

# **The ‘Responsibility to Protect’ and Syria: The International Community’s Failure to Prevent Mass Atrocities (Again)**

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*“How long can this situation continue? I mean in Bosnia, now we have Ban Ki-moon [the UN secretary general] apologising 20 years after. Who will apologise for Syria in 20 years’ time? How can we stay idle?”*

This paper addresses the Syrian revolution<sup>2</sup> and in particular the failure of the international community to respond effectively. Part I outlines some aspects of the problem. Part II suggests some solutions, drawing upon norms of international law such as the “Responsibility to Protect” (also known as R2P, or RtoP). Part III examines the reality - it suggests that what is likely to happen is quite different from what ought to happen.

## **PART I – THE PROBLEM**

### **How many people have died in the Syrian revolution?**

It is impossible to know for certain how many people have been killed in the Syrian revolution since it began in March 2011. The uprising against the Syrian regime was as unexpected to observers and it was to Bashar al-Assad.<sup>3</sup> It started with peaceful

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1- Turkish Foreign Minister Ahmet Davutoglu, in an interview with the Guardian newspaper in October 2012: see Simon Tisdall, “Turkey calls on major powers to intervene in Syria” 19 October 2012, available at: <<http://www.theguardian.com/world/2012/oct/19/turkey-britain-us-intervene-syria>> last accessed on 11 December 2013.

2- Throughout this paper, the term ‘revolution’ will be used to describe what is happening in Syria. The word is meant in the sense of “a fundamental change in political organization; especially : the overthrow or renunciation of one government or ruler and the substitution of another by the governed”: see Merriam-Webster available at <<http://www.merriam-webster.com/dictionary/revolution>> last accessed on 11 December 2013.

3- In an interview with the Wall Street Journal in January 2011, Assad said “...if you want to make a comparison between what is happening in Egypt and Syria, you have to look from a different point: why is Syria stable, although we have more difficult conditions? Egypt has been supported financially by the United States, while we are under embargo by most countries of the world. We have growth although we do not have many of the basic needs for the people. Despite all that, the people do not go into an uprising”: see The Wall Street Journal, “Interview with Syrian President Bashar al-Assad” 31 January 2013, available at: <<http://online.wsj.com/news/articles/SB10001424052748703833204576114712441122894>> last accessed on 11 December 2013. Throughout the interview he denied that Syria would see the same upheaval as Tunisia and Egypt. For a description of the Syrian uprising, as compared with the other Arab uprisings, see Marc Lynch *The Arab Uprising: The Unfinished Revolutions of the New Middle East* (New York: Public Affairs, 2013).

demonstrations in Dar'aa but since it began on 18 March 2011 it has resulted in thousands of deaths. The Syrian Observatory for Human Rights estimated in September 2013 that the number of deaths was around 110,000;<sup>1</sup> in early December 2013 that Non-Governmental Organisation's estimate rose to at least 125,835 dead.<sup>2</sup> The United Nations and the world media seem to have settled on a static total of "at least 100,000". From June 2013 until early 2014, the same statistic "of at least 100,000 dead" was used without any upwards revision.<sup>3</sup> Recently, the United Nations announced that it would no longer revise the death toll – it has said that since it can't verify the numbers, it will stop updating them.<sup>4</sup> Do the numbers even matter? Josef Stalin supposedly once said, "one death is a tragedy; a million is a statistic".<sup>5</sup>

The numbers *do* matter. The Syrian revolution is no longer a small, "internal matter" that can be swept under the carpet by the Assad regime.<sup>6</sup> Despite the fact that the Syrian conflict is often

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1- Huffington Post.com, "Syria Death Toll: More than 110,000 Dead In Conflict, NGO Says" 1 September 2013, <[http://www.huffingtonpost.com/2013/09/01/syria-death-toll\\_n\\_3851982.html](http://www.huffingtonpost.com/2013/09/01/syria-death-toll_n_3851982.html)> last accessed on 1 December 2013.

2- "Syria War Toll Nearly 126,000 – NGO" 2 December 2013 <[http://voiceofrussia.com/news/2013\\_12\\_02/Syria-war-toll-nearly-126-000-NGO-7038/](http://voiceofrussia.com/news/2013_12_02/Syria-war-toll-nearly-126-000-NGO-7038/)> last accessed on 5 December 2013, reporting figures from the Syrian Observatory for Human Rights (SOHR). The SOHR relies on a network of activists, lawyers and doctors on the ground in Syria to formulate its statistics.

3- The statistic of "at least 100,000 dead" in the Syrian revolution was first mentioned in the media in around June 2013 but even in December 2013 the same statistic was still being widely cited.

4- Kashmira Gander, The Independent, "UN to stop updating death toll in Syria conflict" 7 January 2014 available at <<http://www.independent.co.uk/news/world/middle-east/un-to-stop-updating-death-toll-in-syria-conflict-9045096.html>> last accessed on 10 January 2014.

5- There is some debate as to whether Stalin ever said this famous phrase which is always attributed to him: Julia Solovyova, "Mustering Most Memorable Quips" The Moscow Times <<http://bailey83221.livejournal.com/87856.html>> last accessed on 2 December 2013.

6- Bashar al-Assad has been quoted in several sources as referring to the revolution in Syria as an "internal matter". He has also referred to plans for a transitional government as also being "an internal matter". Clearly, the implication from Assad's regime was and remains that Syria is experiencing some domestic problems of an "internal" nature: see Associated Press, "Syrian President Bashar al-Assad Says Transitional Talks are an Internal Matter" May 19 2013, available at The Reporter <[http://www.thereporter.com/ci\\_23277622/syrian-president-bashar-assad-says-transitional-talks-are](http://www.thereporter.com/ci_23277622/syrian-president-bashar-assad-says-transitional-talks-are)> last accessed on 1 October 2014; see also Faisal al Yafai, The American Prospect, "Forgiving Syria", 5 April 2013 where Assad is quoted as describing the uprising as "an internal matter", available at <<http://prospect.org/article/forgiving-syria>> last accessed on 1 October 2014.

reported in terms of the number of dead, it is important to pause and reflect on the fact that the numbers represent real people, real individuals whose lives have been taken. What began on 18 March 2011 as peaceful street protests in Dar'aa, calling for democratic reform and freedom, quickly turned into crimes against humanity<sup>1</sup> and the situation is now a bloody, gruesome, conflict that is without doubt a threat to international peace and security. The figures are always disputed but numerous think-tanks and research groups have been focused on documenting the carnage and have produced credible statistics. One such group has recently reported that amongst the approximately 126,000 deaths, at least 11,000 of those killed have been children.<sup>2</sup>

### **Crimes against children**

A study published by the Oxford Research Group on 24 November 2013 found that approximately 1 in 10 deaths in the Syrian conflict is a child.<sup>3</sup> By the end of August 2013, at least 11,420 children under the age of 17 had been killed in Syria. In terms of location, the highest number of children killed has been in the governorate of Aleppo, where at least 2,223 children have been killed but in proportion to the local population, the deadliest governorate to be a child is Dar'aa, where 1,134 children (or 1 in 400) has been killed.<sup>4</sup> In terms of gender, the Oxford Research Group's study shows that boys' are killed twice as often as girls,

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1 As early as June 2011, Human Rights Watch reported that the massacre in Dar'aa represented a crime against humanity. Witnesses from Dar'aa reported systematic killings, beatings, torture, electric shock devices and detention of people seeking medical care: see Human Rights Watch "We've Never Seen Such Horror: Crimes Against Humanity by Syrian Security Forces" 1 June 2011 available at: <<http://www.hrw.org/node/99366>> last accessed on 11 December 2013.

2- Oxford Research Group, "Stolen Futures: The Hidden Toll of Child Casualties in Syria" available for download at: <<http://www.oxfordresearchgroup.org.uk/sites/default/files/Stolen%20Futures.pdf>> last accessed on 5 December 2013.

3- Ibid, 5.

4- Ibid, 6-7.

and that boys' chances of being killed increase as they get older.<sup>1</sup>

As for cause of death, the Oxford Research Group has found that 70 percent of children are killed by explosive devices. Children are blown up whilst on their way to school or waiting in a bread queue or playing outside. A further 26.5 percent are killed by small-arms fire including 764 cases of summary execution and 389 cases of sniper fire. The cases of summary execution are deeply disturbing: 566 boys and 196 girls have been executed, sometimes in a detention centre, sometimes in a field, sometimes after having been tortured.<sup>2</sup> There is evidence in this report and elsewhere<sup>3</sup> that children are deliberately targeted by snipers; boys aged 13-17 are most at risk of targeted killings. Thus, there is verifiable evidence that children are being tortured and killed in Syria. As if the above data were not disturbing enough, the report shows that amongst the children tortured to death were a number of infants. Child victims of torture ranged in age from one, three, four, nine and ten years old up until 17 years old.<sup>4</sup>

As reported widely in the media, a number of children have been killed by chemical weapons in Syria including approxi-

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1- Ibid.

