for civilian victims even with these two norms which impose moral obligations to act but do not by themselves indicate what courses of action to follow in order to achieve the best outcomes. Limitations inherent in POC and R2P perpetuate protection gaps with respect, for example, to the situation of civilians caught in occupied territories, natural disasters, kin states, and armed civil wars and insurgencies.<sup>[5]</sup>

## Wars are not yet history

Wars have not become history and disputes between organised political groups is still widely prevalent. Simultaneously with outlawing war except in self-defence against armed attack or when authorised by the UN Security Council, therefore, the society of states has tried to 'civilise' the manner in which wars are fought. The regular eruptions of violent conflict between Israel and Palestinians buck the historical trend of falling conflict numbers and casualties. R2P does not seem to be the most pressing or helpful international instrument for addressing the cycle. When we formulated R2P back in 2001, during the Commission deliberations we were clear in

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our mind that R2P did not apply to regular warfare between states. In conversations with regional interlocutors in the Middle East during the outreach conversations, most Commissioners also held that the Israeli-Palestinian conflict had more inter-state than internal conflict characteristics.

The debate over Gaza does of course raise the question of occupying powers' responsibility to protect all peoples living under their occupation. True, Israel withdrew from Gaza in 2005. But because it retained authority over the borders, sea and airspace (making Gaza 'the world's largest open-air prison'[6]), most international organisations, governments and human rights groups continued to regard Gaza as an occupied territory and Israel as the occupying authority. The responsibility to protect the population of Gaza would thus be split between the Palestinian Authority as the de jure government, Israel as the occupying power and Hamas as a de facto military governing authority, although the exact division of responsibility would be impossible to specify.

More importantly, Israel's cycle of offensive military operations in Gaza raise issues of international and UN Charter law: the well established rights to self defence against armed attack and to resist foreign occupation, the validity of these justifications for the resort to violence by Israel and Palestinians, and the limits to the exercise of these rights. Second, the serial provocations and incursions also raise issues of international humanitarian law (IHL): regardless of whether the use of force itself is lawful or not, the conduct of hostilities is still governed by the Geneva laws with respect to proportionality, necessity and distinction between combatants and civilians, including with respect to the choice of munitions. Consequently, in every outbreak of hostilities, there are charges and counter-charges of possible war crimes committed by Hamas and Israel.[7] And during the periods of cessation of hostilities, there are issues of international human rights law. Critics of Israeli laws, administrative practices and security forces behaviour hurl emotive charges of apartheid at one end of the spectrum while, at the other end, sympathisers and supporters accuse the critics of overt or closet anti-Semitism.

The essential enabler of Israel's double standards is the West that still cannot escape its historical guilt over the centuries of nasty discrimination against the Jews that culminated in the Holocaust. It routinely softens its commitment to international criminal justice when Israel is the target and has de facto declared occupied Palestine a human rights exclusion zone. The UN Human Rights Council (HRC) in Geneva may well focus obsessively on Israel. The Security Council in New York compensates by granting Israel virtual immunity from defying a succession of resolutions over the decades and the international criminal justice machinery has conferred virtual impunity on Israeli generals and leaders from independent international investigation and prosecution. The combined result of the three separate pathologies (involving the HRC, Security Council and the ICC) is to discredit the entire UN machinery in almost all relevant constituencies when it comes to dealing with Israel.

All the issues of international, humanitarian and human rights laws being raised with respect to Israel's current offensive in Gaza were intensely debated the last time round in 2008-09 also. There was a furore in Israel as some soldiers claimed they shot unarmed civilians, sometimes under orders from their officers.[8] The HRC-mandated Goldstone Report marshalled evidence of wrongdoing by Hamas and Israel during that Gaza war and called on both to conduct good faith investigations in conformity with international standards.[9] It called on the Security Council to monitor these and only if credible inquiries were not carried out within six months, to refer them to the ICC. Both recommendations were in line with what European and US governments regularly advocate elsewhere. Failure to follow them in the Gaza context undermined the broader international legal principles and also 'the Obama administration's ability to press for justice in places such as Kenya, the Congo and Darfur'.[10]

