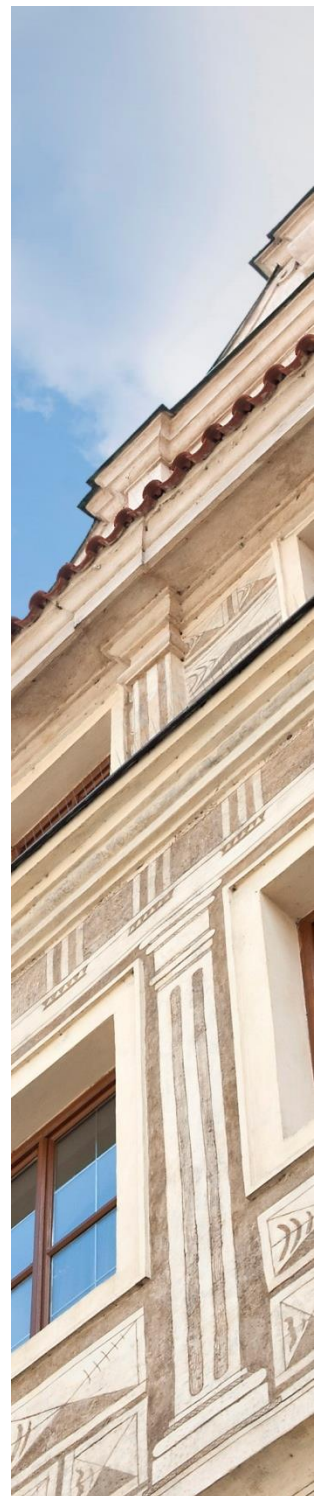


**Emir Abbas Gürbüz**

# **The Coalition Airstrikes in Syria from the Perspective of the Responsibility to Protect**

## **ABSTRACT**

The widespread and massive human rights violations conducted by ISIS draw the international community's attention to the Middle East. Especially after the humanitarian crisis in the Sinjar Mountains, the international community took action in order to prevent a possible further crisis in the region. However, since the current structure of international law prohibits the use of force at the international level with the exception of uses of force with UN Security Council authorization or for the purpose of self-defence, the legality of the military intervention in Syria remains contentious. In this context, the Responsibility to Protect doctrine has been proposed by many scholars to legitimize the coalition airstrikes in Syria. This essay discusses the status of the Responsibility to Protect doctrine in the customary international law and the applicability of the doctrine in the case of Syria.



# Introduction

The Responsibility to Protect (R2P) is one of the most contentious doctrines in international law; it challenges various fundamental principles of international law such as state sovereignty, the principle of non-intervention and the prohibition of the use of force.

A new approach to state sovereignty emerged with the development of the Responsibility to Protect. According to this new approach, states can enjoy their sovereign rights as long as they fulfil their obligation to protect their citizens from genocide and war crimes. If a state fails to do so, the principle of non-intervention may be replaced by the international responsibility to protect.<sup>1</sup> It is clear that this approach runs contrary to the principle of non-intervention.<sup>2</sup> Besides that, it can be said that the UN Security Council's (UNSC) monopoly on legitimizing the use of force has become questionable since the term intervention also includes military interventions.<sup>3</sup>

Although the UN Charter authorizes the UNSC to authorize the use of force at the international level, permanent members of the UNSC do not abstain from using their veto power in order to pursue their own interests. Therefore, the UNSC failed to intervene in humanitarian crises many times. That led states to look for other options in order to overcome the UNSC monopoly on the use of force.

The Responsibility to Protect has been formulated upon the humanitarian intervention concept, which has a long-standing philosophical background in legal history. The roots of humanitarian intervention date back to the emergence of early international law. According to Hugo Grotius, at this time, it was considered legitimate to act in order to liberate people from the tyranny of governments.<sup>4</sup> Furthermore, colonialist states put forward humanitarian arguments to legitimize their domination over their colonies in the 19<sup>th</sup> century.<sup>5</sup> Humanitarian arguments were also used to strengthen the just war doctrine even though there was no legal norm which would restrict the use of force on the international level up to the 20<sup>th</sup> century. However, many scholars claim that the earliest precedent of modern humanitarian intervention is the French intervention in Lebanon on the basis of the

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<sup>1</sup> International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, Ottawa (October 2001) § 6.11.

<sup>2</sup> UN General Assembly Resolution 2131 (XX) (21 December 1965).

<sup>3</sup> Welsh, Jennifer / Thielking, Carolin / MacFarlane, S. Neil (2002). "The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty", *International Journal*, Vol. 57, No. 4, pp. 489-512.

<sup>4</sup> Grotius, Hugo, (1925), *De Jure Belli ac Pacis*, Oxford: Oxford University Press, Book II, ch. 25, sec. 8, vol. II, p. 584.

<sup>5</sup> Dunoff, Ratner, Wippman, (2006), *International Law: Norms, Actors, Process: A Problem-Oriented Approach, Challenges to International Law*, Second Edition, New York: Aspen Publishers, pp. 873-954.

Ottoman Empire's failure to protect the Maronite Christians against the Druze pogroms.<sup>6</sup>

After the decolonization process, humanitarian intervention went beyond the colonial scope and evolved under the effect of humanitarian sentiments. In this context, the UNSC's failure to prevent the genocides in Srebrenica and Rwanda was a milestone for the evolution of humanitarian intervention.