2- Ibid, 8.

3- A BBC documentary followed a group of British citizens who travelled to Aleppo, Syria in November 2013 as part of an aid convoy. They reported first-hand the targeting of children and pregnant women by government snipers. A British doctor assisting in an Aleppo hospital explained how government snipers make a game of shooting civilians: one day they shoot them in the shoulder, another day they shoot them in the ankle, another day in the knee-caps, and so on. One mother was reported to have been walking in the streets of Aleppo with her two young children when a sniper shot one of them. When she called out in anguish and asked them why they shot her child, the sniper shot the other one. When she asked them to shoot her as well, they refused. This story was told to one of the members of the aid convoy. It was broadcast on BBC radio: see Asian Network Reports "A Road Trip to War", 20 November 2013 available at: <http://www.bbc.co.uk/programmes/p011tdnr> last accessed on 6 December 2013.

4- Oxford Research Group, "Stolen Futures: The Hidden Toll of Child Casualties in Syria", supra n12, at 13.

mately 128 killed in the Assad regime's 13 August 2013 attack on the village of Ghouta.<sup>1</sup> The chemical weapons attack attracted a lot of media attention, and resulted in the one and only Security Council resolution concerning the Syrian conflict,<sup>2</sup> but the data shows that out of the total number of children killed, only about 1 percent (about 128 out of 11,420 deaths) were killed by chemical weapons. By far, the risks of being killed in Syria come from aerial bombardment, tanks, missiles, sniper fire and small arms fire. Unfortunately, the international community is not acting to stop the deaths from any of those other causes.

Children are one particularly vulnerable group who have no defence against the Assad regime<sup>3</sup> and cannot be implicated on any level as being deserving of the violence to which they are subjected. The crimes against children documented by the Oxford Research Group are grizzly and disturbing. From a legal perspective, there is no doubt that they are criminal acts of the

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1- Ibid.

2- S/RES/2118 (2013) adopted on 27 September 2013 at the 7038th Meeting of the Security Council, available at: <http://www.un.org/News/Press/docs/2013/sc11135.doc.htm> last accessed on 11 December 2013.

3- Although violence is being perpetrated by both Assad-regime and opposition forces, most of the figures in the Oxford Research Group's "Stolen Futures" Report are from NGOs and civil society groups that are allied with the opposition. Despite open alignment with the opposition, these Syrian and international civil society groups see themselves as impartial casualty recorders. The authors of the "Stolen Futures" Report also note that the Syrian Government had not provided the OHCHR with figures of casualties since March 2012; see Oxford "Stolen Futures" supra n12 at 15. The assertion being made in the main text is that responsibility for the deaths of these children and indeed most civilians, lies mainly with the Assad regime and its supporters including militias. This assertion finds support with the highest-ranking figures in the UN. In February 2014, UN Secretary-General Ban Ki-Moon clearly stated that the regime is mainly responsible when he said, inter alia, that: "...use of weaponry and military tactics that are disproportionate and indiscriminate by Government forces and associated militias has resulted in countless killings and the maiming of children, and has obstructed children's access to education and health services ...": UN, 4 February 2014, "First UN Report on Children in Syria's Civil War Paints Picture of 'Unspeakable' Horrors" available at <<http://www.un.org/apps/news/story.asp?NewsID=47077#.VCuTSFyyfwl>> last accessed on 1 October 2014. In addition, Navi Pillay, the UN High Commissioner for Human Rights said in April 2014 that human rights violations by Syrian government forces "far outweigh" those by armed opposition groups: see Reuters, 8 April 2014, "U.N. human rights chief says Syria government abuses 'far outweigh' rebels", available at <<http://www.reuters.com/article/2014/04/08/us-syria-crisis-un-rights-idUSBREA371UM20140408>> last accessed on 1 October 2014.

worst kind, war crimes and crimes against humanity.<sup>1</sup> Torture is prohibited in all circumstances. It is a crime against humanity and it is subject to universal jurisdiction, which means that any state can exercise its jurisdiction, regardless of where the crime took place, the nationality of the perpetrator, or the nationality of the victim.<sup>2</sup>

## Crimes against women

In addition to the crimes against children, there is documented evidence of the Syrian regime's appalling crimes against women. Violence against women (VAW) has been used in Syria as a systematic regime tool to try to crush the opposition. A recent report published in November 2013 by Syrian human rights activist Semar Nasar in conjunction with the Euro-Mediterranean Human Rights Network shows that VAW, including sexual abuse, is being used widely by the Assad regime but it is most likely

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1- The term 'crimes against humanity' is defined in Article 7 of the Rome Statute of the International Criminal Court. It means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, cultural, religious, gender...or other grounds...(i) Enforced disappearance of persons' (j) The crime of apartheid; (k) Other inhumane acts of a similar character...": see Article 7 of the Rome Statute of the ICC available at <[http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)> last accessed on 1 October 2014.

2- 'Torture' is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...": see Article 1.1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly on 10 December 1984, entered into force on 26 June 1987. Syria acceded to this convention on 19 August 2004. The International Criminal Court has jurisdiction over 'Crimes Against Humanity' by virtue of Article 5(1)(b). 'Torture' is classified in the Rome Statute as a 'Crime Against Humanity' and, as such, is subject to its jurisdiction: see Article 7(f) Rome Statute of the ICC available at [http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) last accessed on 1 October 2014.



under-reported due to feelings of shame and humiliation.<sup>1</sup> The Euro-Mediterranean Human Rights Network report shows that as of August 2013, at least 7,543 women (including 2,454 girls and 257 female infants under the age of 3) have been killed in Syria. Most of the killings were caused by the regime's indiscriminate bombing of civilian neighborhoods. The Assad regime has been indiscriminately attacking civilians by such means as using aircraft to drop explosive barrels on apartment buildings. The Assad regime has also been using Scud missiles and heavy artillery, fired from considerable distances, which are unable to differentiate between military and civilian targets.<sup>2</sup> In addition, women have been killed by snipers: at least 421 women have been confirmed as having been killed deliberately, since snipers can easily distinguish between male and female targets.

Women have also died in large numbers during the numerous massacres that the Assad regime has perpetrated across the country. There have reportedly been at least 20 separate massacres.<sup>3</sup> For example, between 2 and 4 May 2013, in the villages of Al-Baida and Ras al-Nabe, in the countryside of Baniyas, three-day massacres were committed by the Assad regime which left whole families dead. The overall death toll in those massacres was reportedly 459, including 71 women from Al-Baida and 43 from Ras al-Nabe.<sup>4</sup> Most of the women killed in these massacres were apparently slaughtered or burned – their bodies were mutilated, dismembered and thrown into the streets.<sup>5</sup> The details of

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1 Euro-Mediterranean Human Rights Network "Violence Against Women, Bleeding Wound in the Syrian Conflict" November 2013, available at <http://www.euomedrights.org/eng/wp-content/uploads/2013/11/Doc-report-VAW-Syria.pdf> last accessed on 6 December 2013.

2- Ibid, 10.

3- This statistic was reported on the Free Syrian Army channel on 11 December 2013.

4- Euro-Mediterranean Human Rights Network "Violence Against Women", supra n24 at 10.

5- Ibid; see also the Syrian Human Rights Organisation's report available here <http://www.syrianhr.org/reports/syrian-network-for-human-rights-report-18-05-2013.pdf> (in Arabic).

what was done to those women are difficult to read:<sup>1</sup>

*Local Coordination Committee of Baniyas reported that during these events, the house of a female activist who used to disseminate information of the city on social networks was raided. Her fiancé found her after she was defaced with a knife, her nose extracted, stabbed several times in the hands and legs and was half slaughtered. An eyewitness interviewed by LCC activists in Baniyas affirmed he saw soldiers wearing black shirts and camouflage pants raiding houses in the area when the events occurred. [The victim was providing live reporting of the events on Skype when she was assaulted].*

As this paper was being written, a new massacre was carried out in al-Nabek. On Friday, 6 December 2013, government militias were sent into al-Nabek and 58 people – including women and children – were reportedly slaughtered by pro-regime militias.<sup>2</sup>

Women are also being used as human shields in Syria. When the Assad regime's forces stormed into neighbourhoods in Homs in February 2012, women were forced to walk in front of the government tanks because the government troops were afraid of attacks from the Free Syrian Army.<sup>3</sup> There have also been reports of women being seized by government forces at checkpoints and held as human shields to protect the government forces from attacks by the Free Syrian Army.<sup>4</sup> Worse than this is the evidence of sexual violence, at least 300 cases of which have been carefully documented. The details are awful, heart-wrenching and dif-

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1- Euro-Mediterranean Human Rights Network "Violence Against Women" supra n24 at 10-11.

