

SCIENTIFIC ARTICLE

APPLYING THE RESPONSIBILITY TO PROTECT AND INSTANT CUSTOMARY INTERNATIONAL LAW IN CONFLICTS: COMPARATIVE ANALYSIS OF NATO'S INTERVENTION IN KOSOVO AND THE 2023 ISRAEL-HAMAS CONFLICT

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Abstract

This article examines NATO's role in the Kosovo War to discuss considerations of interventions without approval from the United Nation Security Council, using the principle of the Responsibility to Protect (R2P) and the theory of Instant Customary International Law (ICIL). It assesses how these actions fit into changing norms through Norm Cycle Theory, emphasising the evolution of R2P and the significance of *opinio juris* in establishing ICIL. The Security Council's structure and the five permanent members' veto power are major causes of its constraints. Diplomatic impasses and political interests can obstruct action, resulting in inadequate reactions to humanitarian emergencies. The intensification of armed conflicts such as the recent surge in violence in the Israel-Hamas conflict since fall 2023 calls for a renewed conversation about methods of intervention in the event the Security Council is unable or unwilling to take action. The paper suggests that despite its controversies, interventions can represent progress by promoting aid and legal principles. By delving into the applications and obstacles of R2P and ICIL in the context of the 2023 Israel-Hamas conflict, it proposes a harmonisation of UN Charter Article 103 with interventions that lack UN backing by prioritising rights over formalities. This way, the analysis seeks to contribute to discussions on the legality and ethics of interventions, providing perspectives for policy frameworks that address humanitarian emergencies.

Keywords: R2P, Kosovo, NATO, Humanitarian Intervention, Israel-Hamas Conflict.

I. Introduction

The last decades have been characterised by numerous human rights violations and acts of mass violence, while countries across the globe have been grappling with the ethical and legal responsibilities associated with intervening in humanitarian crises proactively. The emergence of the Responsibility to Protect (hereinafter, R2P) concept during the 2005 United Nations General Assembly brought about a shift in how the role and responsibility of the international community is viewed in these contexts, highlighting

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that UN Member States have an obligation to protect populations from atrocities like genocide, war crimes, ethnic cleansing, and crimes against humanity.²

This paper discusses the implications of adopting the R2P doctrine as a customary norm, especially considering the complex geopolitical dynamics in the recent Israel-Hamas conflict. The question of when military intervention by an individual State or group of States is justified to prevent and stop atrocities and protect civilians is a moot point both in international legal studies and international politics. The legal norm of R2P, developed in response to genocides like those in Rwanda and Srebrenica, aims to provide legal and moral grounds for military interventions authorised by the UN Security Council (hereinafter, SC). However, its applicability, particularly when the SC is unable to authorise intervention due to vetoes remains a subject of discussion.

Although a preceding study has already dealt with the normativity of R2P by means of applying the Norm Cycle Model,³ this research is unique in using the theory of "instant" customary international law (hereinafter, ICIL). On the one hand, the Norm Cycle Model developed by Finnemore and Sikkink explains the process of how norms develop, spread and get internalised in communities.⁴ On the other hand, ICIL suggests that under exceptional circumstances new customary international law can quickly emerge without extensive state practices if there is substantial evidence of *opinio juris* among states.⁵ Together, these two models offer insights into the evolution and acceptance of R2P as a norm in law. Building on these, the following paper examines whether military humanitarian intervention is justifiable under R2P by focusing on the role of *opinio juris* in establishing new customary international law while following the international law principles.⁶

The research paper will dissect the convergence of moral imperative and legal justification. It will provide some preliminary explorations whether, in times when the SC is unable or unwilling to act, the international community may, through a collective conviction and a sense of immediate obligation, create an instantaneous legal foundation for intervention. The paper begins by reviewing relevant literature that encapsulates the debates surrounding the R2P doctrine and the concept of ICIL.⁷ It will then critically analyse the legal scaffolding of R2P, delve into the complexities of customary international law, and examine how State practice and *opinio juris* interact with the creation of instant customary norms.⁸ Subsequently, the paper applies these frameworks to cases where humanitarian intervention was considered outside the purview of SC authorisation.

The case of NATO's military intervention in Kosovo in 1999 serves as the central model of this research, offering insights into the interplay between humanitarian imperative and international legal norms in the absence of SC authorisation. Generally, UN Charter prohibits the use of force against a nation's integrity

² Welsh, J., *The United Nations and the Responsibility to Protect: Rhetoric, Norms and the Possibility of Action* (Cambridge University Press 2012).

³ Noguchi Y, "Responsibility to Protect" Theory Evolving from "Concept" to "International Norm": Gaining a Foothold in "the Life Cycle of the Norm" (Sequel)' (2018) 13 *Social Innovation Studies* 211.

⁴ Finnemore, M. & Sikkink, K., 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887.

⁵ Noguchi Y, "Responsibility to Protect" Theory Evolving from "Concept" to "International Norm": Gaining a Foothold in "the Life Cycle of the Norm" (Sequel)' (2018) 13 *Social Innovation Studies* 211.

⁶ United Nations General Assembly, 'About the Responsibility to Protect' <www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml> [accessed 6 December 2023].

⁷ Noguchi Y, "Responsibility to Protect" Theory Evolving from "Concept" to "International Norm": Gaining a Foothold in "the Life Cycle of the Norm" (Sequel)' (2018) 13 *Social Innovation Studies* 211.

⁸ *Ibid.*

or political independence unless it is in self-defence or has authorisation from the SC.⁹ Consequently, NATO's action raised questions about the legality of intervening without SC approval and the circumstances under which such actions could be deemed justifiable.¹⁰

The 2023 Israel-Hamas conflict furthermore represents a new paradigm to understand how the concepts of humanitarian intervention and R2P are being applied and contested under rapidly changing geopolitical circumstances. Through this comparative analysis, the paper aims to elucidate the circumstances under which the international community has acted—or failed to act—under the banner of R2P, and to assess whether it provides a legal rationale for interventions when the SC remains deadlocked. The International Court of Justice (hence ICJ) stands as a pivotal institution in the global efforts to uphold the R2P doctrine. This was starkly illustrated by the Court's January 2024 decision regarding *South Africa v. Israel*, where it ordered provisional measures to address alleged violations of the Genocide Convention by Israel in the current conflict.¹¹ By taking such action, the ICJ demonstrated its proactive role in preventing mass atrocities and enforcing international legal norms. This case exemplifies how judicial bodies can contribute to the practical implementation of R2P principles, bridging the gap between legal theory and tangible protection of vulnerable populations.

By engaging with international treaties, jurisprudence, UN documents, State practices, scholarly works, and various reports from international organisations, the article will navigate through the intricate web of legal, moral, and political considerations that define the realm of “humanitarian interventions”. As this research shows, R2P is now a binding norm, and its content will be clarified through State practices so that the norm will provide the international community with some predictability for timely intervention for atrocities.

II. Exploring the Legal Basis of R2P as Instant Customary International Law

NATO's intervention during the Kosovo War of 1998-1999 provides an example where military engagement took place without authorisation from the SC. While some argue that NATO's involvement was a successful response to the failure of diplomatic efforts to prevent further acts of ethnic cleansing and widespread atrocities and thus motivated by the need to avert a large-scale humanitarian crisis, it also raised important legal and ethical concerns regarding the bypassing of the SC.¹² The Independent International Commission on Kosovo in their Kosovo Report stated that “the NATO military intervention was illegal but legitimate,” highlighting the complex nature of the intervention and its consequences.¹³

The main critique of the R2P doctrine is that it could undermine established State sovereignty principles.¹⁴ R2P posits sovereignty as a responsibility, especially in protecting populations from mass

⁹ United Nations, Charter of the United Nations, 1 UNTS XVI, 24 October 1945, <https://www.refworld.org/legal/constinstr/un/1945/en/27654> [accessed 04 July 2024].