In 1999 Kofi Annan, the Secretary-General of the United Nations, delivered a speech and underlined the priority of human security over state sovereignty.<sup>7</sup> In the same year, NATO forces intervened in the Kosovo crisis without the authorization of the UNSC. Although this intervention was a clear breach of the then current norms regarding the use of force, the majority of states approved the humanitarian arguments in favour of it that were put forward by the NATO coalition by recognizing Kosovo's independence.<sup>8</sup>

In 2001, the International Commission on Intervention and State Sovereignty (ICISS) formulized the doctrine of the "Responsibility to Protect" to replace the doctrine of humanitarian intervention.<sup>9</sup> According to the study in which it formulized the doctrine, an intervention should be in accordance with certain conditions. In this context, for an intervention to be carried out, there must be a just cause for it, all peaceful means of resolving the given conflict should be exhausted, the acting States must have rightful intentions, a reasonable chance of the intervention succeeding must exist and the action must be proportional to the humanitarian crisis.<sup>10</sup> All these criteria set by the ICISS report were also recognized by the UN High Level Panel in 2004.<sup>11</sup>

Finally in 2005, the UN World Summit Outcome clearly recognized the existence of the state's responsibility to protect its citizens from genocide and war crimes and obligated the international community to take collective action when a state fails to fulfill its duties in this respect.<sup>12</sup>

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<sup>6</sup> Chesterman, Simon, (2001), *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford University Press, p. 32.

<sup>7</sup> Annan, K. (1999), Annual Report of the Secretary-General to the General Assembly. United Nations.

<sup>8</sup> 108 out of 193 UN Member States, and 23 out of 28 European Union States recognized Kosovo's statehood. Granville, Luke, "In Defense of the Responsibility to Protect", *Journal of Religious Ethics* (June 2012) p. 171.

<sup>9</sup> International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, Ottawa (October 2001).

<sup>10</sup> *Idem.* p. 32.

<sup>11</sup> See generally The Secretary-General's High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565, Dec. 2004.

<sup>12</sup> UN World Summit Outcome 2005 § 138, 139.

# 1. The Legal Debate on the Responsibility to Protect

Before focusing on the applicability of the Responsibility to Protect to the anti-ISIS strikes, the legal characteristics of the doctrine should be examined in the light of previous events. Therefore the traditional approaches and the new trends related to the legal norms should be described here.

## 1.1. Current Norms Regarding the Use of Force

After the establishment of the United Nations, a monopoly on the use of force was assigned to the UN Security Council with the exception of cases of self-defence.<sup>13</sup> In order to ensure the international peace and security, Article 2.4 of the UN Charter regulated the prohibition of the use of force and threats to use force. It stated the following;

*“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”*

Article 2.4 of UN Charter is accepted as a part of the *jus cogens*<sup>14</sup>, and the prohibition cannot be contracted out at the regional level. In the Nicaragua v. USA judgment of the International Court of Justice (ICJ), the court also underlined the *jus cogens* character of the prohibition of use of force.<sup>15</sup> Besides that, the UN Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty<sup>16</sup> and the Declaration on Principles of International Law Concerning Friendly Relations<sup>17</sup> underline the concept of absolute state sovereignty and repeat the prohibition of use of force.

This provision is now regarded as a principle of customary international law and, as such, is binding upon all states in the international community.<sup>18</sup> However, it should be underlined that the term “force” is interpreted restrictively as armed intervention in it.<sup>19</sup>

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<sup>13</sup> UN Charter Article 51.

<sup>14</sup> Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission*, 1966, vol. II. Article 50, §1.

<sup>15</sup> Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. United States of America) (Merits) Judgment of 27 June 1986, § 190.

<sup>16</sup> UN General Assembly Resolution 2131 (XX).

<sup>17</sup> UN General Assembly Resolution 2625 (XXV).

<sup>18</sup> Brownlie, Ian. (2002), " Problems of a General Nature Relating to the Use Of Force. Chapter XX. The Use or Threat of Force and the Concept of Armed Attack".. *International Law and the Use of Force by States*. New York: Oxford, pp. 364-65.

<sup>19</sup> UN General Assembly Resolution 2131 (XX).

However, the debates on the use of force were always contentious due to the evolutionary character of the international law. Although the current strict regulations on the use of force aimed to ensure world peace, alternative options gained importance due to the UNSC's failure to prevent conflicts. Especially the newly occurred events shaped the debate between current norms and *de lege ferenda* norms.

## 1.2. The Changing Concepts and Rising Humanitarian Concerns

In recent years, the interpretation of fundamental concepts such as state sovereignty and the principle of non-intervention has changed as an effect of the rising humanitarian concerns.

The traditional approach to sovereignty came about in the 17th century through the signing of the Treaty of Westphalia.<sup>20</sup> According to the Westphalian concept of sovereignty, the states have a monopoly on the right to protect their citizens and the means of doing so.<sup>21</sup>

After the tragedy of the Holocaust, the international community signed the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, the Genocide Convention), which describes and sets the legal framework for genocide. Today, there is no doubt about the *jus cogens* character of the Genocide Convention.<sup>22</sup>

Nevertheless, there was a conflict between the two *jus cogens* norms, the prohibition of use of force and the prohibition of genocide, when it came to prevention of genocide before the emergence of humanitarian intervention. That conflict seems to have been solved, however, with the rising humanitarian sensitivity of the international community. This change in attitudes inspired various treaties and UN Resolutions which give priority to human security. However, even those legal documents were based on a traditional state-centric approach, and concepts such as self-determination and the use of force were defined so as in favour of the absolute sovereignty of states.<sup>23</sup> After the end of the Cold War, however, the human security issue loomed large on the international agenda. The 1993 Vienna Declaration and Program for Action was based on the moderate sovereignty interpretation. Article 2 of the declaration states that the right of self-

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<sup>20</sup> Shaw, Malcolm N. (2004), *International Law*, Cambridge University Press, 5th edition, p. 25.

<sup>21</sup> Commission on Human Security (2003), *Human Security Now* (New York: UN), p. 2.

<sup>22</sup> Bassiouni, M. Cherif (1996), "International Crimes: 'Jus Cogens' and 'Obligation Erga Omnes'." *Law and Contemporary Problems*. Vol. 59, No. 4, p. 68.