2- See <http://www.therevoltingsyrian.com> last accessed on 11 December 2013. See also Local Coordination Committees of Syria, 8 December 2013, available at <http://www.uruknet.info/?p=m103196> last accessed on 1 October 2014,

3- Euro-Mediterranean Human Rights Network "Violence Against Women" supra n24 at 11.

4- See Syrian Human Rights Organisation's report, supra n 28.

difficult to recount. For example, the Euro-Mediterranean Human Rights Network report states that:<sup>1</sup>

*Governmental forces and pro- government militias (shabeeha) have been storming areas populated with civilians, conducting wide range campaigns of arrests and committing violent acts against the civilian population including rape, slaughter and arbitrary executions.*

Some of the material in the report on VAW in Syria is so appalling, so disturbing, that one wonders how any human being can carry out such actions on another human being. The report describes the use of rape in prisons, by government security personnel, and of the horrendous aftermath for the victims. Some of the women were deliberately targeted because of their familial connection to men who were political activists or men who were helping the opposition.

### **War crimes?**

Any student of international law would be able to tell you that there is ample evidence of war crimes and crimes against humanity in Syria.<sup>2</sup> There can be absolutely no doubt about that. Every school that is bombed, every mosque that is targeted, every marketplace, every bread-queue, every civilian area that is indiscriminately bombed from the air, every child that is tortured, every woman that is raped and abused, every town that is destroyed, every burning barrel of explosives that is dropped on a civilian area, every hospital that is targeted, every Scud missile that is launched on a suburb, is a war crime.

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1- Euro-Mediterranean Human Rights Network "Violence Against Women, Bleeding Wound in the Syrian Conflict", supra n24 at 13.

2- For definitions of the terms 'war crime' and 'crimes against humanity' see infra at n22 and n70.

Despite the overwhelming evidence of war crimes, the international community has been reluctant to act. It was only on 2 December 2013 that the UN Human Rights Council stated unequivocally that the Syrian regime was clearly and openly engaged in committing war crimes. A United Nations fact-finding team stated in early December that it had found “massive evidence” that the Assad regime, and most likely Assad himself, is responsible for committing war crimes.<sup>1</sup> Navi Pillay, the United Nations High Commissioner for Human Rights, stated that a fact-finding report has now been completed and it contains a list of names (currently confidential) who may be recommended for prosecution for war crimes. There is no confirmation yet of whether Bashar al-Assad’s name is on the list – it should be – but whether it is or not is not really the point. The most important point is that at long last, after two and a half years of conflict, leaders in the international community are willing to accept that the Syrian regime has committed, and is continuing to commit, war crimes.

It is disappointing that this recognition has come so late in the day. After at least 124,000 people have been killed, there is a suggestion that the regime is guilty of war crimes. Unfortunately, the international community has thus far been rather subdued on sounding the alarm on the level of violence against civilians in Syria. Perhaps this is due in part to the role of the media. Media reports have tended to focus on warnings about so-called “Al-Qaeda linked groups” and “Jihadist elements” whilst playing down the source of the problem, which is, that Assad and his regime are getting away with mass murder.

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1- BBC News, “UN implicates Bashar al-Assad in Syria war crimes” 2 December 2013, available at: <<http://www.bbc.co.uk/news/world-middle-east-25189834>> last accessed on 6 December 2013.

## The role of the media

The Western media seems to have been accepting the narratives put forward by the Assad regime, namely, that the uprising is driven by a 'foreign agenda' and that Assad is standing bravely against Islamic extremism.<sup>1</sup> The Western media has been slow at seeing through the spin. The latest angle to emerge is the al-Qaeda narrative: the claim is that foreigners are going to fight in Syria, to help get rid of Assad, but they will become radicalized and then return to their home country in the West to carry out acts of terrorism.<sup>2</sup> The acceptance and repetition of this narrative is a public relations victory for the Assad regime but it also serves the purposes of Western governments that are reluctant to intervene and find this to be a handy and semi-believable excuse for doing nothing to help the people of Syria get rid of their brutal dictator.

The reality is a long way from the Assad regime's narrative. The facts speak for themselves. The Syrian regime's latest means of attack on civilians is the age-old strategy of siege. Assad's troops are trying to starve civilians to death in a bid to make them surrender and stop supporting the opposition fighters. According to

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1- The Western media, and especially the British and American news media, seems focused on the 'Al-Qaeda' angle to the Syrian conflict. The news stories appearing in mainstream American and British newspapers highlight the risks of 'insurgents' being indoctrinated or radicalized and then coming home to America or Britain and supposedly committing terrorist attacks. This angle to the story plays into the hands of the Assad regime by making the opposition look like a group of Al-Qaeda fighters trying to bring down a government, which of course is a complete misrepresentation of the real story. For some examples of the stories in this vein, see inter alia: Greg Miller, *The Washington Post*, 21 November 2013, "U.S. officials warn of insurgent attacks in Syria" available at: <[http://www.washingtonpost.com/world/national-security/us-officials-warn-of-insurgents-streaming-into-syria/2013/11/20/eeca04ac-523b-11e3-9fe0-fd2ca728e67c\\_story.html](http://www.washingtonpost.com/world/national-security/us-officials-warn-of-insurgents-streaming-into-syria/2013/11/20/eeca04ac-523b-11e3-9fe0-fd2ca728e67c_story.html)> last accessed on 6 December 2013; see Con Coughlin and Gordon Rayner, 3 December 2013, "Hundreds of British jihadists in Syria" available at: <<http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10492997/Hundreds-of-British-jihadists-in-Syria.html>> last accessed on 6 December 2013. There are many, many articles written along the lines of "don't help the opposition, they are all al-Qaeda and will come back to attack us" in the Western media.

2- See for example Con Coughlin, 3 December 2013 "The Syrian civil war is breeding a new generation of terrorist" available at: <<http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10491523/The-Syrian-civil-war-is-breeding-a-new-generation-of-terrorist.html>> last accessed on 6 December 2013. This article argues that 'at least 300 British Muslims are now actively engaged in fighting for al-Qaeda linked groups, such as the Nusra Front'.

reports from the BBC, hundreds of thousands of people in the Damascus countryside and around Homs are right at this moment in danger of starving to death. The government of Syria has cut the electricity and is preventing any food, medicine or gas from getting into the towns. The Syrian government freely admits that its strategy is “starve or surrender”.<sup>1</sup> The residents of those towns, such as Muadamiyah, are acutely aware that the outside world has left them to die. One of them remarked that Assad should be taken to the Hague [the seat of the International Criminal Court] and not Geneva [the location of the proposed Geneva II “peace” talks]. But nothing is presently happening to Assad or his regime. It seems clear that the international community has largely abandoned the people of Muadamiyah, and the rest of Syria. It is focusing on assisting the refugees, but the cause of the crisis inside Syria festers on.

## **PART II – THE SOLUTION**

### **What can be done?**

International law has an answer to this heinous situation: it is called ‘humanitarian intervention’. It is not a new idea. In fact, it is a very old idea that when a ruler is killing his own people, and violating their human rights on a large scale, sometimes other actors have to step in, to intervene, acting according to their conscience, and stop the carnage. The notion of ‘humanitarian intervention’ has been much discussed by politicians and lawyers over many decades. Some writers tend to think that ‘humanitarian intervention’ is a recent development. For example, Michael Ig-

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1- Leana Hosea, BBC.com, “Growing suffering of Syria’s besieged civilians” 5 December 2013 available at <<http://www.bbc.co.uk/news/world-middle-east-25240296>> last accessed on 6 December 2013.

natieff has stated that it originated in 1991<sup>1</sup> and Samantha Power concurs.<sup>2</sup> But other scholars show that it is 'anything but new'.<sup>3</sup> Nicholas Wheeler refers to the fact that legal historians can trace the notion of humanitarian intervention back to Hugo Grotius in the seventeenth century.<sup>4</sup> A comprehensive history of humanitarian intervention has recently been produced which confirms that it can be traced back to at least the eighteenth century, and that its roots and antecedents are actually even further back in the sixteenth and seventeenth centuries.<sup>5</sup> The point of creating a comprehensive historical survey is partly to refute the claims that are often made that 'humanitarian intervention' is a development of the later twentieth century - a claim that seems to suggest that its recent arrival is one reason to deny its legitimacy. It is beyond the scope of this paper to delve deeply into the history of humanitarian intervention, that topic has been tackled elsewhere, suffice to say that it is not a recent or modern phenomenon nor is it a recent challenge to the notion of sovereign states.<sup>6</sup>

## What is humanitarian intervention?

There are several possible definitions of humanitarian intervention. One definition holds that humanitarian intervention means:<sup>7</sup>

*The threat or use of force across state borders by a state (or*

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1- Michael Ignatieff, *Empire Lite: Nation-building in Bosnia, Kosovo and Afghanistan* (Vintage, 2003) at 57-59.