Israel refused to cooperate with the Goldstone inquiry, thereby ensuring an imbalance of narrative in favour of those claiming to be the victims of Israeli attacks, occupation and policy. Israelis are not exceptional in branding as self-haters and traitors those amongst themselves who refuse to turn a blind eye to the slaughter of innocent Others. Yet an impartial, honest and credible accounting to international human rights and humanitarian law standards would do much to validate Israel's humanity in the eyes of all but the anti-Semites. In addition, the Goldstone Report was 'an important ethical challenge not only to Israel but to western countries that have empowered Israel and remain insensitive to the suffering caused by Israel's occupation of the West Bank and its blockade of Gaza'.[11]

On 16 October 2009, the 47-member Human Rights Council endorsed the Goldstone Report by a vote of 25-6, with

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the US being one of the six to vote against. Britain and France were among five countries that did not vote, while eleven countries abstained.[12] On 5 November, the General Assembly voted 114-18 (with 44 abstentions and 16 not voting) to endorse the Goldstone Report. While most Western countries abstained, Australia, Canada, Germany, Italy and the US joined Israel in voting against it.[13] In February 2010 the ICRC condemned Israeli occupation of two million Palestinians in the West Bank, calling for 'action to be taken to allow Palestinians to live their lives in dignity'. The ICRC reiterated the call for 'Israel to do more to protect Palestinians in the West Bank against settler violence, to safeguard their land and crops, to allow families to repair their houses and to assure that all Palestinians can get to hospital or to school without delay'.[14]

### No moral equivalence, but de facto Israeli impunity is a problem

There can be no moral equivalence between a group that is sworn to the destruction of an existing country and commits acts of terror on civilians, and a state that uses military power to defend its existence and its citizens from the former. Under its national security responsibility, the Government of Israel has a duty to defend its population from external attack and daily harassment. Hamas employs the tactic of hiding its fighters and weapons amidst civilians, knowing that that will risk the death of innocents as Israelis return fire. Hamas blows up busloads of school children, hides behind human shields and fires rockets indiscriminately targeted at civilians. The deaths of fellow-Palestinians is less consequential to them than the international censure of Israel for killing innocent civilians. Prime Minister Binyamin Netanyahu is not wrong in saying: 'here's the difference between us. We are using missile defense to protect our civilians, and they're using their civilians to protect their missiles'.[15] It is also true that it is relatively common to find Israelis dissenting from and criticising their government policy but far more challenging to find Palestinians prepared to be self-critical.

By the same token, however, there is no moral equivalence between rockets that killed one Israeli and retaliatory military strikes and ground operations that killed 290 Palestinians, an estimated 75 percent of them civilians, including many children, in the first ten days.[16] In the next four days the Palestinian death toll climbed to almost 700 against fewer than 50 for Israelis, including 3 children. Israel simply is not careful and discriminating enough in avoiding civilian casualties to satisfy the strict requirements of IHL on proportionality and distinction: 'Israeli air attacks in Gaza investigated by Human Rights Watch have been targeting apparent civilian structures and killing civilians in violation of the laws of war'. Its Middle East director Sarah Leah Whitson added: 'Recent documented cases in Gaza sadly fit Israel's long record of unlawful airstrikes with high civilian casualties'.[17] But Israel never has and does not intentionally target civilians. And the imbalance of casualties on the two sides reflects Israeli military superiority, not Hamas benign intent or restraint.

Collective punishment is also wrong. Those of us from former European colonies can recognise it as a defining feature of conqueror-conquered relations. When my mother was expecting her first child during the Quit India movement (1942), she shifted across the border into Nepal. Why? Because the British had no compunction about inflicting collective punishment on an entire village from which a freedom fighter was believed to come or suspected of hiding. They were not known to be discriminating in their choice of people to question nor gentle in their techniques of interrogation, so the family feared for the fate of the pregnancy. Whatever the official policy and documentary evidence in New Delhi and London, this was the belief among villagers at the ground level about the reality of colonial rule and state-citizen equations.

The chief obstacle to negotiations in recent times has not been Palestinian rejectionism but Israeli intransigence and settlements policy. Gideon Levy asks readers to peruse the list of Hamas demands and judge for themselves whether even one is unjust.[18] If Hamas resistance is defined by terror, Israeli occupation is rule by fear and overwhelming brute force. Whatever the rhetoric, the reality is that their policy of confiscating or razing Palestinian property and colonising Palestinian land has been made possible with US backing and guarantee and the tacit complicity of most Arab autocrats. And the ruthless suppression of protests is done with the help of Western-supplied weapons. At a time when Amnesty International called for the UK to suspend arms to Israel,[19] in a perverse example of American largesse, on 15 July a Senate committee *doubled* the amount of funding requested by the administration for Israel's Iron Dome anti-missile system.