<sup>23</sup> UN General Assembly Resolution 1514 (XV), 14 December 1960, Article 4,6.  
UN General Assembly Resolution 2625 (XXV), Helsinki Final Act Principle No. 8.

determination may overcome the principle of territorial integrity when people's rights of self-determination are violated.<sup>24</sup>

While the traditional approach considers sovereignty as a right provided to the states, the new approach holds that sovereignty is a responsibility which obligates states to protect their populations from massive human rights violations.<sup>25</sup> In this context, states can enjoy their sovereignty as long as they manage to fulfil their obligations; otherwise the responsibility to protect their populations would shift to the international community.<sup>26</sup> Defenders of humanitarian intervention, criticizing the traditional approach to state sovereignty, assert that human security should be counteractive to state security in case of an excessive violation of human rights.<sup>27</sup>

In 2000, the Human Security Commission was established within the United Nations. The commission published its first report in 2003 and underlined that the traditional view of security must have a paradigmatic shift from state-centrism to people-centrism.<sup>28</sup> Furthermore in 2001, the International Commission on Intervention and State Sovereignty published the report on the Responsibility to Protect and offered a new doctrine on use of force in accordance with the new sovereignty approach.

### **1.3. The Emergence of a New Custom or Codification of a Previously Existing Custom?**

Rising humanitarian concerns in the international community also appeared in the legal field. It is noteworthy that the language of some of the relevant legal documents has been changed with rising humanitarian concerns. In the text of the UN Charter, international peace and security was the main point for the UNSC to focus on. Besides that, the UN Charter only obligates states to promote human rights and encourage other states to respect human rights.<sup>29</sup>

However, after the 1990s the humanitarian arguments gained more space in international law. For example, in 2004 the UN High Level Panel on Threats,

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<sup>24</sup> Article 2.3: *"In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind."*

<sup>25</sup> Schaller, Christian (2008). "Die völkerrechtliche Dimension der Responsibility to Protect" *SWP-Aktuell*, June 2008, p. 3.

<sup>26</sup> See generally International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, Ottawa (October 2001).

<sup>27</sup> Ben Simon, Okolo, (2008) "Human Security and the Responsibility to Protect Approach. A Solution to Civilian Insecurity in Darfur", *Human Security Journal* Volume 7, pp. 46-61.

<sup>28</sup> Commission on Human Security (2003), *Human Security Now* (New York: UN) p. 4.

<sup>29</sup> UN Charter Article, 1, 62, 68, 79.



Challenges, and Change recognized the Responsibility to Protect as an “emerging norm”<sup>30</sup> and accepted the framework set by the ICISS Report.

In this context, the 2005 UN World Summit Outcome, which was adopted with consensus, assigned to each state the responsibility to prevent its population from being faced with mass murder through appropriate and necessary means.<sup>31</sup> Besides that, the document also assigned to the UNSC the responsibility to act in accordance with the UN Charter and prevent an ongoing humanitarian crisis.<sup>32</sup> At the end of the World Summit, UN Secretary General Kofi Annan said the following to the world’s leaders: “You will be pledged to act if another Rwanda looms.”<sup>33</sup> The summit agreement strengthens the justification by limiting sovereignty by assigning to the state the responsibility to protect its own citizens and sets clear responsibilities for the international community, as it is to take action when a country fails to protect its own citizens.<sup>34</sup> According to some scholars, in cases of UN inaction, a unilateral military intervention could be initiated in order to fulfil a task that the UNSC was responsible for but failed to carry out.<sup>35</sup>

Defenders of the R2P often claim that the R2P is not a new emerging norm but a codification of already existing norms.<sup>36</sup> As Hobbes considered ensuring the security of the citizens as the state’s main duty, many scholars underline that in the event that the state could no longer perform the function it was given power to perform, it would not qualify as sovereign.<sup>37</sup> In this context, the R2P could be considered as codified and as the reformed form of the customary humanitarian intervention practices.<sup>38</sup>

Unlike the traditional humanitarian intervention, the Responsibility to Protect includes some procedural safeguards to keep states from abusing the doctrine. It also includes the prima facie case requirement, which demands clear evidence of ongoing atrocities in the target country to ensure that a humanitarian ground for an intervention exists, and the requirement that peaceful measures must already be

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<sup>30</sup> The Secretary-General’s High-Level Panel on Threats, Challenges, and Change, A More Secure World: Our Shared Responsibility, U.N. Doc. A/59/565, Dec. 2004, § 203.

<sup>31</sup> UN World Summit Outcome 2005 § 138.

<sup>32</sup> UN World Summit Outcome 2005 § 139.

<sup>33</sup> Kofi Annan, U.N. Secretary-General, Address to the 2005 World Summit (Sept. 14, 2005).

<sup>34</sup> Alicia L. Bannon, (2006), “The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism”, *Yale Law Journal*, p. 1158.

<sup>35</sup> *Ibid.*

<sup>36</sup> Bellamy, A. J. and Drummond, C. (2011), “The Responsibility to Protect in Southeast Asia: Between Non-interference and Sovereignty as Responsibility” *The Pacific Review*, p. 181.