2- Samantha Power 'A Problem from Hell': *America and the Age of Genocide* (New York: Harper Perennial: 2003).

3- Gary Bass *Freedom's Battle: Origins of Humanitarian Interventionism* (Alfred Knopf, 2008) at 3.

4- Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (New York: Oxford University Press, 2001) 45.

5- See Brendan Simms and D. J. B. Trimm (eds) *Humanitarian Intervention: A History* (Cambridge: Cambridge University Press, 2011).

6- *Ibid.*

7- J.L. Holzgrefe and Robert O. Keohane (eds.) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003) at 18.

*group of states) aimed at preventing or ending widespread violations and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.*

**This definition has four key parts:**

- (a) it involves an intervention;
- (b) it is aimed at the government of the target state;
- (c) it is coercive in the sense that the target state does not invite the intervention; and
- (d) it is intended to avert, halt and/or prevent large-scale mortality, mass atrocities, human rights abuses or other widespread suffering which is being caused by the action or deliberate inaction of the authorities in the target state.<sup>1</sup>

When action in another state's affairs is made at the request of the target government then it is not considered an intervention. But when it is imposed on a government without their permission then intervention is controversial. This is because humanitarian intervention has almost always been perceived as breaking the conventional pattern of international relations.<sup>2</sup> It challenges the Westphalian concept of sovereignty and seems to be a *prima facie* breach of Article 2(4) and Article 2(7) of the United Nations Charter. Recall that Article 2(4) of the UN Charter says that:

*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political*

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1- Simms and Trim note that in their definition of humanitarian definition there are three key parts. I have used some of the language used in their definition but I can identify four clear parts to the definition: see Simms and Trim Humanitarian Intervention, supra n43 at 4.

2- Ibid, 5.



*independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*

**Article 2(7) of the UN Charter says that:**

*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; but this principle shall not prejudice the application of enforcement measures under Chapter VII.*

So when one state, or a group of states, seeks to intervene by force in another state, the first reaction is that this must be a breach of international law. It seems to fly in the face of notions of sovereignty and the non-interference in the domestic matters of other states. However, a closer reading of the UN Charter makes it clear that sovereignty is not an absolute value: it has to be balanced against the purposes of the UN. In other words, states do not just have rights, they also have responsibilities. Article 2(4) of the UN Charter says that states may not act in a manner that is inconsistent with the purposes of the UN. Chapter 1 of the UN Charter states that the purposes of the UN are *inter alia* to maintain international peace and security, and to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. When a state is killing its own people, torturing them, denying them their human rights, denying them the right to self-determination, then that state is no longer acting in accordance with the purposes of the UN, and therefore, it is no longer entitled to be shielded from intervention by the doctrine of state sovereignty.

The issue of whether a state (or states) can intervene on the grounds of humanitarian intervention is one that has stirred debate for decades. But the debate has intensified since the end of the Cold War. The end of the Cold War marked an era of new hope for human rights protection and an increased expectation that the Security Council would be able to carry out its duties in an effective way. By the early 2000s, there was enthusiasm for an ‘emerging norm’ of intervention to protect human rights.<sup>1</sup> There had been some interventions in the 1990s – for example, in 1999 NATO forces mounted a bombing campaign against Serbia in an attempt to stop attacks on civilians in Kosovo.<sup>2</sup> The NATO bombing campaign was justified on the grounds of humanitarian intervention but it was never authorized by the Security Council. Nevertheless, the action was justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe.<sup>3</sup> Although the NATO military intervention in Kosovo was conducted without Security Council authorization, it was generally seen as a legitimate use of force because it was necessary to save civilian lives.

But the international community had proven to be less effective in other crises, including Darfur, Bosnia and especially in relation to Rwanda. The international community failed to do anything to stop the genocide that occurred in Rwanda in 1994, resulting in the deaths of somewhere between 500,000<sup>4</sup> to 1 million Tutsis<sup>5</sup>

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1- Matthew Jamison “Humanitarian intervention since 1990 and ‘liberal interventionism’” in Simms and Trim (eds) *Humanitarian Intervention: A History* at 365.

2- For a list of humanitarian interventions since 1989, see James Pattison *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford: Oxford University Press, 2012) at 1.

3- Anthony Aust *Handbook of International Law* 2nd ed (Cambridge: Cambridge University Press, 2010) at 213.

4- Estimates of the number of Tutsis killed vary widely. A commonly cited number is 800,000.

5- Boutros Boutros-Ghali “Introduction” in *The United Nations and Rwanda 1993-1996* (New York: Department of Public Information, United Nations, 1996) at 4.

within a period of about 3 months.<sup>1</sup> Former Secretary-General Kofi Annan later admitted that the international community was guilty of sins of omission in failing to stop the killing.<sup>2</sup> The shocking genocide that occurred in Rwanda, as well as the UN's failure to lead a response in Kosovo, led Kofi Annan to ask the international community to take a stance on when states should intervene to stop a humanitarian disaster from occurring? Kofi Annan phrased the question in this way:<sup>3</sup>

*...if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?*

In response to that challenge, the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS) in September 2000.<sup>4</sup> The ICISS' report, issued on December 2001, concluded unanimously that there is a "Responsibility to Protect" which means that:<sup>5</sup>

*...sovereign states have a responsibility to protect their citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.*

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1- The mass slaughter began on 4 April 1994 and ended on 4 July 2004 – both dates are now national holidays in Rwanda.

2- BBC.com, "UN Chief's Rwanda genocide regret" 26 March 2004, available at: <<http://news.bbc.co.uk/2/hi/africa/3573229.stm>> last accessed on 8 December 2013.

3- "The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty" December 2001, (International Development Research Centre, 2001) available online at: <<http://www.scribd.com/doc/52015826/40/Appendix-A-Members-of-the-Commission>> last accessed on 8 December 2013.

4- The ICISS was co-chaired by Gareth Evans and Mohamed Sahnoun. It consisted of 12 Commissioners, including the co-chairs, and it issued its report in December 2001.

5- ICISS Report at viii.

The idea of a “Responsibility to Protect” then went from strength to strength. In 2004, the Report of the UN Secretary-General “In Larger Freedom: Towards Development, Security and Human Rights for All” included a recommendation that the international community be able to intervene when states are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. It referred to the “responsibility to protect” as an emerging norm.<sup>1</sup> The notion that the international community has a “responsibility to protect” people when their own government is committing atrocities against them was then discussed by all states at the 2005 World Summit.<sup>2</sup> The result of that discussion was the formal adoption of the “responsibility to protect” principle; it was enshrined in the 2005 World Summit Outcome document. It is important to note, however, that the World Summit Outcome document was subsequently embodied in a UN General Assembly resolution and as such is not legally binding.<sup>3</sup>

The “responsibility to protect” (also known as R2P or RtoP) principle was stated in paragraphs 138 and 139 of the World Summit Outcome document. Those paragraphs read as follows:

*138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this respon-*

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1- The Secretary-General’s High Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, paragraph 203, UN Doc A/59/565 (December 2004).

2- The 2005 World Summit was a meeting in New York of all (then) 191 states from 14-16 September 2005. The “responsibility to protect” principle was one issue that was discussed at the summit.

3- UN General Assembly Resolution 60/1 of 16 September 2005, paras 138-139.

sibility and support the United Nations in establishing an early warning capability.