¹⁰ Malone D and Thakur R, *UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publishers 2023).

¹¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v Israel*) (Provisional Measures) [2024] ICJ Rep 192 <https://www.icj-cij.org/node/203447>.

¹² Henkin L, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 AJIL 824.

¹³ Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 186.

¹⁴ Thakur, R. and Orford, A. 'International Authority and the Responsibility to Protect' (2012) 23(1) EJIL 284; Johnson, J. 'Humanitarian Intervention, the Responsibility to Protect, and Sovereignty: Historical and Moral Reflections' (2015) 23 Mich St Int'l L Rev 609; Hehir, A. 'The Responsibility to Protect Debate: An Enduring Black Hole' (2024) *Journal of Intervention and State Building*.

atrocities. However, critics worry this could open doors for interventions driven by political interests rather than for purely humanitarian motives.¹⁵ Governments accused of atrocities often invoke the right to sovereignty as a defence against intervention, creating a complex legal dilemma for the international community and challenging the traditional balance between respect for state sovereignty and the need to address grave humanitarian crises.¹⁶

The limitations faced by the SC often stem from its structure and the veto power held by its five permanent members. Political interests and diplomatic deadlocks can impede actions resulting in insufficient responses to crises.¹⁷ As several scholars have shown, finding a balance between respecting state sovereignty and safeguarding human rights remains a challenge, especially considering the potential for political manipulation and the procedural limitations imposed by the SC.¹⁸

The following chapter will explore the legal basis of R2P vis a vis the prevailing UN Charter system using the concept of Instant Customary International Law and Norm Cycle Theory.

II.1 The Responsibility to Protect within the UN Charter System

The emergence of the R2P framework signified a change in how state sovereignty and humanitarian intervention is viewed from both an international relations and legal perspective. At its core, R2P is based on the idea that sovereignty comes with the responsibility to safeguard all populations from atrocities like genocide, war crimes, ethnic cleansing, and crimes against humanity. In the past, R2P has relied on the authorisation of intervention by the SC. This reliance stems from the belief that decisions involving interventions in states should be overseen by the SC as a representative body of international consensus, particularly when such actions are undertaken for humanitarian reasons.¹⁹

The framework's dependence on the SC has both advantages and disadvantages. On the one hand it ensures legitimacy and agreement on a great power's level. However, it also faces challenges due to the dynamics within the SC, which can result in a lack of action or delayed responses during crises. This has sparked discussions regarding the effectiveness of R2P in situations where urgent measures are necessary but obtaining consensus within the SC proves difficult. As seen in the Kosovo intervention. The traditional framework of R2P highlights the significance of consensus through SC authorisation for interventions aimed at preventing or stopping mass atrocities. However, this reliance on the SC can sometimes impede decisive action leading to approaches as witnessed during the Kosovo intervention.²⁰

At the core of this discussion lies Article 103 of the UN Charter, which states:

¹⁵ Johnson J, 'Humanitarian Intervention, the Responsibility to Protect, and Sovereignty: Historical and Moral Reflections' (2015) 23 Mich St Int'l L Rev 609.

¹⁶ Ibid.

¹⁷ Malone D and Thakur R, UN Security Council: From the Cold War to the 21st Century (Lynne Rienner Publishers 2023).

¹⁸ Jide Nzelibe, 'Courting Genocide: The Unintended Effects of Humanitarian Intervention' (2009) 97 Cal L Rev 1171; Hehir A, 'The Responsibility to Protect Debate: An Enduring Black Hole' (2024) Journal of Intervention and State Building.

¹⁹ Peter Stockberger, 'The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm, or Just Wishful Thinking' (2017) 5 Int'l Hum Rts L Rev 365.

²⁰ Peter Stockberger, 'The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm, or Just Wishful Thinking' (2017) 5 Int'l Hum Rts L Rev 365; Malone D and Thakur R, UN Security Council: From the Cold War to the 21st Century (Lynne Rienner Publishers 2023).

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."²¹

Interpreting Article 103 of the UN Charter is important for considering military interventions without SC authorisation, because the article presupposes the importance of that authorisation to respect State's right to sovereignty. According to Paulus & Leiß, Article 103 establishes the superiority of the UN Charter obligations, and that in case of incompatibilities between the responsibilities outlined in the UN Charter and those found in any other treaty or agreement, the obligations of the UN Charter will take precedence.²² According to Erika de Wet, this rule is important as it guarantees that the UN Charter holds priority in the realm of law influencing the overall legal framework worldwide.²³ Robert Kolb²⁴ and Rain Liivoja²⁵ also offer insights into how Article 103 interacts with international law norms and influences the operational dynamics of the SC.

The article by Liivoja explores the concept of a hierarchy among sources of law, and the role played by peremptory norms (*jus cogens*) and Article 103 in establishing this hierarchy.²⁶ The author concludes that both peremptory norms and obligations under the UN Charter indicate a hierarchy within law. This hierarchy is important for resolving conflicts between sources of law, emphasising that certain norms have gained superior status due to their content or nature.

De Wet's analysis of Article 103 further supports this idea by suggesting that responsibilities outlined in the UN Charter could apply to actions taken without SC approval under Chapter VII.²⁷ This standpoint advocates for an interpretation of Article 103 that aligns with the overarching objectives of the Charter focusing on conflict prevention and rights protection. Expanding the understanding of Article 103 to cover interventions endorsed by entities other than the SC reinforces the case for a norms approach. This tactic is crucial for the security systems effectiveness and maintaining the balance needed to discourage actions that could undermine principles.

Lastly, Kolb addresses the challenges involved in interpreting Article 103 regarding actions authorised by the SC.²⁸ The author supports extending the application of Article 103 to include authorisations, arguing that this approach is necessary for ensuring the effectiveness of the security system. Furthermore, he emphasises the significance of ensuring that actions carried out in accordance with SC authorisations do not exceed the scope of their mandate.

²¹ United Nations, Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 103.

²² Andreas L Paulus and Johann Ruben Leiß, 'Article 103' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012).

²³ De Wet, E, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law' in d'Aspremont J and Besson S (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017).

²⁴ Kolb R, 'Article 103 of the UN Charter and Security Council Authorizations' in Capaldo GZ (ed), *The Global Community Yearbook of International Law and Jurisprudence* 2018 (OUP 2019).

²⁵ Liivoja R, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 ICLQ 583, 585-586.

²⁶ *Ibid.*

²⁷ De Wet E, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law' in d'Aspremont J and Besson S (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017).

²⁸ Kolb R, 'Article 103 of the UN Charter and Security Council Authorizations' in Capaldo GZ (ed), *The Global Community Yearbook of International Law and Jurisprudence* 2018 (OUP 2019).