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Europeans and Westerners rightly and gratefully remember the US as liberator and defender of freedom and liberty. Unfortunately across vast swathes of the third world, for most of the Cold War, in the name of fighting communism, Washington bankrolled and armed dictators, toppled independent-minded democrats, and fuelled civil wars. Israel and its Western backers routinely blame the victims for fighting back. Jews whose wealth, art and treasures were stolen by and under Nazi occupation have the right to have them returned or be appropriately compensated, but not Palestinians robbed and dispossessed of their land and property by Israeli Jews.

On 23 July, UN Human Rights Commissioner Navi Pillay said: 'There seems to be a strong possibility that international law has been violated, in a manner that could amount to war crimes.'<sup>[20]</sup> On the day that the death toll reached 725 (690 Palestinians and 35 Israelis including three civilians), the 47-member HRC voted to launch an inquiry, with 17 countries (mostly Western) abstaining and only the US opposing. The resolution was entitled 'Ensuring Respect for international law in The Occupied Palestinian Territories, including East Jerusalem.' When Russia is outvoted by a solid majority in a UN body, this is described as proof of its international isolation. When the US finds itself alone, this is hailed as a triumph of US principles and values in the face of a morally bankrupt UN.

Anyone who dares to be critical of any Israeli policy or action, no matter how justified and mildly expressed, risks an avalanche of vitriol and vilification and, depending on country of residence and nature of employment, calls for being sacked by the lobby that must never be named because it does not exist. Israel's impunity extends to no real accountability for strikes, some fatal, on UN facilities, posts and personnel. For example, on 18 July 2006 four unarmed UN observers died when the UN position in Khivam, Lebanon, well known to the Israeli Defence Force for many years and clearly marked, was hit by Israeli strikes. Israel also fired on UN armoured personnel carriers and peacekeepers sent to dig out the bodies. Ireland's foreign minister Dermot Ahern remarked that the incident 'raises questions about whether this was an accident'.<sup>[21]</sup>

## If you have a solution for the Middle East conflict, you have been misinformed

There is no obvious solution to the core Middle East conflict and that is the source of the difficulty and the explanation for the obsession with process, form and illusory appearance of activities. The territorial and political goals of the main conflict protagonists are not reconcilable and their resort to the weapons of terror and war are a reflection of this impossibility. In a notable act of Christian charity, Western reparations to Jews for centuries of persecution climaxing in the Holocaust were paid mainly in Palestinian coinage. If Jews could successfully reclaim Palestine centuries after being exiled from it following the Babylonian and Roman conquests of Palestine, it's hard to see how Palestinians can be persuaded to accept the existence of Israel as a permanent and irreversible fait accompli instead of a temporary setback. It is just as hard, conversely, to see how Israelis can be persuaded that any agreement, such as a two-state solution, will not be a mere truce in their enemies' unsated quest to destroy Israel rather than a genuine resolution of the basic underlying conflict. In which case why should they agree to any territorial or political compromise?

## Notes

[1] Thucydides, *History of the Peloponnesian War*, 5.89, 'Melian Dialogue' (London: J.M. Dent, 1910), English translation available online at the Perseus Project: <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0200%3Abook%3D5%3Achapter%3D89%3Asection%3D1>.

[2] The notion of 'excess state violence' has evolved to challenge the use of violence by any state in its internal and international behaviour beyond the level that international political actors consider to be legitimate. See Bruce Cronin, 'International Legal Consensus and the Control of Excess State Violence', *Global Governance* 11:3 (2005), pp. 311-30.

[3] The relationship between the two can vary from overlap through complementarity to tension. See Hugh Breakey, Angus Francis, Vesselin Popovski, Charles Sampford, Michael G. Smith, and Ramesh Thakur, *Enhancing Protection Capacity: A Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts* (Brisbane: Institute for Ethics, Governance and Law, 2012), <http://www.griffith.edu.au/criminology-law/institute-ethics->

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governance-law/research/responsibility-to-protect-protection-of-civilians-policy-guide.