*139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.*

The “responsibility to protect” means that when a population is exposed to genocide, war crimes, ethnic cleansing or crimes against humanity, the government concerned will not be able to hide behind the excuse that it can do what it wishes within its borders. There are three aspects to the norm: the responsibility to prevent, the responsibility to react and the responsibility to rebuild. Aside from understanding the four situations where R2P

applies, the other key component of the principle is the three pillars of R2P, which are as follows:

*Pillar One: Every state has the Responsibility to Protect its populations from four mass atrocity crimes: genocide, war crimes, crimes against humanity and ethnic cleansing.*

*Pillar Two: The wider international community has the responsibility to encourage and assist individual states in meeting that responsibility.*

*Pillar Three: If a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter.*

## **Recent developments on R2P**

Since its birth in 2001 to its formal adoption by the international community in 2005, the “responsibility to protect” has been repeatedly discussed and debated by politicians, academics, and international lawyers. There is much to be said about the emerging norm, which cannot be summarized here: many books and articles have been written about it which explore every conceivable aspect of the theory and its application.<sup>1</sup> There are also numerous websites and organisations dedicated to developing R2P and they are making efforts to both raise awareness of and entrench respect for this most laudable of norms.<sup>2</sup> But despite this apparent enthusiasm for the theory itself, there seem to be two rather significant problems. First, there is still considerable disagreement over whether R2P entitles states to use force out-

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1- For example, a simple search on [www.amazon.com](http://www.amazon.com) for books with the phrase “responsibility to protect” in the title, brings up 23 books.

2- For example, [www.responsibilitytoprotect.org](http://www.responsibilitytoprotect.org) and [www.globalr2p.org](http://www.globalr2p.org).

side the authority of the Security Council and secondly, there is the very real problem that a theory is fairly useless when there is no *political will* to put the theory into practice. It seems that we have come a long way from Rwanda in terms of theory, but in reality, the international community is dogged by exactly the same old problem – a lack of political will to use the theory when it is most needed.<sup>1</sup>

As for the first problem, there is a continuing debate over what should happen when the Security Council is not able to take action in a situation where R2P clearly seems appropriate. The 2005 World Summit Outcome document clearly states that action has to be done ‘through the Security Council, in accordance with the Charter, including Chapter VII’. In other words, action still rests with the Security Council.<sup>2</sup> However, some scholars argue that when the Security Council is deadlocked, and peaceful means have been exhausted, then the third pillar should allow the use of low-intensity military options such as no-fly zones and safe havens that are focused on protecting populations.<sup>3</sup> The latter makes sense: the world should not stand by and observe mass atrocity crimes without responding, simply because the Security Council is unwilling to act. There is an ongoing debate over whether it is, or is not, permissible to use force under R2P even when the Security Council has not authorized it: the jury is still out on this point. Even if one assumes that R2P action should be authorized by the Security Council, there is still a possible way out

1- Recall this statement from former Secretary-General Kofi Annan: “We must all recognize that we have failed in our response to the agony of Rwanda...Our readiness and capacity for action have been demonstrated to be inadequate at best, and deplorable at worst, owing to the absence of the collective political will” [emphasis added]: “Report of the Secretary-General on the Situation in Rwanda” UN Doc S/1994/640, 31 May 1994, as cited in *Humanitarian Intervention: Ethical, Political and Legal Dilemmas* at 17, fn 10.

2- See Aust, *supra* n50 at 215.

3- See Paul Williams, J. Trevor Ulbrick and Jonathan Worboys “Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis” 45 *Case Western Reserve Journal of International Law* (2012) 473 at 474.

by resorting to the will of the General Assembly. The ICISS report mentioned that military intervention should ideally be authorized by the Security Council, with the permanent members agreeing not to exercise their veto<sup>1</sup> but in the event of disagreement within the Security Council, it was suggested that the General Assembly could act using the 1950 Uniting for Peace Resolution (see further discussion below).<sup>2</sup>

As for the second problem, there seems to be no easy cure to the problem of a lack of political will. The best theory in the world is useless when there is no real political will to see that theory applied. It is quite clear that this is the real problem in the Syrian crisis; this is the real explanation for the lack of adequate international action. No amount of academic discussion or rhetoric can change the fact that there are currently no states that are ready and willing to intervene under R2P to stop the mass atrocities from occurring.

### **What should be done in Syria?**

First and foremost, the United Nations Security Council *should* do its job: it should take action to maintain international peace and security. It should acknowledge the findings of other United Nations bodies. For instance, it should note that the United Nations Human Rights Council has already undertaken an investigation and presented the United Nations Security Council with

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1- Article 27(3) of the UN Charter states that substantive resolutions of the Security Council require an affirmative vote of nine members, including the concurring votes of the permanent members.

2- Resolution 377 A (V). See the ICISS Report at paras 6.15-6.29. See also discussion in Joseph McMahon "Responsibility to Protect: Questions and Answers" Social Science Research Network working paper, SSRN-id2344942.pdf. The 'Uniting for Peace Resolution' was adopted by the General Assembly on 3 November 1950. It was in response to the strategy of the USSR to block any action by the Security Council on protecting the Republic of Korea from the military aggression launched by North Korea: see Christian Tomuschat "Uniting for Peace: Resolution 377 (V)" available at <<http://legal.un.org/avl/ha/ufp/ufp.html>> last accessed on 10 December 2013.



its finding that Syria's humanitarian crisis is being driven by a state policy of deliberate attacks against civilians.<sup>1</sup> It should note that the Syrian regime's regular forces and the regime's *shab-biha* forces have been responsible for acts of murder, torture, rape, and gross violations of human rights including unlawful killing, indiscriminate attacks against civilians and acts of sexual violence.<sup>2</sup> It should adopt a resolution, stating that crimes against humanity,<sup>3</sup> war crimes, ethnic cleansing and even genocide<sup>4</sup> have been and are still being committed inside Syria. It should declare that the current situation in Syria is a threat to international peace and security. It should state that the government of Syria has a responsibility to protect its citizens from these most heinous crimes and since it is clearly not fulfilling its responsibility, the Security Council should authorize the use of military force to protect those citizens.

At the very minimum, the Security Council should authorise the establishment of a no-fly zone over rebel-held areas, especially areas along the Syrian borders with Turkey, Lebanon and

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1- See Independent International Commission of Inquiry, Report of the Independent Commission of Inquiry on the Syrian Arab Republic, paras 50, 57, UN Doc. A/HCR/21/50, 16 August 2012.

2- Ibid.

3- 'Crimes against humanity' is defined in Article 7 of the Rome Statute of the International Criminal Court. It means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, cultural, religious, gender...or other grounds... (i) Enforced disappearance of persons' (j) The crime of apartheid; (k) Other inhumane acts of a similar character..."

4- 'Genocide' is defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. It means any of the following acts if committed with the intent to destroy in whole or in part, a national, ethnical, racial, or religious or national group: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group: Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, 78 UNTS 277 (No.1021). It currently has 144 state parties, including Syria.

Jordan but also areas inside Syria (such as al-Raqqa, Aleppo city and its countryside, Deir Ezzor and elsewhere including Daraa) where the Free Syrian Army have already captured and are in control of territory. A group of states with military capability, a 'coalition of the willing', should be invited to co-operate in destroying the Syrian regime's air defense systems and then policing the no-fly zones. This would enable Syrian citizens to be protected from the daily air-strikes that they are currently being subjected to. It would also allow civilians not only to be able to live in their homes, but also to flee to safety if necessary. In many areas of Syria, the Assad regime has no power on the ground: its forces have been forced out, its bases have been captured, its weapons stores have been over-run and it must resort to bombing indiscriminately from the air. Thus, an extensive no-fly zone under the auspices of the United Nations Security Council would help to protect thousands of Syrians without the need to put 'boots on the ground'. Naturally, the US and other states are very wary of sending in ground troops given their recent experiences in Iraq and Afghanistan, but there would probably be no need for foreign ground forces if no-fly zones and other means of assistance were provided to the opposition.