This implies that there needs to be an equilibrium between respecting procedures and effectively addressing humanitarian crises to prevent measures that may erode the foundations of international law.²⁹ In that context, Thakur & Orford hint at the role of the United Nations General Assembly of maintaining peace, noting: ‘As UN organs expanded the range of actions that they considered necessary for maintaining peace and security, the conception of “international peace and security” itself gradually expanded.’³⁰

II.2 Legal Reasoning for Bypassing Security Council Authorisation

The urgency to address the shortcomings of the UN security structure becomes particularly evident when there is a risk of humanitarian crises due to political inaction. One solution could be to empower organisations under Chapter VIII of the UN Charter. The Chapter acknowledges the significance of regional arrangements and related institutions and organisations in upholding peace and security, provided that their actions align with the UN’s goals and principles.³¹ These regional arrangements are typically formed between countries within a geographical area, such as the African Union (AU), the European Union (EU), the Organisation of American States (OAS), or the Association of Southeast Asian Nations (ASEAN).³² Regional organisations with military capacity (in this case only NATO) situated in close geographical proximity to the crisis have the ability to implement interventions that are both timely and culturally attuned. The familiarity of these bodies within regions equips them with a deeper understanding of the cultural, political and social dynamics at play, which enables them to respond more effectively to meet the unique needs of affected populations.³³

The "Uniting for Peace" Resolution adopted by the UN General Assembly in 1950 offers another avenue.³⁴ This resolution states that if the SC is unable to fulfil its duty because its permanent members do not all agree, the General Assembly will promptly discuss the issue and may propose to its members joint actions, including ‘the use of armed force, when necessary, to maintain or restore international peace and security’.³⁵

Against this background, some scholars argue that in situations of large-scale atrocities such as genocide, the moral obligation to act takes precedence over conventional procedural rules outlined in the UN Charter, especially in relation to SC approval.³⁶ The following legal reasonings further support this view:

Doctrine of Necessity: This legal principle is frequently used to justify actions taken in circumstances where it is impossible or impractical to strictly adhere to the law. It comes into play when there is a need to safeguard human values or interests. The doctrine of necessity can be applied in situations

²⁹ Wheeler NJ, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000).

³⁰ Thakur R and Orford A, 'International Authority and the Responsibility to Protect' (2012) 23(1) *EJIL* 284.

³¹ United Nations, Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, ch VII.

³² Villani U, 'The Security Council's Authorization of Enforcement Action by Regional Organizations' (2002) 6 *Max Planck Yearbook of United Nations Law* 535.

³³ Graham K, 'Regionalisation and Responses to Armed Conflict, with Special Focus on Conflict Prevention and Peacekeeping' in Sampford C, Thakur R (eds), *Institutional Supports for the International Rule of Law* (Routledge 2014).

³⁴ UNGA Res 377(V) 'Uniting for Peace' (3 November 1950) UN Doc A/RES/377(V), para 1.

³⁵ *Ibid.*

³⁶ Peters A, 'Article 25' in Simma B and others (eds), *The Charter of the United Nations: A Commentary*, vol 1 (3rd edn, OUP 2012) 840-841; Wheeler, NJ, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000); Lauterpacht E, 'Fairness in International Law and Institutions By Franck TM (OUP 1995)' (1997) 91 *AJIL* 189.

where immediate action is necessary to prevent atrocities and waiting for authorisation from the SC could lead to damage.³⁷

Emerging Norms in International Law: The international legal landscape is undergoing changes in terms of intervention. Increasing recognition of the R2P indicates a shift in how states approach ethical considerations. This evolving norm suggests that there may be grounds for acting against atrocities without the approval of the SC.³⁸

Alignment with the Objectives of the United Nations: The UN has outlined several objectives in its Charter, including the promotion of peace and security, the advancement of social progress and better living standards, and the encouragement of respect for human rights. Some argue that interventions aimed at preventing genocide and safeguarding human rights align with these fundamental overarching aims of the UN and should not be impeded by requirements set by the SC.³⁹

As becomes apparent from the discussions, finding a middle ground is essential when discussing the nature of Article 103 in relation to the R2P doctrine. On the one hand, the international community needs to respect the obligations outlined in its statutes while on the other act in cases of extreme human rights violations. This perspective underscores the importance of interpreting norms that empower not the SC but other UN bodies and member states to take decisive actions against atrocities. It underscores the need of adapting laws to tackle emerging challenges, safeguarding dignity and effectively responding to crises. This approach would uphold legal principles while acknowledging the ethical imperative to intervene.

II.3 Balancing the UN Charter and Moral Imperatives

To fully grasp the interpretation of Article 103 within the framework of R2P, it is crucial to understand the procedures outlined in the Charter and the moral obligations surrounding humanitarian crises. Article 103 of the UN Charter establishes that Charter obligations supersede treaty commitments, often being interpreted as implying that SC authorisation is required for interventions and thus seemingly limiting the scope of R2P without SC approval.⁴⁰ However, interventions into situations where inaction could result in large scale atrocities might align with the overarching objectives of the Charter such as preventing warfare and safeguarding human rights, even if they do not strictly adhere to procedural norms. This view suggests that moral and ethical imperatives to end mass violence and to uphold human dignity can serve as a strong foundation for action under R2P despite legal limitations.⁴¹

The implementation of the R2P without authorisation from the SC stirs up concerns within the framework of Article 103 Supremacy clause. Article 103 in the UN Charter holds that the responsibilities outlined in the Charter take precedence over those in any other agreement, but this priority is only applicable in cases where there is a clash between the two sets of responsibilities.⁴² A detailed examination

³⁷ D'Amato, A., *The Concept of Custom in International Law* (Cornell University Press 2010).

³⁸ Bellamy, A., *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press 2009); Thakur R and Orford A, 'International Authority and the Responsibility to Protect' (2012) 23(1) EJIL 284.

³⁹ Crawford J, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012); Malone, D, Thakur, R, *UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publishers 2023).

⁴⁰ De Wet, E, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law' in d'Aspremont J and Besson S (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017).

⁴¹ Bellamy, A. J, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press 2009); Thakur R and Orford A, 'International Authority and the Responsibility to Protect' (2012) 23(1) EJIL 284.

⁴² Liivoja R, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 ICLQ 583, 585-586.

is necessary to reconcile the application of R2P, a principle that promotes intervention, with the obligations outlined in Article 103.⁴³

Scholars such as Alex J. Bellamy⁴⁴ and Edward C. Luck⁴⁵ have been instrumental in analysing the development and implications of R2P in the aftermath of the Kosovo intervention. Their work explores both the conceptual challenges and practical applications of R2P, shedding light on its evolution from a theoretical framework to an operational norm within the UN system. The concept of R2P as a guiding principle has gained recognition through UN resolutions and real-world applications at the same time as it created tensions between the necessity for action and the adherence to established law under the UN Charter in terms of state sovereignty and non-interference outlined in Article 2(4).⁴⁶

Within this context, Article 103 plays a crucial role by highlighting the importance of upholding Charter obligations. However, a dilemma arises when R2P-driven interventions aimed at preventing atrocities appear to clash with these principles. These situations challenge traditional understandings of legal responsibilities under the Charter.

To further explore the relationships between the formal legal framework of the UN and the moral imperatives of humanitarian intervention, the next two sections will consider the emergence of R2P in the context of *jus cogens* and evolving customary international law.