[4] For the relationship between international protection and prosecution, see See Ramesh Thakur and Vesselin Popovski, 'The Responsibility to Protect and Prosecute: The Parallel Erosion of Sovereignty and Impunity', in Giuliana Ziccardi Capaldo, ed., *The Global Community: Yearbook of International Law and Jurisprudence 2007*, Vol. 1 (New York: Oxford University Press, 2008), pp. 39–61.

[5] This is elaborated in Ramesh Thakur, 'Protection Gaps for Civilian Victims of Political Violence', *South African Journal of International Affairs* 20:3 (December 2013), pp. 321–38.

[6] Seumas Milne, 'Gaza: this shameful injustice will only end if the cost of it rises', *Guardian*, 17 July 2014.

[7] With respect to the previous big eruption of violence in Gaza, see Chris McGreal, 'Demands grow for Gaza war crimes investigation', *Guardian*, 13 January 2009; Richard Falk (UN Special Rapporteur on Palestinian human rights), 'Israel's war crimes', *Le Monde Diplomatique* (English edition) (15 March 2009), <http://mondediplo.com/2009/03/03warcrimes>.

[8] Ethan Bronner, 'Soldiers' accounts of Gaza killings raise furor in Israel', *New York Times*, 20 March 2009, and Rory McCarthy, 'Israeli troops describe shooting Gaza civilians', *Guardian*, 20 March 2009.

[9] *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict* (Geneva: United Nations Human Rights Council, A/HRC/12/48, 15 September 2009), [http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC\\_Report.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf). In April 2011 Richard Goldstone, chair of the inquiry commission, wrote an opinion article retracting some of the harshest conclusions against Israel: 'Reconsidering the Goldstone Report on Israel and war crimes', *Washington Post*, 2 April 2011, [http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC\\_story.html](http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html). But the other members of the commission strongly repudiated his retraction and stood by the original report: Hina Jilani, Christine Chinkin and Desmond Travers, 'Goldstone report: Statement issued by members of UN mission on Gaza war', *Guardian*, 14 April 2011, <http://www.guardian.co.uk/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza>.

[10] Antonio Cassese (President of the Special Tribunal for Lebanon and past president of the International Criminal Tribunal for Former Yugoslavia), 'We must stand behind the UN report on Gaza', *Financial Times*, 14 October 2009.

[11] Michael Lerner, 'A war crime whitewash', *Guardian*, 21 October 2009.

[12] Howard Schneider and Colum Lynch, 'U.N. panel backs Gaza report', *Washington Post*, 17 October 2009.

[13] Document GA/10883, 5 November 2009, <http://www.un.org/News/Press/docs/2009/ga10883.doc.htm>.

[14] 'Israel makes life very hard for Palestinians, says ICRC', *BBC News*, 17 Feb. 2010, [http://news.bbc.co.uk/2/hi/middle\\_east/8519921.stm](http://news.bbc.co.uk/2/hi/middle_east/8519921.stm).

[15] In an interview on *Fox News*, 20 July 2014, transcript available at: <http://www.haaretz.com/news/video/1.604852>.

[16] *BBC News*, 'Gaza conflict: UN says number of displaced almost doubles', 19 July 2014, <http://www.bbc.com/news/world-middle-east-28377345>.

[17] Human Rights Watch, 'Israel/Palestine: Unlawful Israeli airstrikes kill civilians', 15 July 2014, <http://www.hrw.org/news/2014/07/15/israelpalestine-unlawful-israeli-airstrikes-kill-civilians>.

[18] Gideon Levy, 'What does Hamas really want?', *Haaretz*, 20 July 2014,

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<http://www.haaretz.com/opinion/.premium-1.606042>.

[19] <http://www.amnesty.org.uk/>.

[20] Harriet Sherwood, Ian Black and Paul Lewis, 'Israel may have committed war crimes during Gaza offensive, UN says,' *Guardian*, 24 July 2014, <http://www.theguardian.com/world/2014/jul/23/israel-may-have-committed-war-crimes-in-gaza-un>.

[21] Steve Farrell and Nicholas Blanford, 'UN observers begged Israelis to stop shelling their position', *The Times*, 27 July 2006, <https://profile.theguardian.com/user/id/2510085>.

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**Ramesh Thakur**, a former United Nations Assistant Secretary-General, is emeritus professor at the Australian National University. His most recent book is *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*, 2<sup>nd</sup> ed. (Cambridge University Press, 2017).