In addition to no-fly zones, several other suggestions should be considered. The opposition should be provided with appropriate weapons such as anti-air-craft and anti-tank missiles to allow them to defend themselves and to defeat the Syrian regime's forces, without the need for foreign boots on the ground. One scholar, Anne-Marie Slaughter, has called for "no-kill zones" to be established. In her words, this would mean that specialized weapons would be provided to Syrian towns willing to declare "no-kill zones" meaning no attacks by the Syrian army, the *shab-*

*biha* or anyone else. She also suggested that the US should provide communications and intelligence equipment to enable those towns to track the movements of government troops. She also suggested that drones from Jordan, Saudi Arabia, Turkey and the US could fire on Syrian government tanks approaching the “no-kill zones”.<sup>1</sup>

Although this is what *should* happen, it seems that this is not a political reality due to the fact that both Russia and China will not support a resolution that even criticizes Assad, let alone creates a low-intensity military intervention such as a no-fly zone. The record is clear that the regime in Moscow stands solidly behind the regime in Damascus. Russia and China have already vetoed three separate resolutions aimed at holding the Assad regime accountable. The whole R2P principle is being steered off course because of the old problem of the permanent members’ veto. The veto problem was discussed by the ICISS Commissioners who noted that:<sup>2</sup>

*...it is unconscionable that one veto can override the rest of humanity on matters of grave humanitarian concern. Of particular concern is the possibility that needed action will be held hostage to unrelated concerns of one or more of the permanent members...*

It is suggested that Russia’s reasons for continuing its support of the Assad regime and blocking Security Council action are purely motivated by self-interest. Russian concerns are related to preserving a historical relationship, economic interests and geopolitical influence. There is a long-standing relationship between Syria and Russia, dating back to the USSR. It is no secret that

1- Anne-Marie Slaughter “Syria is not a problem from Hell - But if We Don’t Act Quickly , It Will Be” in Nader Hashemi and Danny Postel (eds) *The Syria Dilemma* at 95-96.

2- ICISS Report at paragraph 6.20, p51.

Russia has only one deep warm-water sea-port and it is located in Tartous, Syria. To lose Syria would be to lose its military base on the edge of the Mediterranean Sea. But Russia is also benefiting economically from its arms sales to Syria, reportedly worth around \$4 billion dollars in fighter jets and advanced missiles.<sup>1</sup> It doesn't seem to matter to Russia that Syria is using those fighter jets and advanced missiles on the Syrian suburbs; that it is using Russian weapons to kill thousands of Syrian civilians.<sup>2</sup> Furthermore, Russia has substantial business interests and investments in Syria, reportedly to the tune of \$20 billion dollars.<sup>3</sup> On top of that is Russia's waning popularity amongst states that were once part of the USSR (for example, the current uprising in Ukraine in response to the government's decision to renew economic ties with Russia instead of seeking an agreement with Europe). Russia is trying to keep its influence in the region afloat in more ways than one. As others have noted, Russia's continued support for Assad has more to do with self-interest than in concerns that R2P will be abused and used as an excuse for unjustified interventions.<sup>4</sup>

Even if the Security Council cannot agree on a resolution on Syria to authorise some form of military intervention, there are at least three other options, which could also assist the Syrian people. These are explored briefly below.

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1- See for example New York Times, op ed, Yagil Beinglass and Daniel Brode, "Russia's Syrian Power Play" available at <[http://www.nytimes.com/2012/01/31/opinion/russias-syrian-power-play.html?\\_r=](http://www.nytimes.com/2012/01/31/opinion/russias-syrian-power-play.html?_r=)> last accessed on 6 December 2013.

2- Compare with Putin's ironic statement after the December 2013 bombings in Volgograd, when he stated that "there is no justification for committing crimes against civilians": see The Telegraph, "Vladimir Putin meets survivors of Volgograd suicide bombings" 1 January 2014, available at <<http://www.telegraph.co.uk/news/worldnews/europe/russia/10546111/Vladimir-Putin-meets-survivors-of-Volgograd-suicide-bombings.html>> last accessed on 11 January 2014.

3- Beinglass and Brode, supra n74.

4- I agree with the points made by Williams, Ulbrick and Worboys supra n65 at 488-489.

## **Other options – if the Security Council continues to neglect its duties**

First, the United Nations General Assembly could act under the Uniting for Peace Resolution.<sup>1</sup> This possibility was put forward by the ICISS Commissioners as an option when the Security Council is deadlocked.<sup>2</sup> As discussed above, this was adopted by the General Assembly in 1950 when Russia was using its veto to try to protect its ally, North Korea. In that resolution, Section A states that when the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility to maintain international peace and security, then the General Assembly shall seize itself of the matter. If the General Assembly is not sitting, it can meet in an emergency special session either at the request of the Security Council or upon a request by the majority of its own members. The Uniting for Peace resolution states that the General Assembly may, if it deems it appropriate, recommend collective action, including the use of force. The General Assembly would probably need the support of at least one permanent member if it recommended the use of force. To date, the Uniting for Peace resolution has been used to recommend military action on only one occasion, in relation to North Korea,<sup>3</sup> but this is an option that is still available and it would allow states which are truly concerned with implementing R2P to show their intention, rather than hiding behind the excuse of the veto.

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1- Uniting for Peace Resolution, General Assembly resolution 377 (V), adopted in New York on 3 November 1950.

2- ICISS Report at paras 6.29-6.30, p53.

3- Resolution 498 (V) 1951, adopted by the General Assembly on 1 February 1951: "By resolution 498 (V) of 1 February 1951 it made a finding to the effect that the People's Republic of China had engaged in aggression in Korea (para. 1) and "call[ed] upon all States and authorities to continue to lend every assistance to the United Nations action in Korea" (para. 4), which of course meant military assistance.": Christian Tomuschat, *supra* n67.

Secondly, the Arab League could pass a resolution finding that the situation in Syria is a threat to regional peace and security. The Arab League could ask a regional organization such as NATO to intervene and assist. As pointed out by Anne-Marie Slaughter, Arab states could ask for assistance from Turkey and any other countries. Turkey in turn could seek assistance from its ally, NATO. But the Arab League could, if it was motivated to do so, take action to protect citizens within Syria and then seek *ex post facto* authorization from the Security Council.<sup>1</sup>

Thirdly, it is at least arguable that any other individual state, sufficiently concerned with the plight of Syrian citizens and possessing appropriate military capability could intervene themselves on the grounds of R2P. It would be more likely that a 'coalition of the willing' would intervene, rather than one individual state, and it would be necessary to meet some criteria. Suggested criteria to meet before intervening would be as follows:<sup>2</sup>

1. Establishing a *prima facie* case that force is necessary to avert mass atrocity crimes;
2. Ensuring that peaceful means have been exhausted;
3. Proving that the Security Council is unable to act due to the use of the veto;
4. Ensuring that any military force is limited to low-intensity options such as the establishment of no-fly zones and humanitarian zones with the objective of protecting civilians;
5. Attempting to secure authorization from a legitimate authority such as the General Assembly or a regional authorization;

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1- This suggestion was made by the ICISS Commissioner at paras 6.34-6.35, p53.

2- These criteria are suggested by Williams, Ulbrick and Worboys *supra* n 60 at 490-491. However, I have slightly changed the criteria in 5 and 6. I would argue that there may be instances when the Security Council does not act, but also the General Assembly cannot adopt a resolution authorizing force and there may not even be a regional organization willing to authorise the intervention. In such cases (of which Syria may be one) there is still a need to intervene.

6. The intervention should come at the request of a credible opposition group that is seeking the intervention to protect civilians.<sup>1</sup>

Whether Security Council permission is needed for an R2P intervention is still unsettled law. Whether states can intervene when the Security Council fails to fulfill its mandate is controversial. There are precedents that can be drawn upon to support such action: interventions in Kosovo in 1999 and Iraq in 1991 serve as illustrations for how a military intervention is sometimes permitted, even seen as legitimate, if it is done for humanitarian reasons – even if it is not expressly mandated by the United Nations Security Council and not strictly speaking lawful.

### **PART III – THE REALITY**

Although it seems easy enough to brainstorm solutions and even map out what ought to happen to solve the Syrian crisis, it seems most unlikely that any of the abovementioned options will become a reality anytime soon. Despite the fact the United Nations now acknowledges that war crimes are being committed on a massive scale, despite the fact that evidence of the crimes is available for all to see, being broadcast daily on YouTube, Facebook, Twitter, blogs, websites and on at least 10 different satellite television channels,<sup>2</sup> the reality is this: Western nations are more concerned to defeat Islamist forces within Syria than with

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1- In the case of the Syrian conflict, it is hard to define exactly what a credible opposition group would be. A lasting solution will have to come from groups inside Syria, such as the Free Syrian Army, rather than from groups based outside Syria, such as the Syrian National Coalition, which do not really represent the people on the ground in Syria.

2- The television channels that are broadcasting the daily carnage include: Shada TV, Orient News, the Free Syrian Army channel and others.

helping the Syrian people to overthrow Assad.<sup>1</sup> Perhaps some Arab states are worried that if they intervene in Syria to remove Assad, the “tiger of intervention, once let loose, may turn on the rider”.<sup>2</sup> In other words, the chaos in Syria serves as a sad, but somewhat useful example to other non-democratic regimes in the Arab world – to intervene in Syria might unleash forces within their own country that governments are thus far managing to hold back.