II.3.1 Jus Cogens: Reconciling R2P & Article 103

Several scholars highlighted the tensions between the formal legal framework of the UN and the moral imperatives of humanitarian intervention.⁴⁷ The convergence of these norms with Article 103 unveils a legal landscape in which preventing and prohibiting genocide has become acknowledged as an absolute norm (*jus cogens*), challenging the conventional interpretation of Article 103. This pivotal moment in law demonstrates the necessity of reinterpreting Article 103 in a manner that aligns with the core values embedded in R2P, particularly when inaction could lead to severe humanitarian crises.⁴⁸

The discussions relating to Article 103 and R2P extend beyond academia, as they are indicative of the demand to align governance mechanisms with ethical responsibilities to protect vulnerable populations from mass atrocities. Traditional interpretations of state sovereignty clash with *jus cogens norms* that prioritise civilian protection. This reassessment does not undermine the authority of the SC, but instead is meant to strengthen the UNs' ability to achieve its objective of achieving peace, security and upholding human rights values.

By incorporating these considerations into the examination of R2P within the framework of law, it becomes evident that a rigid interpretation of Article 103 is inadequate to address the complexity of contemporary challenges. Instead, adopting an understanding that allows for Article 103 to coexist with R2P principles guided by law and *jus cogens* emerges as an approach towards establishing a responsive

⁴³ Lauterpacht E, 'Fairness in International Law and Institutions By Franck TM (OUP 1995)' (1997) 91 AJIL 189; Crawford J, Brownlie's Principles of Public International Law (8th edn, OUP 2012).

⁴⁴ Bellamy, A., Responsibility to Protect: The Global Effort to End Mass Atrocities (Polity Press 2009).

⁴⁵ Luck, E. C., 'Building a Norm: The Responsibility to Protect Experience' in Robert I Rotberg (ed), Mass Atrocity Crimes: Preventing Future Outrages (Brookings Institution Press 2010) 108-127.

⁴⁶ Bellamy, A.J., 'The Responsibility to Protect: A Wide or Narrow Conception?' (2013) 34 Ethics & International Affairs, 187.

⁴⁷ Ratner, SR, 'The Security Council and International Law' in Malone DM (ed), The UN Security Council: From the Cold War to the 21st Century (Lynne Rienner Publishers 2004) 602-604; Ribeiro, MMLA, 'R2P and the Pluralist Norm-shapers' (2020) 42(1) Contexto Internacional 9.

⁴⁸ Ibid.

and effective international legal framework.⁴⁹ This expanded analysis, situated within discussions surrounding R2P and Article 103, contributes to a better understanding of available mechanisms for international action to prevent human suffering. It also highlights the importance of a UN Charter operating based on principles but without historical limitations regarding interventions. The emerging framework should be capable of demonstrating a collective responsibility to protect civilians from genocide and other mass atrocities while respecting national sovereignty and global governance.

II.3.2 From Emergence to Internalisation: Norm Cycle Theory & R2P as Instant

According to Sender & Wood, ICIL proposes a radical departure from the traditional process of developing international legal norms.⁵⁰ Conventional customary international law relies on a gradual evolution, grounded in the twin concepts of state practice and *opinio juris* which require a general and consistent practice by states undertaken with the belief that such practice is legally required. ICIL, however, introduces an accelerated mechanism, contending that in certain extraordinary situations international norms can and should develop rapidly, bypassing the protracted processes that have historically characterised their formation.

The theory of ICIL is grounded in the idea that urgent global crises necessitate an immediate legal response, which cannot be delayed by the usual progressive development in international law. According to Krivokapić, this accelerated process is typically driven by situations involving grave humanitarian crises or sudden shifts in the international order that are perceived to require immediate legal response from the international community to establish new norms or clarify existing ones.⁵¹ In that sense, both Sender & Wood and Krivokapić advocate for the recognition of ICIL as a means to address urgent global issues.⁵²

In the realm of ICIL, the development of law is expedited by the belief that a firm and widespread sense of legal obligation among states can trigger the swift establishment of a new standard even without substantial state actions.⁵³ In law it usually takes a considerable amount of time and consistent state practice, combined with the belief that such practice is legally mandatory to establish a new standard. However, ICIL puts forward the idea that in cases when states collectively recognise an obligation to respond to a situation, this can lead to the rapid formation of a new customary norm.⁵⁴ This perspective challenges the importance of state practice by suggesting that the moral urgency of a given situation can accelerate the development of norms even without an extended history of norm enforcement.

⁴⁹ Ibid.

⁵⁰ Sender, O. & Wood, M., 'Between "Time Immemorial" and "Instant Custom": The Time Element in Customary International Law' (2021) 42 *Grotiana* 229.

⁵¹ Boris Krivokapić, 'On the Issue of So-Called "Instant" Customs in International Law' (2017) 9 *Law and Politics* 187.

⁵² Sender O and Wood M, 'Custom's Bright Future: The Continuing Importance of Customary International Law' in Bradley CA (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 360-369; Boris Krivokapić, 'On the Issue of So-Called "Instant" Customs in International Law' (2017) 9 *Law and Politics* 187, 188-189.

⁵³ Scharf MP, 'Accelerated Formation of Customary International Law' (2014) 20 *ILSA J Int'l & Comp L* 305, 306-307.

⁵⁴ Sender O and Wood M, 'Custom's Bright Future: The Continuing Importance of Customary International Law' in Bradley CA (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 360-369; Boris Krivokapić, 'On the Issue of So-Called "Instant" Customs in International Law' (2017) 9 *Law and Politics* 187, 188-189.

The integration of the R2P concept with ICIL using the lens of Norm Cycle Theory further enhances our understanding of how such norms develop, gain acceptance, and become part of legal practices.⁵⁵ According to Finnemore & Sikkink's Norm Cycle Theory, this process consists of three stages: norm emergence, norm cascade and norm internalisation.⁵⁶ Analysing Article 103 of the UN Charter through the lens of this norm cycle highlights nuanced interactions.⁵⁷ A closer examination reveals that Article 103 can coexist with other binding international norms. This interpretation suggests that in cases where R2P principles are invoked to stop or prevent genocide, Article 103 should not act as a barrier but defer to these higher order norms. In essence, the interpretation harmonising Article 103 and military intervention without the SC authorisation is internalised as a customary norm because of the supremacy of human rights values to stop and prevent genocide.

Conceptualising R2P as ICIL has implications for the advancement of regulations as it depicts law as dynamic and capable of adapting to changing societal needs. However, if standards can quickly emerge in response to crises, this also raises concerns about their consistency and long-term validity. Moreover, standards developed on a need basis and tailored to specific situations could potentially result in a fragmentation of rules and regulations, all the while a universally accepted foundation is lacking.⁵⁸

When combined, R2P and ICIL provide a comprehensive framework for understanding and addressing international crises. R2P's focus on prevention and intervention aligns with the agility of ICIL, potentially offering a more effective mechanism for international response to humanitarian crises. Yet, this synthesis also brings to the fore critical considerations regarding the balance between state sovereignty and humanitarian intervention, the legitimacy of rapidly formed legal norms, and the consistent application of these frameworks in international law. The next chapter will apply these frameworks to describe the emergence of R2P as ICIL after the Kosovo intervention.

III. The Emergence of R2P as ICIL After the Kosovo Intervention

The late 1990s witnessed a crisis in Kosovo characterised by intense ethnic conflict and violence. The ethnic Albanian population bore the brunt of this turmoil, enduring acts of brutality perpetrated by Serbian forces.⁵⁹ These acts included ethnic cleansing, mass killings and other flagrant violations of International Humanitarian Law (IHL). As a result, hundreds of thousands of Kosovo Albanians were displaced from their homes, with many seeking refuge in neighbouring countries to escape the violence.⁶⁰ This crisis eventually reached such a threshold that NATO members felt compelled to intervene to

⁵⁵ Sender, O. & Wood, M., 'Between "Time Immemorial" and "Instant Custom": The Time Element in Customary International Law' (2021) 42 *Grotiana* 229.