<sup>37</sup> *Ibid.*

<sup>38</sup> See generally Richemond, Daphné (2003), “Normativity in International Law: The Case of Unilateral Humanitarian Intervention”, *Yale Human Rights & Development Law Journal*, Vol. 6, No. 45; see also Burton, Michael (1996), “Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention”, 85 *GEO. L. J.* 417, 421.

exhausted for an intervention to take place to ensure that force is being used only as a last resort.<sup>39</sup>

## 1.4. Precedent Cases

From the perspective of the R2P being a codification of existing norms, India's intervention in Bangladesh<sup>40</sup> and Tanzania's intervention in Uganda (although Tanzania's intervention was carried out on the basis of self-defense, Tanzania did not merely repel the Ugandan government's attacks, but overthrew its particularly repressive regime)<sup>41</sup> are exercises of the R2P<sup>42</sup> since those interventions took place with humanitarian concerns and did not receive authorization from the UNSC. Reflecting a similar sentiment, the Economic Community of West African States ("ECOWAS") intervened on a humanitarian basis in Liberia in 1992 and in Sierra Leone in 1998 – in both cases, the intervention occurred prior to the Security Council authorization of it.<sup>43</sup>

The fact should be pointed out that the international community considered those interventions legitimate by recognizing the *de facto* situations that occurred after those interventions.<sup>44</sup>

The Iraqi no-flight zone was also established without a UNSC authorization. Although there is a UNSC Resolution that condemns the human rights violations in Iraq, the Resolution's text does not directly reference any kind of coercive measure.<sup>45</sup> In this context, the UNSC Resolution was a clear proof of the ongoing atrocities in Iraq, and gaining such a proof is necessary for exercising the Responsibility to Protect. Thus, it can be said that Iraq is an example of the modern day conception of the R2P.

Another example of the modern conception of the R2P is NATO's intervention in Kosovo. Before the operation, NATO announced that the Yugoslavian government was not willing to work towards a peaceful settlement, and the atrocities against Kosovar Albanians turned into an ethnic cleansing.<sup>46</sup> Thus, NATO claimed that the use of force in this case became a last resort to halt a possible genocide.<sup>47</sup> Nevertheless, the UNSC never called a meeting dealing with the agenda of a military

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<sup>39</sup> International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, Ottawa (October 2001) p. 36.

<sup>40</sup> Greenwood, Sir Christopher (2002), *Humanitarian Intervention: The Case of Kosovo*, *Finnish Yearbook of International Law* 141, p. 163.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> 35 countries recognized Bangladesh immediately after its declaration of independence. Today, almost all countries, including Pakistan, recognize Bangladesh's statehood.

<sup>45</sup> United Nations Security Council Resolution 688, 5 April 1991.

<sup>46</sup> Press Statement of Javier Solana, NATO Press Release 040 (1999).

<sup>47</sup> *Ibid.*



intervention to Kosovo due to Russia's strong opposition to any military intervention.

Before the commencement of the NATO operation, the UNSC drafted a resolution to condemn the activities of Yugoslavian forces in Kosovo. However, the resolution's text was not authorizing any state to take forcible measures, just as the Iraqi Resolution did not authorize any state to do so.

The Kosovo operation led to a more serious legal debate about the place of humanitarian intervention in international law. Many scholars considered the operation as "illegal but legitimate"<sup>48</sup> since the breach of international law prevented gross and irretrievable human right violations.<sup>49</sup>

Besides those precedent cases which were finalized with the use of non-authorized force, in some cases a humanitarian catastrophe was prevented through non-military options and UNSC action. For example, in Myanmar, the international community applied various political and commercial sanctions to the military junta in order to force them to refrain from persecuting minorities.<sup>50</sup>

In the Libyan case, the international community took many measures to get the Qaddafi regime to abstain from provoking a civil war. In this context, the UNSC drafted a resolution to condemn the actions of the Libyan Government.<sup>51</sup> Finally after all peaceful measures were exhausted, the UNSC authorized the international community to create a no flight zone over the Libyan air space.<sup>52</sup> It should be pointed out that Russia and China did not use their veto power in the related vote, but abstained from it since the ICISS Report and the UN High Level Panel Report recommend that the permanent members of the UNSC should abstain from using their veto power when the vote applies to a massive existing humanitarian crisis. In this context many scholars praise the Libyan intervention as a positive achievement of the R2P.<sup>53</sup>

Another R2P case is the debate on a possible intervention in Syria after the Ghouta chemical attacks in 2013. After the Assad regime's use of chemical weapons on civilians, the international community discussed using force against Assad's regime

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<sup>48</sup> Alston, P. and MacDonald, E. (2008) Sovereignty, Human Rights, Security: Armed Intervention and the Foundational Problems of International Law, *Human Rights, Intervention, and the Use of Force*, Oxford University Press (2008) p. 17.

<sup>49</sup> Simma, Bruno (1999) "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law*, 10, pp. 1-22.

<sup>50</sup> Gurbuz, Emir Abbas (2014), Uluslararası Hukukta Koruma Sorumluluğu Çıkmazı, Bahçeşehir Üniversitesi Hakemli Hukuk Dergisi, Cilt: 9 Sayı: 113-114, pp. 153-172.

<sup>51</sup> United Nations Security Council Resolution 1970.

<sup>52</sup> United Nations Security Council Resolution 1973.

<sup>53</sup> Williams, Paul D. (2011), "The Road to Humanitarian War in Libya", *Global Responsibility to Protect*, Volume 3, Issue 2, pp. 121, 122; see generally Bajoria, Jayshree (2011). "Libya and the Responsibility to Protect" Council on Foreign Relations.

to halt the atrocities against Syria's civilian population. Despite the strong opposition of Russia and China, France declared that it was "ready to punish those who took the heinous decision to gas innocents".<sup>54</sup> In addition, the UK published a policy paper about its legal position on the intervention and claimed that the use of force is legal when it is done to prevent a humanitarian catastrophe, even in the absence of a UNSC authorization.<sup>55</sup> At the same time the US Congress adopted a bill which authorizes the president to use force against Syria to eliminate its weapons of mass destruction<sup>56</sup> as a response to the use of those weapons against the country's civilian population.<sup>57</sup> Many other states also expressed their support for the military response to Assad's regime due to its confirmed use of chemical weapons against civilians.<sup>58</sup> This preparation of a military intervention surely reflects that there is an *opinio juris* that states that an intervention in Syria would be justified since it would prevent gross human rights violations despite the absence of a UNSC Resolution.