Everybody seems to look to the West, and especially the US, for leadership in these matters but perhaps it is time for the Arab nations to stand up and defend the Syrians. The Arab states have certainly invested enough in military hardware over the years.<sup>3</sup> One could argue that they ought to be able to do something to rescue Muslims when those Muslims are calling out for help.

### **Self-interest and Syria: the US, the UK and NATO**

An intervention on the side of the Syrian people to remove the Assad regime does not appear to align with the self-interest of many (or any?) nations. As Michael Ignatieff has pointed out in a recently published essay:<sup>4</sup>

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1- Since the first draft of this article was prepared, the US and its allies have begun an aerial bombing campaign of targets in Syria and Iraq which is aimed at defeating fighters from the Islamic State of Iraq and Syria. The objective was stated by President Obama as addressing the threat posed by 'Islamic State' to the US and its allies: see for example The Washington Post, 23 September 2014 “U.S. Military Leaders: strikes in Syria are just the start of a prolonged campaign” available at [http://www.washingtonpost.com/world/us-attacks-islamic-state-in-syria-with-five-middle-east-partners/2014/09/23/b78ad7e8-c8f2-4aa8-aaa7-ec92572f6716\\_story.html](http://www.washingtonpost.com/world/us-attacks-islamic-state-in-syria-with-five-middle-east-partners/2014/09/23/b78ad7e8-c8f2-4aa8-aaa7-ec92572f6716_story.html) last accessed on 1 October 2014. In that statement, US officials reportedly said that the target was Islamic State militants – they were not targeting President Assad or his forces.

2- ICISS Commission’s Report at para 6.33 p53.

3- Consider the amount of money spent by nations on military defense. Saudi Arabia is ranked 7th in the world – spending 56.7 billion US dollars; Turkey and/or the UAE are in 15th place with spending of somewhere around 18 billion US dollars: see the Stockholm International Peace Research Institute (SIPRI) Yearbook 2013.

4- Michael Ignatieff, “Bosnia and Syria: Intervention Then and Now” in Nader Hashemi and Danny Postel *The Syria Dilemma* (Massachusetts Institute of Technology, 2013) at 53. The phrase at the end of this excerpt comes from Stephen M. Walt “The dearth of strategy on Syria” *ForeignPolicy.com*, 21 March 2013 available at [http://walt.foreignpolicy.com/posts/2013/03/21/the\\_dearth\\_of\\_strategy\\_on\\_syria](http://walt.foreignpolicy.com/posts/2013/03/21/the_dearth_of_strategy_on_syria) last accessed on 7 December 2013.



*...a risk-averse form of Realism has taken hold of Western capitals, particularly Washington. Realist proponents ask, what interest does the United States actually have in intervening in Syria at all? Or more pungently, who cares which bunch of thugs runs the country?*

The fact is that virtually no state has any self-interest in risking their troops' lives and getting involved in a potentially protracted military conflict simply for the sake of saving Syrians' lives. The US and the UK are still reeling from their involvement in Afghanistan and Iraq. There is no appetite in either country to get embroiled in another conflict. Almost a year ago, when President Obama was asked in an interview how he deals with the ongoing violence in Syria, he seemed to have more questions than answers:<sup>1</sup>

*In a situation like Syria, I have to ask, can we make a difference in that situation? Would a military intervention have an impact? How would it affect our ability to support troops who are still in Afghanistan? What would be the aftermath of our involvement on the ground? Could it trigger even worse violence or the use of chemical weapons? What offers the best prospect of a stable post-Assad regime? And how do I weigh tens of thousands who've been killed in Syria versus the tens of thousands who are currently being killed in the Congo?*

In other words, it's not really in our best interests to get involved there, and anyway, who's to say that the people getting killed in Syria deserve our sympathy any more than the people getting killed elsewhere?

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1- Franklin Foer and Chris Hughes, "Barack Obama is not Pleased" The New Republic, 27 January 2013, available at <<http://www.newrepublic.com/article/112190/obama-interview-2013-sit-down-president>> last accessed on 7 December 2013.

The US President is acutely aware of the international laws that are being broken, he is acutely aware of the humanitarian catastrophe, he is acutely aware of the “Responsibility to Protect” norm (more so than any other previous US president) but there is no appetite in the US to do anything. The US’s closest ally in the Middle East is Israel,<sup>1</sup> and both Assad senior and junior have served US interests well in the region. The US would be loathe to get rid of Assad and his criminal regime if the replacement were to be a group of people who want Shari’a law. It is a case of “the devil you know being better than the devil you don’t”. It is a fact openly acknowledged but perhaps not widely known, that the only Syrian border with Israel, the Quenitra crossing opened in 1974, has been quiet for 40 years under the Assad regime. In fact, the Syria-Israel border has been Israel’s *quietest* border for the past 40 years. In a recent blog for the Israeli Defence Force, an Israeli commander who served at the Quenitra crossing for the past 4 years explained how this border crossing had been quiet for 4 decades until the Syrian uprising began in 2011.<sup>2</sup> There is every reason to believe that if Assad falls, or rather *when* Assad falls, Israel may have reason to worry about its border with Syria for the first time in a very long time. The United States would be acutely aware that Assad has been a better, more reliable neighbor for the Israelis and would probably calculate that Assad is preferable to a potential Islamic state.

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1- According to the US State Department’s webpage, “The United States was the first country to recognize Israel in 1948. Since then, Israel has become, and remains, America’s most reliable partner in the Middle East...”: US State Department, Diplomacy in Action, ‘US Relations with Israel’, Factsheet, 10 March 2014, available at <<http://www.state.gov/r/pa/ei/bgn/3581.htm>> last accessed on 1 October 2014.

2- Israeli Defence Forces, 1 October 2013, The Keeper of the Burning Border: 4 years at the only Israel-Syria Border Crossing” available at <<http://www.idfblog.com/2013/10/01/keeper-burning-border-4-years-israel-syria-border-crossing/>> last accessed on 7 December 2013.

## Chemical weapons deal done – case closed

The closest that the US or any other state has come to a military intervention in Syria was in September 2013 when the US President signaled that he was considering a military strike. However, that was averted when the President could not obtain the support of the US Congress; then events were overtaken by the chemical weapons issue. Military intervention was seen as unnecessary once the Syrians and Russians had agreed that Syria would allow international inspectors to enter the country and destroy Syria's chemical weapons. The Security Council adopted its first and so far only resolution on the Syrian crisis in 2013.<sup>1</sup> As a result, the US Senate suspended its debate on the proposal for a military strike and US Secretary of State John Kerry said that a strike wouldn't be necessary if Syria handed over all of its chemical weapons.<sup>2</sup> After the deal was done there was much back-slapping and self-congratulatory talk. It was as if the crisis had been solved. This was a strange development, in light of the fact that only about 1 percent of deaths in the Syrian conflict have been caused by chemical weapons. But it allowed the US to backtrack without losing face, and it provided a way out of any commitment to intervene when 'red lines' were crossed. It seems that now that the chemical weapons issue has been virtually resolved, it is as if the problem is over, case closed. Of course, chemical weapons were never and are currently not the main threat to the Syrian people. Destroying all of Syria's chemical weapons will make virtually no difference to the daily death toll and it will not provide any way out of the current conflict.

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1- On 27 September 2013, the UN Security Council adopted resolution 2118, enabling the destruction of Syria's chemical weapons stockpile: UN Doc. S/RES/2118 (2013) 27 September 2013.

2- See Mary Casey and Joshua Haber, "Obama Pulls Back on Military Strike on Syria with Russian Chemical Weapons Proposal" 10 September 2013, available at <[http://mideastafrica.foreignpolicy.com/posts/2013/09/10/obama\\_pulls\\_back\\_on\\_military\\_strike\\_on\\_syria\\_with\\_russian\\_chemical\\_weapons\\_proposal#sthash.5aSuAaVs.dpbs](http://mideastafrica.foreignpolicy.com/posts/2013/09/10/obama_pulls_back_on_military_strike_on_syria_with_russian_chemical_weapons_proposal#sthash.5aSuAaVs.dpbs)> last accessed on 8 December 2013.