⁵⁶ Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887

⁵⁷ De Wet E, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law' in d'Aspremont J and Besson S (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017).

⁵⁸ Heinsch R, 'Methodological Challenges in Ascertaining Customary International Humanitarian Law: Can Customary International Law Respond to Changing Circumstances in Warfare?' in *Law-Making and Legitimacy in International Humanitarian Law* (Edward Elgar Publishing 2021) 170.

⁵⁹ Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press 2000)

⁶⁰ *Ibid.*

prevent further escalation of atrocities and provide much needed humanitarian assistance to those affected.⁶¹

NATO members and other countries expressed concerns about ethnic cleansing and human rights abuses in Kosovo as early as 1993.⁶² On March 24, 1999, NATO directly intervened militarily in the conflict without authorisation from the SC. Although the SC did not authorise the intervention, it expressed concern about the situation in Kosovo and called for settlements through resolutions.⁶³ This indirect involvement influenced discussions on the legality and legitimacy of the intervention. Organisations like the Organisation for Security and Cooperation in Europe established the Kosovo Verification Mission to monitor compliance with agreed terms.⁶⁴ It is particularly noteworthy how NATO's actions sparked debates about whether interventions could be considered legal and legitimate, even without SC authorisation.⁶⁵

The process of norm internalisation after the Kosovo intervention is described by scholars such as Ahmad,⁶⁶ Nuñez-Mietz,⁶⁷ and Currie.⁶⁸ Currie provides a detailed background of the Kosovo intervention, focusing on the debates that arose regarding its legality and legitimacy. The author clarifies that NATO conducted the intervention without approval from the SC, leading to debates about national sovereignty and the global duty to protect civilians against widespread atrocities.⁶⁹

Nuñez-Mietz explores the development of norms following NATO's military intervention against Yugoslavia in 1999.⁷⁰ During this period, NATO member states collectively showed a willingness to take action for humanitarian purposes despite lacking explicit SC authorisation, which according to some was a way to avoid the consequences of non-authorisation.⁷¹ This led to discussions about the legality and legitimacy of interventions, challenging traditional ideas about sovereignty and non-intervention. Nuñez-Mietz suggests that the NATO involvement in Kosovo conducted without approval from the SC had an impact on the formation of legal standards regarding the application of force for humanitarian reasons.

Lastly, Ahmad's analysis delves into how the international community responded when NATO intervened in Kosovo.⁷² It explores the reactions from different actors and organisations, shedding light

⁶¹ Kritsiotis D, 'The Kosovo Crisis and NATO's Application of Armed Force against the Federal Republic of Yugoslavia' (2000) 49 ICLQ 330

⁶² United Nations Security Council, 'Resolution 855 (1993)' (9 August 1993) UN Doc S/RES/855

⁶³ Ibid.

⁶⁴ OSCE, 'Kosovo Verification Mission/OSCE Task Force for Kosovo (closed)' (OSCE) <https://www.osce.org/kvm-closed> [accessed 6 January 2024].

⁶⁵ Wheeler NJ, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 265-268.

⁶⁶ Ahmad N, 'The Evolution of the Prohibition on the Use of Force in the Face of United Nations Security Council Inaction: How Can the United Nations General Assembly Maintain International Peace?' (2021) SSRN 4014527.

⁶⁷ Nuñez-Mietz, FG, 'Legalization and the Legitimation of the Use of Force: Revisiting Kosovo' (2018) 72 Int'l Org 725.

⁶⁸ Currie, J, 'NATO's Humanitarian Intervention in Kosovo: Making or Breaking International Law' (1998) 36 Can YB Int'l L 303.

⁶⁹ Ibid.

⁷⁰ Nuñez-Mietz FG, 'Legalization and the Legitimation of the Use of Force: Revisiting Kosovo' (2018) 72 Int'l Org 725.

⁷¹ Currie J, 'NATO's Humanitarian Intervention in Kosovo: Making or Breaking International Law' (1998) 36 Can YB Int'l L 303.

⁷² Ahmad N, 'The Evolution of the Prohibition on the Use of Force in the Face of United Nations Security Council Inaction: How Can the United Nations General Assembly Maintain International Peace?' (2021) SSRN 4014527.

on the challenges of gaining collective support for such interventions. The international community referred to here is not limited to NATO or UN members, or a specific group of countries, but includes a range of players like the European Union, the Organisation of Islamic Cooperation, and individual countries such as Romania, Bulgaria and Slovenia who allowed their airspace to be used for the action. Ahmad emphasises that while there was support from sources indicating some acceptance of military interventions under specific circumstances, this support was not universal. His analysis highlights how international reactions vary greatly, offering insights into what conditions are needed for the international community to become involved in or endorse interventions. This underscores the complexities and debates surrounding the legality and legitimacy of interventions.

When analysing these viewpoints, it becomes clear that the intervention in Kosovo marks a milestone in the conversation about humanitarian intervention and international law. It emphasises the necessity for a structure that can efficiently address humanitarian emergencies while respecting international legal norms. The conversations and consequences stemming from the Kosovo intervention contributed to a comprehension of concepts like R2P and ICIL as elements of modern international law, indicating a consensus on the responsibilities of states amidst mass atrocities.

III.1 Intervention in Kosovo Through the Lens of Norm Cycle Theory: A Case for Effective Intervention

The establishment of standards after interventions shows a gradual acceptance of the R2P and ICIL principles. This suggests that interventions to prevent large scale atrocities may be considered justifiable without approval from the SC. This shift reflects a change in law to accommodate urgent humanitarian action while upholding fundamental legal principles.

Furthermore, the diverse reactions from countries regarding the Kosovo intervention shed light on the challenges of reaching a shared agreement on the lawfulness and legitimacy of actions.⁷³ Although some level of approval was evident, the lack of consensus highlighted divergent positions on when it is appropriate for the global community to intervene in order to prevent human rights violations taking place in sovereign states.

Applying Norm Cycle Theory to the case of Kosovo, it can be argued that R2P emerged as an adaptable measure to respond to humanitarian crises in situations where the SC is unable or unwilling to take action, which had lasting effects on how the international community approached humanitarian interventions more generally.

The following observations can be made:

Norm Emergence

The Kosovo intervention played a role in establishing R2P as a concept that challenged ideas about State sovereignty by emphasising the need to prevent mass atrocities. Despite lacking authorisation from the SC, the intervention was widely perceived as morally justified by many international actors and scholars.⁷⁴ Moreover, the Independent International Commission on Kosovo concluded that NATO's involvement was deemed "illegal but legitimate", underscoring the conflict between the official legal structure and the ethical obligation to respond to humanitarian emergencies.⁷⁵ This highlighted the tension between state

⁷³ Nuñez-Mietz, FG, 'Legalization and the Legitimation of the Use of Force: Revisiting Kosovo' (2018) 72 *Int'l Org* 725.

⁷⁴ Wheeler, NJ, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 275-284.

⁷⁵ Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000).

sovereignty and obligations related to the protection of human rights. During this stage, different actors such as states, international organisations and civil society groups advocated for R2P as they recognised the necessity for a norm that would legitimise intervention in the face of atrocities.