Two common points for all the precedent cases are the humanitarian concerns and a step-by-step action that would be proportional to the level of atrocities. For instance, in Iraq and Libya, the application of a no-flight zone succeeded in halting the atrocities against the civilian population. However, in the Kosovo case, a larger scale of air operations was required to keep Yugoslavian troops from committing war crimes.

As a result, the precedent applications are significant for revealing the state practice element of a customary international law norm. The R2P applications in the recent past show that actions based on the R2P are desired to take place under the umbrella of a coalition, as mentioned in the ICISS Report.<sup>59</sup> The non-military sanctions in Myanmar, the unauthorized military actions in Iraq and Kosovo and the Libya intervention under a UN mandate have all taken place under such a coalition. Similarly, the "Friends of Syria" group has been formed to act against the Assad

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<sup>54</sup> Huffington Post (2013), "France 'Ready To Punish' Syria Over Gas Attack". *Huffington Post*. 27 August 2013, retrieved from: [http://www.huffingtonpost.com/2013/08/27/france-syria\\_n\\_3823398.html](http://www.huffingtonpost.com/2013/08/27/france-syria_n_3823398.html).

<sup>55</sup> The UK Government, "Chemical Weapon Use by Syrian Regime: UK Government Legal Position" (policy paper) published on 29 August 2013 (available at: <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>).

<sup>56</sup> An original joint resolution to authorize the limited and specified use of the United States Armed Forces against Syria (adopted on 6 September 2013).

<sup>57</sup> Statement by the President on the U.S.-Russian Agreement on the Framework for Elimination of Syrian Chemical Weapons, 14 September 2013.

<sup>58</sup> These states included Albania, Australia, Brazil, Canada, Germany, Indonesia, Qatar, South Korea and Turkey.

<sup>59</sup> International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, Ottawa (October 2001), pp. 48, 49.

regime after the preceding Security Council deadlock.<sup>60</sup> Besides, the international community recognized states' responsibility to protect their populations by approving the 2005 World Summit Outcome Document and the 1949 Genocide Convention. Furthermore, there are the *de facto* situations that occurred after some unauthorized military actions have been recognized by many states, including a majority of the permanent members of the UNSC. This fact shows that the states recognize such emerging customary rules.

## 2. The R2P's Application to the Anti-ISIS Coalition

Following the formation of the US-led anti-ISIS coalition, the international community carried out air strikes in Syria as a response to the war crimes committed by ISIS. However, the foreign military involvement in Syria caused a debate on the legitimacy of the use of force since the coalition forces did not receive consent from the Bashar Assad government. It should be underlined that there is no doubt of the legality of the airstrikes in Iraq since the Baghdad government invited the international community to strike against ISIS. It is also clear that the anti-ISIS operations were carried out with humanitarian concerns. However, the absence of a consensus on the legality of the humanitarian intervention makes the foreign involvement in Syria questionable. As of 30 September 2015, Russia also became involved in the conflict by sending troops to Syria to support the Syrian Arab Army's struggle against the rebels and ISIS. However, Russia's involvement will be disregarded here since the Russian intervention has been legitimized by an invitation from the Bashar Assad government.<sup>61</sup>

### 2.1. The ISIS Advance & War Crimes

ISIS was founded as a minor belligerent armed group in the Iraqi civil war. Taking advantage of the rising sectarian tensions within the country, the group gained popular support and military power in a short period of time. In mid-2013, ISIS became officially involved in the Syrian Civil War and declared war on both moderate and regime forces. Besides gaining a huge territory and economic power, ISIS also recruited many militants from all over the world. In June 2014, ISIS started an offensive in the Iraqi territory and succeeded in gaining control of the Sunni-populated regions; it then united these regions with the ISIS-held regions of Syria in 2015.

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<sup>60</sup> Reuters (2012), "France, Partners Planning Syria Crisis Group: Sarkozy", *Reuters*, 4 February 2012, retrieved from: <http://www.reuters.com/article/2012/02/04/us-syria-france-idUSTRE8130QV20120204>.

<sup>61</sup> New York Daily News (2015), "Syrian Government Invites Russia to Send in Ground Troops to Protect Assad Regime from ISIS", *New York Daily News*, 2 October 2015, retrieved from: <http://www.nydailynews.com/news/world/russia-launches-attacks-syria-day-article-1.2382933>.

During its advance, ISIS committed many serious war crimes, including executing prisoners<sup>62</sup>, killing civilians<sup>63</sup>, torture<sup>64</sup>, mass rape<sup>65</sup>, use of children in military forces<sup>66</sup>, slavery<sup>67</sup>, and use of chemical weapons.<sup>68</sup>

ISIS mainly targeted non-Sunni religious communities in the regions that they held. Especially Yazidi, Christian, Alawite and Shia Turkmen communities were victims of the religiously motivated violence. According to the UN Reports, in these attacks approximately 5.000<sup>69</sup> Yazidis have been killed, and more than 430.000<sup>70</sup> Yazidis were displaced. Unlike the Christians, the Yazidis were practicing a polytheist religion; therefore ISIS offered them no choice other than converting to Islam or death. Yazidi women were also victims of slavery. In October, the UN confirmed that 5.000–7.000 Yazidi women and children had been abducted by ISIS and sold into slavery.<sup>71</sup>

In addition to the Yazidis, more than 200.000 Assyrian Christians were also forced to leave their homelands.<sup>72</sup> In total, more than 830.000 people (including Sunni Arabs and Turkmen) have been displaced since ISIS's capture of Mosul.<sup>73</sup>

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<sup>62</sup> "Video Shows Islamic State Executes Scores of Syrian Soldiers", *Reuters*, 28 August, 2015, retrieved from: <http://www.reuters.com/article/2014/08/29/us-syria-crisis-idUSKBN0GS10O20140829>.