## NATO

If there is no appetite in the UN Security Council, or in the US, for military action, the same can also be said for NATO. In October 2012, Turkey called for the major powers to intervene in Syria.<sup>1</sup> At that time, 'only' 32,000 people had died and Turkey was already calling it a humanitarian disaster. But the head of NATO, Anders Fogh Rasmussen, has made it very clear that he does not see any military role for NATO in Syria.<sup>2</sup> He is maintaining the line that NATO will only act with UN Security Council authorization, seemingly forgetting the fact that not all military interventions in Europe have been authorized by the Security Council. Like other Western leaders, he insists that a political solution is the only solution, seemingly also forgetting that the Serbs were only willing to sit down and negotiate a political settlement in Dayton, Ohio, once the military intervention had altered their chances of a military success. It is naturally hard to talk to someone and have a political dialogue with them when they are busy killing you.

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1- Simon Tisdall, "Turkey calls on major powers to intervene in Syria" The Guardian.co.uk, 19 October 2012, available at <<http://www.theguardian.com/world/2012/oct/19/turkey-britain-us-intervene-syria>> last accessed on 10 December 2013.

2- Major Garrett "NATO Secretary-General rejects role for NATO in Syria" 31 May 2013, available at: <<http://www.cbsnews.com/news/nato-secretary-general-rejects-western-military-role-in-syria/>> last accessed on 10 December 2013.

## **NATO: backsliding on human rights?**

The current stance of NATO, which sees it firmly set against even low-intensity military intervention, such as the establishment of no-fly zones or humanitarian zones, is somewhat surprising. Two examples – Kosovo in 1999 and Libya in 2011 - illustrate the change in stance.

### **Kosovo 1999**

In 1998, when Yugoslav President Slobodan Milosevic began attacks against ethnic Albanian civilians in Kosovo, NATO was not willing to stand by and observe. Once mass human rights abuses became evident, including evidence of rape and torture, and in the face of a deadlocked Security Council, NATO decided to conduct air-strikes aimed at protecting the Kosovar population.<sup>1</sup> Operation Allied Force lasted for seventy-seven days and the airstrikes ended the conflict in Kosovo. The bombing campaign was not authorized by the Security Council, so it was *illegal*, yet it was still widely accepted as being *legitimate*. The Independent International Commission on Kosovo found that it was legitimate because all diplomatic avenues had been exhausted and there was no other way to stop the killings and atrocities in Kosovo. Although it is rather crass to make direct comparisons of human suffering, it is clear that the number of lives lost in Kosovo at the point of intervention was much less than that in Syria. For example, from March 24 1999 to June 19 1999, it was estimated that up to 10,000 Kosovars were killed and up to 850,000 became refugees in neighbouring countries; another 590,000 were internally displaced.<sup>2</sup> By comparison, in Syria, there are at least

1- Independent International Commission on Kosovo, The Kosovo Report, (Oxford University Press, 23 October 2000).

2- Ibid, available at <<http://reliefweb.int/report/albania/kosovo-report>> last accessed on 11 December 2013.

124,000 dead, there at least 2.3 million refugees outside the country and a staggering 6.4 million internally displaced.<sup>1</sup> So, if it was legitimate (but unlawful) to intervene in Kosovo in 1999, why is NATO refusing to do the same in 2013? What makes Syria so different from Kosovo?

## Libya 2011

The second example that must be mentioned is Libya in 2011. On 27 March 2011, the Security Council unanimously adopted resolution 1970, acting under Article 41 of the UN Charter.<sup>2</sup> It condemned the Qaddafi regime's use of lethal force against protesters, it referred the situation to the International Criminal Court and it imposed a series of international sanctions.<sup>3</sup> It was passed in reaction to the use of force by the Gaddafi regime especially the aerial bombings of civilian populations. It also recalled the Libyan government's responsibility to protect its citizens. The action by the Security Council was "swift and decisive", to use its own words.<sup>4</sup> But in the weeks that followed, it became apparent that Qaddafi was not going to halt the attacks against civilians.

Thus, on 17 March 2011, the Security Council passed resolution 1973 which authorized the subsequent military intervention.<sup>5</sup> In resolution 1973, the Security Council expressed "grave concern at the deteriorating situation, the escalation of violence and

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1- See US Aid, 5 December 2013, available at <<http://www.usaid.gov/crisis/syria>> last accessed on 11 December 2013.

2- S/RES/1970 (2011) adopted on 26 February 2011.

3- See Security Council Press Release, 26 February 2011, SC/10187/Rev.1\*\*, available at: <<http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>> last accessed on 11 December 2013.

4- Ibid.

5- S/RES/1973 (2011) adopted on 17 March 2011. There were 10 votes in favour, 0 against and 5 abstentions. Text available at <<http://www.un.org/News/Press/docs/2011/sc10200.doc.htm#Resolution>> last accessed on 11 December 2013.

the heavy civilian casualties”.<sup>1</sup> The resolution also authorized the international community to:<sup>2</sup>

*...take all necessary measures... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi...*

Thus, resolution 1973 provided the authority to establish a no-fly zone and to protect civilians. NATO then led the military intervention to prevent atrocity crimes being committed by the government of Libya against its own citizens. This was the first time that R2P had been used explicitly as the justification for the use of military force. It was widely applauded and seen by some as a great success. Importantly, it was seen as an affirmation of the emerging R2P norm.<sup>3</sup>

### **Kosovo, Libya...why not Syria?**

The examples of Kosovo and Libya throw up the obvious question: why was there a military intervention in each of those cases but not in Syria?<sup>4</sup> The situation in Syria is more serious to international peace and security than both Kosovo and Libya, and has resulted in far more deaths and refugees, and yet no states are prepared to act – either with or without the mandate of the Security Council. The strange, inexplicable treatment of Syria when compared to Libya and Kosovo is indeed a riddle.<sup>5</sup>

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1- Ibid, preamble.

2- Ibid, paragraph 4.

3- See for example the discussion in Williams, Ulbrick and Worboys, supra n 60 at 488.

4- The differences between Syria and those previous interventions has been discussed at length in the literature. See for example Amos Guiora, “Intervention in Libya, yes; Intervention in Syria, no; Deciphering the ...” Guiora calls it an “unanswerable riddle”, trying to figure out the Obama administration’s different response to Syria when compared with Libya.

5- Ibid.

## Conclusion

What will happen in Syria? There is no shortage of people willing to give their opinion on what should happen in Syria. In terms of public international law, the international community's failure to respond to the crisis in Syria will profoundly shape the future of R2P. If this 'emerging norm', which has been the subject of so much scholarly debate and excitement, cannot be employed when it is needed most, in a *textbook case* such as Syria, then the principle of R2P should be left to Rest in Peace.<sup>1</sup>

One day in the near future, someone will write a report observing how unfortunate the loss of life in Syria was, how the international community should have acted sooner, how the international community should have done more...just as the international community did after Bosnia, Darfur and Rwanda. But this is hypocrisy: to stand by and watch the killing, and then shed tears and write words of regret afterwards.<sup>2</sup>

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1- See Stewart Patrick, Council on Foreign Relations, "RIP for R2P? Syria and the Dilemmas of Humanitarian Intervention" 12 June 2012 available at <<http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/4220-steward-m-patrick-council-on-foreign-relations-rip-for-r2p-syria-and-the-dilemmas-of-humanitarian-intervention>> last accessed on 10 December 2013.

2- This paper was originally written for presentation at the inaugural Kuwait International Law School conference held in December 2013. Following the comments of the anonymous reviewers, it was revised briefly. However, it was not substantially rewritten to take into account developments that occurred in the interim. Therefore the figures cited herein and the arguments put forward should be read in the context in which they were originally written.



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- "Syria War Toll Nearly 126,000 – NGO" 2 December 2013 <[http://voiceofrussia.com/news/2013\\_12\\_02/Syria-war-toll-nearly-126-000-NGO-7038/](http://voiceofrussia.com/news/2013_12_02/Syria-war-toll-nearly-126-000-NGO-7038/)> last accessed on 5 December 2013, reporting figures from the Syrian Observatory for Human Rights (SOHR). The SOHR relies on a network of activists, lawyers and doctors on the ground in Syria to formulate its statistics.

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last accessed on 6 December 2013. There are many, many articles written along the lines of “don’t help the opposition, they are all al-Qaeda and will come back to attack us” in the Western media.

- Con Coughlin, 3 December 2013 “The Syrian civil war is breeding a new generation of terrorist” available at: <<http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10491523/The-Syrian-civil-war-is-breeding-a-new-generation-of-terrorist.html>> last accessed on 6 December 2013. This article argues that ‘at least 300 British Muslims are now actively engaged in fighting for al-Qaeda linked groups, such as the Nusra Front’.
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sponsibility, paragraph 203, UN Doc A/59/565 (December 2004).

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