Norm Cascade

After the Kosovo intervention, the International Commission on Intervention and State Sovereignty in 2001 released a report that introduced the R2P doctrine. This doctrine suggests that state sovereignty comes with a responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. UN member states officially adopted R2P at the World Summit in 2005, marking the beginning of a phase where states increasingly accepted and implemented its principles. The focus moved from advocating for the norm to promoting its acceptance within law and state practices.⁷⁶

Norm Internalisation

The ongoing process of internalising R2P involves becoming widely accepted as part of states' legal and operational frameworks. As R2P becomes law, we can see evidence of this internalisation through consistent application of R2P principles in international responses to crises such as in Libya in 2011. Despite ongoing debates about how to interpret and apply R2P, it has been consistently used.⁷⁷

III.2 The Humanitarian Objectives in the Kosovo Intervention

In the case of Kosovo, it was argued that urgent measures were necessary to halt atrocities and ethnic cleansing.⁷⁸ From this perspective, NATO's intervention was justified as a response to the failure of the Yugoslav government to protect its people and instead instigated the violence. It marks the evolving agreement that the international community bears a responsibility to react when gross human rights violations occur, particularly when the involved state is unwilling or incapable of safeguarding its own citizens.⁷⁹ The intervention ensured the protection of civilians as it successfully put an end to the violence and established an environment that allowed refugees and internally displaced individuals to eventually return to their homes.⁸⁰ In doing so, NATO's intervention not only saved numerous lives but also established a benchmark for future humanitarian actions underscoring the international community's duty to protect innocent civilians in the presence of state-based violence brutalities.

From this perspective, R2P has evolved from being accepted to becoming part of the legal system that governs state behaviour. This process emphasises that states must not only view these principles as obligations but also as legal responsibilities within the ever-evolving context of customary international law. The intervention in Kosovo serves to exemplify how R2P was applied as ICIL, showcasing an inclination towards preventing crises rather than being constrained by traditional legal barriers. Advocating for R2P as ICIL requires efforts to establish consensus on its foundations and ensure that interventions are both legally valid and reinforce commitment to protection principles. This approach does not only strengthen the effectiveness of R2P, but also contributes to shaping global norms that prioritise protecting human rights and deterring mass atrocities.

⁷⁶ Ribeiro MMLA, 'R2P and the Pluralist Norm-shapers' (2020) 42(1) *Contexto Internacional* 9.

⁷⁷ Alex J Bellamy and Paul D Williams, 'The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect' (2011) 87 *International Affairs* 825, 825-828

⁷⁸ Kritsiotis D, 'The Kosovo Crisis and NATO's Application of Armed Force against the Federal Republic of Yugoslavia' (2000) 49 *ICLQ* 330.

⁷⁹ *Ibid*

⁸⁰ *Ibid*

The NATO intervention in Kosovo provides lessons when considering R2P and ICIL. It demonstrates that under certain circumstances, there may be a need for action even without the endorsement of the SC, which challenges the traditional R2P framework that heavily depends on UN authorisation. This case underscores the potential for an adaptive application of R2P to allow it to function effectively even without unanimous agreement from the SC.⁸¹ Moreover, the intervention in Kosovo aligns with the principles of ICIL by demonstrating how urgent humanitarian crises can trigger the development of legal norms.⁸²

This phenomenon implies that international law has the ability to adapt swiftly to humanitarian needs and showcases a dynamic relationship between moral imperatives and legal standards, highlighting the evolving nature of law and its potential to redefine the legal and ethical boundaries of humanitarian intervention.⁸³ In many ways, it represented a moral awakening among international actors.⁸⁴ This was accompanied by the acknowledgement that the international community not only possesses a right but a responsibility to intervene in cases involving extreme human rights violations.⁸⁵

This shift also marks a departure from the positions held during the Cold War era, which was characterized by competing ideologies: the Eastern bloc's emphasis on non-intervention and the West's increasing advocacy for human rights.⁸⁶ The end of the Cold War accelerated discussions on universal responsibilities and joint international action, leading to new perspectives on humanitarian intervention as exemplified by the Kosovo conflict in 1998-1999.⁸⁷

III.3 Kosovo Intervention: Beyond R2P's Security Council Dependence

Supporters of the intervention made their case by emphasising the necessity to prevent large scale atrocities and to protect innocent civilians, drawing comparisons to previous failures in preventing the genocides in Rwanda and Srebrenica.⁸⁸ This perspective suggests that international law should deviate from strict adherence to state sovereignty in extreme circumstances.⁸⁹ In this context, customary international law would serve as a foundation for justifying the intervention. Additionally, Article 103 of the UN Charter, which emphasises the authority of the UN Charter above all treaties, would not directly apply to NATO's involvement in Kosovo. This is because the intervention was not triggered by political agreement but was rather justified on humanitarian grounds amidst the lack of specific approval from

⁸¹ Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000)

⁸² Krivokapic B, 'On the Issue of So-Called "Instant" Customs in International Law' (2017) 9(1) *Danubius Universitas Acta Administratio*; Omer Sender and Michael Wood, 'Between "Time Immemorial" and "Instant Custom": The Time Element in Customary International Law' (2021) 42 *Grotiana* 229.

⁸³ Wheeler NJ, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000).

⁸⁴ *Ibid*

⁸⁵ Cassese A, 'Ex Injuria Ius Oritur: Are We Moving towards Legitimization of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *EJIL* 23.

⁸⁶ Malone D and Thakur R, *UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publishers 2023).

⁸⁷ Thomas G Weiss and Rorden Wilkinson, 'Global Governance to the Rescue: Saving International Relations?' (2014) 20(1) *Global Governance* 19

⁸⁸ Adam Roberts, 'NATO's 'Humanitarian War' over Kosovo' (1999) 41(3) *Survival* 102

⁸⁹ Yost DA, *NATO Transformed: The Alliance's New Roles in International Security* (US Institute of Peace Press 1998).

the SC.⁹⁰ However, it did not lead to a clash between the principles outlined in the UN Charter and any other international accord, a situation that Article 103 specifically deals with.⁹¹

The case of Kosovo highlights the importance of being flexible in reevaluating the R2P doctrine and its practicality in addressing human rights violations. It provides insights into how interventions evolve, the role of law and the responsibilities of actors during humanitarian crises. It also underscores the need for systems to adapt to situations where immediate protection of human rights may require actions beyond conventional norms.

Advocating for flexibility does not mean disregarding established norms but rather enhancing their implementation when considering the urgency and moral duty to prevent and respond to atrocities. It calls for a principled approach to decision-making processes to ensure that safeguarding human rights remains the primary focus within the legal framework governing state actions and global responses. After examining NATO's involvement in Kosovo and its profound impact on the R2P framework, the article now delves into R2P as ICIL. The ideas of R2P gained prominence after the Kosovo crisis which prompted a re-evaluation of established international legal norms. This section will explore how ICIL served as a justification in this context, showcasing the interplay between emerging humanitarian needs and the evolution of international legal principles.⁹²

III.4 Instant Customary International Law as a Legal Justification

The last sections demonstrated that the impact of NATO's involvement in Kosovo on law was significant. It challenged the pace at which international legal norms typically evolve and enabled adaptation in cases of clear moral urgency. By stopping ethnic cleansing and protecting civilians in Kosovo, the intervention set a precedent that emphasised the importance of addressing global humanitarian needs, even if it meant bypassing traditional procedural legalities. It demonstrated that the international community has a responsibility to protect civilians when a state commits large-scale human rights violations which can override states' right to non-interference.⁹³ This redefinition of sovereignty, understood as states' obligation to protect civilians, marks a change in how intervention without conventional legal approval were viewed by the international community.⁹⁴

To determine what is considered *opinio juris* with regards to Kosovo, it is important to examine how the international community perceived and justified NATO's intervention based on these obligations. If a significant portion of the international community believed that NATO's intervention was justified because there was an obligation to prevent or halt the humanitarian crisis even without SC authorisation, this could be seen as establishing *opinio juris*. This would indicate a recognition that in situations of grave humanitarian crisis, there is a legal duty to act, potentially influencing new legal precedents within ICIL.⁹⁵

⁹⁰ Simma B, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 Eur J Int'l L 1, 6-8.