<sup>63</sup> UN News Center (2014), "Iraq Violence: UN Confirms More Than 2000 Killed, Injured since Early June". *UN News Centre*. 24 June 2014, retrieved from: <http://www.un.org/apps/news/story.asp?NewsID=48117#.Vh1fOOx3Dy0>.

<sup>64</sup> Human Rights Watch (2014), "Syria: ISIS Tortured Kobani Child Hostages", Human Rights Watch, 4 November 2014, retrieved from: <https://www.hrw.org/news/2014/11/04/syria-isis-tortured-kobani-child-hostages>.

<sup>65</sup> Foreign Policy Magazine (2014), "The Islamic State of Sexual Violence", *Foreign Policy Magazine*, 16 September 2014, retrieved from: <http://foreignpolicy.com/2014/09/16/the-islamic-state-of-sexual-violence>.

<sup>66</sup> Foreign Policy Magazine (2014), "Children of the Caliphate", *Foreign Policy Magazine*, 24 October 2014, retrieved from: <http://foreignpolicy.com/2014/10/24/children-of-the-caliphate/>.

<sup>67</sup> Foreign Policy Magazine (2014), "The Islamic State of Sexual Violence", *Foreign Policy Magazine*, 16 September 2014, retrieved from: <http://foreignpolicy.com/2014/09/16/the-islamic-state-of-sexual-violence>.

<sup>68</sup> The Guardian (2015), "Kurdish Forces Fighting Isis Report Being Attacked with Chemical Weapons". *The Guardian*. 13 August 2015, retrieved from: <http://www.theguardian.com/world/2015/aug/13/kurdish-forces-fighting-isis-attacked-chemical-weapons-reports>.

<sup>69</sup> The Daily Mail, (2014), "Full Horror of the Yazidis Who Didn't Escape Mount Sinjar: UN Confirms 5,000 Men Were Executed and 7,000 Women Are Now Kept as Sex Slaves", *The Daily Mail*, 14 October 2014, retrieved from: <http://www.dailymail.co.uk/news/article-2792552/full-horror-yazidis-didn-t-escape-mount-sinjar-confirms-5-000-men-executed-7-000-women-kept-sex-slaves.html>.

<sup>70</sup> Rudaw (2015), "Report: 430,000 Kurdish Yezidis Displaced by ISIS", *Rudaw*, 1 October 2015, retrieved from: <http://rudaw.net/NewsDetails.aspx?pageid=161908>.

<sup>71</sup> The Telegraph (2014), "ISIL Carried Out Massacres and Mass Sexual Enslavement of Yazidis, UN Confirms". *The Telegraph*, 14 October 2014, retrieved from: <http://www.telegraph.co.uk/news/worldnews/islamic-state/11160906/Isil-carried-out-massacres-and-mass-sexual-enslavement-of-Yazidis-UN-confirms.html>.

<sup>72</sup> Aina.org (2014), "Increasing Calls for Military Intervention to Save Assyrians and Yazidis", *Aina.org*, 15 August, retrieved from: <http://www.aina.org/releases/20140815163513.html>.

## 2.2. The International Response to ISIS

In 2013, the UN Human Rights Council drafted two resolutions which underline that the Syrian authorities failed to meet their 'responsibility to protect' their country's population against atrocities.<sup>74</sup> In this context, the UNSC drafted a resolution and authorized the international community to deliver humanitarian aid to Syria without the consent of the Syrian government.<sup>75</sup> Although the Syrian government declared that any humanitarian aid without the consent of Damascus would be a breach of the sovereignty of Syria<sup>76</sup>, the international community delivered hundreds of humanitarian convoys to Syria in accordance with the UNSC Resolution, which is also considered as a great achievement for the R2P.<sup>77</sup>

Soon after the fall of Mosul, the UN reported that ISIS killed more than 1.000 Iraqi civilians in 17 days - from 5 to 22 June 2014.<sup>78</sup> After ISIS occupied Mosul, the second largest city of Iraq, the international community became aware of the criminal potential of ISIS and of what it is capable of. Also Navi Pillay, the UN High Commissioner for Human Rights, announced that ISIS is performing "widespread ethnic and religious cleansing in the areas under their control".<sup>79</sup>

During the Sinjar crisis in August 2014, the Arab League declared ISIS's actions to be crimes against humanity.<sup>80</sup> In addition, a U.N. report published by the Human Rights Office recognized ISIS's atrocities against Yazidis as genocide.<sup>81</sup> Also in August 2014,

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<sup>73</sup> Amnesty International (2014), Iraq: Ethnic Cleansing on Historic Scale: The Islamic State's Systematic Targeting of Minorities in Northern Iraq, 2 September 2014, index number: MDE 14/011/2014, p. 5.

<sup>74</sup> The Deteriorating Situation of Human Rights in the Syrian Arab Republic, and the Recent Killings in Al-Qusayr, A/HRC/RES/23/1, 29 May 2013; The Deterioration of the Situation of Human Rights in the Syrian Arab Republic, and the Need to Grant Immediate Access to the Commission of Inquiry, A/HRC/RES/23/26, 14 June 2013.

<sup>75</sup> UN Security Council Resolution 2165 (14 July 2014).

<sup>76</sup> Reuters (2015), "U.N. Security Council Authorizes Cross-Border Aid Access in Syria", *Reuters*, 14 June, retrieved from: <http://www.reuters.com/article/2014/07/14/us-syria-crisis-un-aid-idUSKBN0FJ1Z320140714>.