⁹¹ Kolb R, 'Article 103 of the UN Charter and Security Council Authorizations' in Capaldo GZ (ed), The Global Community Yearbook of International Law and Jurisprudence 2018 (OUP 2019).

⁹² Daniel H Joyner, 'The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm' (2002) 13 Eur J Int'l L 597.

⁹³ Independent International Commission on Kosovo, The Kosovo Report: Conflict, International Response, Lessons Learned (OUP 2000).

⁹⁴ Allison R, 'Humanitarian Intervention, Kosovo, and Beyond: Divergent Norms' in Allison R (ed), Russia, the West, and Military Intervention (OUP 2013).

⁹⁵ Ibid.

NATO's actions, which prioritised the value of life and dignity above adherence to state sovereignty, are in line with the core principles of the UN Charter.⁹⁶ These principles emphasise human rights and international cooperation, reflecting a progressive interpretation of sovereignty. The idea of sovereignty has transformed from being viewed as a defence against interference to being recognised as a duty that states hold towards their citizens.⁹⁷ According to this perspective, sovereignty is not a privilege that shields countries from intervention. Instead, it is a privilege that entails the duty to safeguard the rights and well-being of their people. The connection between Article 103 of the UN Charter and customary international law warrants closer examination in that regard.

It is generally accepted that Article 103 establishes superiority of obligations outlined in the UN Charter over other agreements, including international law.⁹⁸ However, as Knorr points out, the classification of the crime of genocide as *jus cogens* in the context of international law emphasises its recognition as a universal norm acknowledged by the international community.⁹⁹ This classification underscores the responsibility to criminalize genocide beyond treaty obligations. Considering genocide as a *jus cogens* norm requires states to prevent and punish genocidal acts, which demonstrates a universal commitment to protect individuals from the most severe crimes.

Ribeiro argues that NATO's intervention —motivated by the need to stop acts that were perceived as genocide and thus violating a *jus cogens* norm, — constituted a moment where the existing legal framework, particularly Article 103 of the UN Charter, was tested and reinterpreted to address an urgent humanitarian crisis.¹⁰⁰ In that view, NATO's intervention in Kosovo represented a mandatory action required by a violation of a *jus cogens* norm. This perspective suggests that despite bypassing authorisation from the SC and conflicting with Article 103, the intervention was in accordance with states' obligation to prevent and punish acts of genocide. According to this interpretation, NATO's intervention can therefore be seen as an act under ICIL that highlights how international responses to human rights violations are evolving over time. Considering Ribeiro's analysis, there is an argument to be made for minimising the reliance on SC approval to activate R2P to mirror the mechanism that underlay NATO's actions in Kosovo. Hence, the next section examines the impact of Kosovo on the development of the R2P doctrine and sheds light on the delicate relationship between state sovereignty and humanitarian responsibility.

III.5 Rethinking R2P: Kosovo's Contributions to International Law

While getting approval from the SC is crucial for order and consensus, Rodley argues that it needs R2P mechanisms that enable flexible action when addressing evolving situations such as in Kosovo.¹⁰¹ Furthermore, NATO's intervention was expression of the increasing international agreement on the obligation to prevent atrocities such as genocide as a *jus cogens* norm. Article 48 of the Draft Articles for Responsibility of States for Internationally Wrongful Acts (DASR) acknowledges that this obligation goes

⁹⁶ De Wet E, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law' in d'Aspremont J and Besson S (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017).

⁹⁷ Allison R, 'Humanitarian Intervention, Kosovo, and Beyond: Divergent Norms' in Allison R (ed), *Russia, the West, and Military Intervention* (OUP 2013).

⁹⁸ *Ibid.*

⁹⁹ Michelle Knorr, 'The International Crime of Genocide: Obligations *Jus Cogens* and *Erga Omnes*, and Their Impact on Universal Jurisdiction' (2011) 7 *Essex Hum Rts Rev* 32.

¹⁰⁰ Ribeiro MMLA, 'R2P and the Pluralist Norm-shapers' (2020) 42(1) *Contexto Internacional* 9.

¹⁰¹ Rodley NS, 'R2P and International Law: A Paradigm Shift?' in Bellamy AJ and Dunne T (eds), *The Oxford Handbook of the Responsibility to Protect* (OUP 2016).

beyond individual state interests and extends to the whole international community.¹⁰² This means that any violation of these obligations is considered not only an offence against one state but against the international community as a whole which in turn creates a duty for collective responses. This shows a changing understanding of law that recognises a collective responsibility in addressing core international crimes.¹⁰³

NATO's involvement in Kosovo can thus be seen from the perspective of this shared responsibility. As has been shown in the previous chapters, international law traditionally prioritised the sovereignty of states, resulting in their reluctance to intervene in situations such as genocides or ethnic cleansing. In the context of Kosovo, NATO's actions can be interpreted as reflecting an understanding of international law that prioritizes the protection of human rights over state sovereignty in extreme circumstances.¹⁰⁴ This shift indicates a transition from international law's traditional focus on state interactions to a more comprehensive approach that emphasizes global humanitarian values and the protection of communities facing atrocities. The war in Kosovo highlighted the drawbacks of relying on legal processes in situations where prompt action is crucial to prevent mass atrocities. From this perspective, NATO's actions can be viewed as either setting the stage for or influencing the evolution of law. Consequently, by grounding NATO's actions in the responsibility to protect civilians from atrocities, the intervention has contributed to shaping a norm within international law. It also resulted in the development of a framework that outlines the conditions and boundaries of humanitarian interventions.

As such, R2P would be more effective if it integrated response mechanisms for situations where traditional legal endorsements such as approval from the SC are not available.¹⁰⁵ This adjustment is essential for R2P to strike a balance between prompt humanitarian intervention and aligning with principles of international law and state sovereignty. After all, the idea of an international responsibility to avert atrocities, which eventually developed into R2P, was notably shaped by the Kosovo intervention and its repercussions, making it a benchmark case in discussions on international interventions to safeguard human rights.¹⁰⁶

At first, the notion of intercession for reasons was viewed as more of a guiding principle rather than a strict framework, sparking concerns about its enforceability. Although such principles were not legally binding at the time of the Kosovo war, they nevertheless effectively justified and guided NATO's intervention and thus played a crucial role in influencing both state behaviour and international responses to humanitarian crises. The impact of the Kosovo intervention on R2P also demonstrates how such guiding principles can gradually become a norm in international customary law. This involves recognising and implementing R2P principles in state practices and international legal decisions. When states actively put legal principles into practice, as seen in the case of Kosovo, they contribute to the

¹⁰² ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10.

¹⁰³ Ribeiro, MMLA, 'R2P and the Pluralist Norm-shapers' (2020) 42(1) *Contexto Internacional* 9.