<sup>77</sup> Global Centre for the Responsibility to Protect (2013), R2P References in United Nations Security Council Resolutions and Presidential Statements, Global Centre for the Responsibility to Protect, retrieved from: <http://www.globalr2p.org/publications/232>.

<sup>78</sup> Today's Zaman (2014), "UN Warns of War Crimes as ISIL Allegedly Executes 1,700", *Today's Zaman*, 15 June, retrieved from: [http://www.todayszaman.com/anasayfa\\_un-warns-of-war-crimes-as-isil-allegedly-executes-1700\\_350389.html](http://www.todayszaman.com/anasayfa_un-warns-of-war-crimes-as-isil-allegedly-executes-1700_350389.html).

<sup>79</sup> The Guardian (2014), "Isis Accused of Ethnic Cleansing as Story of Shia Prison Massacre Emerges", *The Guardian*, 25 August 2014, retrieved from: <http://www.theguardian.com/world/2014/aug/25/isis-ethnic-cleansing-shia-prisoners-iraq-mosul>.

<sup>80</sup> Medafrika Times (2014), "MENA: Arab League Accuses ISIS of 'Crimes against Humanity'", *Medafrika Times*, 12 August 2014, retrieved from: <http://medafricatimes.com/3105-mena-arab-league-accuses-isis-of-crimes-against-humanity.html>.

<sup>81</sup> Huffington Post (2014), "ISIS May Have Committed Genocide Against Yazidis: UN", *Huffington Post*, retrieved from: [http://www.huffingtonpost.com/2015/03/19/isis-genocide-yazidis\\_n\\_6900224.html](http://www.huffingtonpost.com/2015/03/19/isis-genocide-yazidis_n_6900224.html).

the UNSC adopted a resolution which condemns ISIS activities in Iraq and Syria without authorization of the use of force.<sup>82</sup>

In November 2014, the UN Commission of Inquiry on Syria published a report, and in it, it wrote that ISIS is committing crimes against humanity.<sup>83</sup> Following the report, the UNGA adopted another resolution and urged the international community to take all appropriate steps to protect civilians.<sup>84</sup>

During the ISIS siege of Kobani, the UN Special Advisors on the Prevention of Genocide and the Responsibility to Protect delivered a speech on 10 October 2014 urging regional and global actors to take collective action to ensure the protection of the populations endangered by ISIS and avert the possibility of further atrocity crimes.<sup>85</sup> It should be noted that the UN advisors referenced the 2005 World Summit Outcome document and the Responsibility to Protect doctrine in their speech.<sup>86</sup> The President of the Security Council also expressed his concerns about the ongoing humanitarian crisis in the ISIS-held regions a short time afterwards.<sup>87</sup>

Furthermore, the UN Special Envoy for Syria called Turkey to take action in order to protect the civilians of Kobani, reminding the world of the horrific atrocities that were committed in Sinjar. He also compared the situation in Kobani with Srebrenica, stating that “when there is an imminent threat to civilians we cannot, we should not remain silent.”<sup>88</sup>

### 2.3. A Comparison with the Precedent Applications

The first international initiative for the R2P in Syria was against the crimes of the Assad regime at the beginning of the war. While the Security Council could authorize the use of military force in Syria pursuant to its Chapter VII powers, it was deadlocked in 2011. Also, to date, Russia and China have vetoed three<sup>89</sup> resolutions authorizing peaceful measures to end the conflict in Syria. Lastly, in July 2012, Russia and China vetoed a British-drafted resolution sponsored by the U.S., France,

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<sup>82</sup> UN Security Council Resolution 2170 (15 August 2014).

<sup>83</sup> The Daily Star (2014), "UN Probe: ISIS Committing 'Crimes Against Humanity' in Syria," *The Daily Star*, 14 November 2014, retrieved from: <http://www.dailystar.com.lb/News/Middle-East/2014/Nov-14/277641-un-probe-isis-committing-crimes-against-humanity-in-syria.ashx>.

<sup>84</sup> UN General Assembly Resolution A/C.3/69/L.31.

<sup>85</sup> Statement by Adama Dieng, Special Adviser of the Secretary-General on the Prevention of Genocide, and Jennifer Welsh, Special Adviser of the Secretary-General on the Responsibility to Protect, on the situation in Kobane, Syria (New York, 10 October 2014).

<sup>86</sup> Full text of the statement:

<http://www.un.org/en/preventgenocide/adviser/pdf/10.10.14%20Statement%20of%20the%20Special%20Advisers%20on%20the%20situation%20in%20Kobane.pdf>.

<sup>87</sup> Statement by the President of the Security Council, 19 November 2014, S/PRST/2014/23.

<sup>88</sup> Note to Correspondents - Transcript of a press conference with the UN Special Envoy for Syria (SES) Staffan de Mistura, Geneva, 10 October 2014.

<sup>89</sup> Draft Resolutions: S/2011/612, S/2012/77, S/2012/538.



and Germany that threatened sanctions unless the Syrian government withdrew heavy weapons from populated areas within ten days.

After the international community failed to act against the Syrian regime at the first stage of war, ISIS emerged as a greater threat against the civilian population in Syria. Therefore an international coalition was formed to commence air strikes against ISIS, despite the absence of consent from both Assad and the UNSC. Although the R2P doctrine foresees the intervening countries' cooperation with the government of the affected country to prevent a humanitarian catastrophe in the first level<sup>90</sup>, it was not possible for the international community to assist Syria in preventing the atrocity crimes that are currently occurring within its jurisdiction because the Syrian government itself is also perpetrating them.<sup>91</sup> Therefore US officials clearly noted that the current government already lost its legitimacy by performing human rights violations against its own people.<sup>92</sup> Correspondingly, the Syrian government declared that any strikes against ISIS without its consent would be considered acts of aggression.<sup>93</sup>

It was clear that the international coalition acted against ISIS with the intention to prevent a possible genocide in Syria, since the world already witnessed the previous genocidal acts of ISIS.<sup>94</sup> However, the possibility of genocide by itself was not enough to legitimize such an action in another sovereign state's territory. Therefore it is necessary that the ongoing situation in Syria should meet the criteria set in the ICISS Report and the UN High Panel Report. The primary criterion for applying the R2P is whether one can prove the existence of a humanitarian crisis in the area in question. In this context, many international organizations such as Amnesty International<sup>95</sup> and Human Rights Watch<sup>96</sup> make announcements about the ongoing human right violations committed by ISIS. Moreover, the UN General Assembly<sup>97</sup>, the UN Security Council<sup>98</sup>, the UN Human Rights Council<sup>99</sup> and the Arab League recognized ISIS's acts as genocide and condemned the actions with various resolutions.

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<sup>90</sup> UN World Summit Outcome 2005 § 139.

<sup>91</sup> UN Human Rights Council Resolution adopted at "urgent meeting" of HRC at its 19th regular session, A/HRC/RES/19/1.

<sup>92</sup> "Interview with Bob Schieffer of CBS's Face the Nation" 13 September 2014, retrieved from: <http://www.state.gov/secretary/remarks/2014/09/231629.htm>.

<sup>93</sup> New York Times (2014), "Syrian Leaders See Opportunities and Risks in U.S. Striking ISIS on Their Soil", *The New York Times*, 14 September 2014, retrieved from: <http://www.nytimes.com/2014/09/15/world/middleeast/syrian-leaders-see-opportunities-and-risks-in-us-strikes-against-isis-on-their-soil.html>.

<sup>94</sup> Huffington Post (2014), "ISIS May Have Committed Genocide Against Yazidis: UN", *Huffington Post*, retrieved from: [http://www.huffingtonpost.com/2015/03/19/isis-genocide-yazidis\\_n\\_6900224.html](http://www.huffingtonpost.com/2015/03/19/isis-genocide-yazidis_n_6900224.html).

<sup>95</sup> See footnote 74.

<sup>96</sup> See footnote 65.

<sup>97</sup> See footnote 85.

<sup>98</sup> See footnote 83.

<sup>99</sup> See footnote 82.



Furthermore, there is no doubt that in this case, the international coalition acted with *just cause* in order to halt a genocide. The fact that the coalition forces limited their operation to ISIS-held areas and did not apply it to regime forces is significant for proving that the intervention met the criteria of *good intentions* and *proportionality*, which also reveals that the intervention did not aim to breach Syria's sovereignty, but to prevent a humanitarian tragedy.

The international community did not directly intervene in the conflicts, as the application of the R2P is dependent on the exhaustion of other measures. On the first level, the international community promoted a "train & equip" program in order to create local forces to fight against ISIS.<sup>100</sup> But after the lack of success of the train & equip program, a military coalition was formed in order to halt the growing humanitarian tragedy. The coalition forces aimed to assist the Euphrates Volcano forces, which are a result of the train & equip program.

Moreover the reality that the air strikes prevented ISIS from gaining more territory and exterminating the civilian population also reveals the existence of a *reasonable chance of success* of the intervention.

It is also possible to increase the legitimacy of an intervention by receiving consent from the representatives of the oppressed people, as was the case with the Kurdish community's request for military action from the USA and European governments,<sup>101</sup> and the KLA's call for aid from the international community during the Kosovo crisis.<sup>102</sup> In Syria, a legitimate request for an intervention could come from a number of sources, including the Syrian National Council, the Local Coordinating Committees of Syria, the Revolutionary Council, the Free Syrian Army, and other leading opposition groups, but in this case, it was the armed political party PYD that actually requested air strikes from the international community.<sup>103</sup>

### 3. The Result

In consequence, these early instances of state practices form the foundation of the R2P, demonstrating that states recognized the importance of protecting civilians from atrocity crimes even despite the absence of a UNSC authorization.

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<sup>100</sup> See generally Blanchard, Christopher M., and Belasco, Amy (2015), *Train and Equip Program for Syria: Authorities, Funding, and Issues for Congress*, Congressional Research Service, 9 June 2015, retrieved from: <https://www.fas.org/sgp/crs/natsec/R43727.pdf>.

<sup>101</sup> Malanczuk, Peter (1991), "The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War", *European Journal of International Law*, pp. 114 – 121.

<sup>102</sup> New York Times (1999), "Conflict in the Balkans: In Kosovo; Top Ethnic Albanian Rebel Asks NATO to Start Strikes", *New York Times*, March 23, 1999, retrieved from: <http://www.nytimes.com/1999/03/23/world/conflict-balkans-kosovo-top-ethnic-albanian-rebel-asks-nato-start-strikes.html>.

<sup>103</sup> The Guardian (2014), "US-Led Air Strikes Hit Key Isis Targets amid Battle with Kurdish Forces", *The Guardian*, 14 March 2015, retrieved from: <http://www.theguardian.com/world/2015/mar/14/us-led-air-strikes-isis-kurdish-forces-syria>.

Although there is a point of view which considers the R2P as a codification of already existing customs, it is hard to accept that there was already an existing legal norm for the use of force without its approval from the UNSC in a case where the UNSC was deadlocked and failed to prevent crimes against humanity.

However, under the light of the abovementioned facts, it is clear that there is an emerging custom which may lead to a new exception in the current legal framework of prohibition of use of force.

Also under the light of those facts, an absence of UNSC or government approval does not make the airstrikes in Syria illegal since the airstrikes are carried out with legal and humanitarian arguments which already partially embrace the customary rules. It should be pointed out that the response of the international community to the airstrikes will be the determining factor in the fate of the R2P's status as a customary rule. There is no doubt that the coalition airstrikes in Syria will be a milestone and a precedent for the future R2P debate.

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