¹⁰⁴ Chesterman, S, 'Responsibility to Protect and Humanitarian Intervention: From Apology to Utopia and Back Again', in Geiß, R and Melzer, N (eds), *The Oxford Handbook on the International Law of Global Security* (Oxford University Press, 2021).

¹⁰⁵ Rodley NS, 'R2P and International Law: A Paradigm Shift?' in Bellamy AJ and Dunne T (eds), *The Oxford Handbook of the Responsibility to Protect* (OUP 2016).

¹⁰⁶ Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000).

development of these principles as international law and thus making them more legally significant and applicable.¹⁰⁷

In parallel with the Norm Cycle Theory, the concept of ICIL sheds light on how the intervention in Kosovo led to a shift towards accepting principles as norms. It usually takes time for customary international law to be formed through state practice and *opinio juris*. However, due to growing demands for mechanisms to prevent and respond to mass atrocities, R2P was able to bypass the lengthy process of customary law formation. This demonstrates how emerging norms can quickly gain acceptance. The analytical frameworks provided by the Norm Cycle Theory and ICIL show us how international law is constantly changing and evolving to address societal needs. The intervention in Kosovo thus showcased how principles of humanitarian intervention, which later formed the basis of R2P, can be practically applied in these situations.¹⁰⁸

However, the criticism of NATO's intervention in Kosovo has also prompted a more nuanced assessment of such interventions. It emphasizes the importance of a framework that facilitates decisive action during humanitarian crises while ensuring compliance with legal principles and norms. In summary, the case illustrates the dynamic nature of international law and humanitarian intervention, highlighting the necessity of adapting to emerging challenges while upholding justice and human rights standards. The next chapter will explore how such a framework could be applied to the current Israel-Hamas conflict.

IV. The R2P Failure in 2023: The Israel-Hamas Conflict

While the conflict between Israel and Palestinian militant groups led by Hamas in the Gaza Strip is part of a long-standing dispute in the region, this paper will focus on the escalation of violence since October 7, 2023. This coincided with the anniversary of the Yom Kippur War (also known as the Ramadan War), when Hamas launched a surprise attack against Israel, resulting in approximately 1,200 Israeli casualties and the kidnapping of around 240 Israelis and foreigners.¹⁰⁹ In response, Israel initiated "Operation Swords of Iron" with the objective to dismantle Hamas and rescue hostages.¹¹⁰ However, the operation quickly resulted in a humanitarian crisis with the death toll reaching over 35,000 as of March 14, 2024, according to the Health Ministry in Hamas-run Gaza.¹¹¹ While international actors quickly appealed to both parties to cease the violence and respect their obligations under international law, the fighting continues with the civilian population in Gaza facing one of their worst humanitarian crises since decades.¹¹² In December 2023, South Africa ultimately brought the case before the International Court of Justice (ICJ), accusing Israel of committing genocide against Palestinians in Gaza.

¹⁰⁷ Chesterman S, 'Responsibility to Protect and Humanitarian Intervention: From Apology to Utopia and Back Again' in Geiß R and Melzer N (eds).

¹⁰⁸ Rodley NS, 'R2P and International Law: A Paradigm Shift?' in Bellamy AJ and Dunne T (eds), *The Oxford Handbook of the Responsibility to Protect* (OUP 2016).

¹⁰⁹ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), 'Hostilities in the Gaza Strip and Israel | Flash Update #54' (2023) <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-54>.

¹¹⁰ 'Israel's Operation Swords of Iron Update 10/11' (JINSA, 11 October 2023)

https://jinsa.org/jinsa_report/israels-operation-swords-of-iron-10-11/ [accessed 31 January 2024].

¹¹¹ 'Gaza War: UN revises death toll for women and children', (Reliefweb, 17 May 2024), Iain Overton, <https://reliefweb.int/report/occupied-palestinian-territory/gaza-war-un-revises-death-toll-women-and-children>.

¹¹² Khatib R, McKee M and Yusuf S, 'Counting the dead in Gaza: difficult but essential' [2024] *Lancet* (London, England).

The legal complexities surrounding this situation involve the principles of law and self-defence doctrines. Although the R2P doctrine would provide a legal basis for intervention, the SC's inability to reach consensus effectively hinders collective action. Against this background, the decision by the International Court of Justice (ICJ) in the case against Israel regarding the Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) is of great importance. In January 2024, the ICJ issued a significant provisional order in which it directed Israel to take several measures to protect Palestinians in Gaza, including preventing acts of genocide as defined in the Genocide Convention, ensuring its military does not commit such acts, preventing and punishing incitement to genocide, enabling urgent humanitarian assistance, preserving evidence related to alleged genocidal acts, and reporting to the Court on compliance measures within one month.¹¹³ Notably, the Court specifically ordered Israel to prevent 'killing members of the group' and 'causing serious bodily or mental harm to members of the group', directly quoting language from the Genocide Convention.

The following chapter explores to what extent adopting the Kosovo model and bypassing SC approval could provide for an effective legal framework for intervention, especially given that political interests currently overshadow humanitarian concerns. When considering intervening in the Gaza Strip without SC authorisation, we can draw upon both imperatives emphasised by the ICJ and evolving norms regarding state sovereignty and humanitarian intervention explained by Norm Cycle Theory.¹¹⁴ The allegations of genocide in Gaza create a situation where it becomes crucial for the international community to fulfil its responsibility in protecting civilians from atrocities. Norm Cycle Theory provides a framework for understanding how international responses to crises can contribute to shaping norms regarding intervention and human rights protection.

IV.1 Applying R2P to the Israel-Hamas Conflict

The ICJ's order can be seen as evidence of R2P being a principle of ICIL, which would position the ICJ as an important actor within the R2P framework and allows for a nuanced understanding of the interplay between international legal principles and the mechanisms for their enforcement.¹¹⁵ When analysing the role of the ICJ in addressing allegations of genocide such as in the current case, it is crucial to consider the broader context of international law and principles that guide international responses to grave human rights violations. From this perspective, the ICJ's order not only addresses specific questions regarding the Genocide Convention and its application in the present case but also supports the spirit of R2P by underscoring the importance of international action in situations where there is a risk of genocide, war crimes, ethnic cleansing, and crimes against humanity.

The involvement of the ICJ furthermore shows how the judiciary plays a role within efforts to prevent and address mass atrocities. By examining and possibly making decisions on allegations of genocide, the ICJ contributes to the principles of R2P, which aim to protect populations from serious international crimes. Although the ICJ does not possess enforcement powers like those of the SC, its rulings can influence norms, state behaviour and actions taken by the international community. Therefore, while the ICJ's primary function is to adjudicate disputes between states based on international law, its decisions related to crimes that also fall under the R2P umbrella can be seen as parts of a mosaic of international legal and diplomatic efforts to uphold these principles. The court's rulings can reinforce legal norms that

¹¹³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) (Provisional Measures) [2024] ICJ Rep 192 <https://www.icj-cij.org/node/203447>.

¹¹⁴ Ibid.; Ribeiro MMLA, 'R2P and the Pluralist Norm-shapers' (2020) 42(1) Contexto Internacional 9.

¹¹⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) (Provisional Measures) [2024] ICJ Rep 192 <https://www.icj-cij.org/node/203447>.

underpin R2P and hence provide a legal basis for international action in defence of vulnerable populations while also serving as a deterrent to potential violators.

In this view, the ICJ is an integral component of the international architecture designed to implement R2P. Its role in interpreting international law and rendering judgments on allegations of grave crimes contributes to the broader endeavour of preventing mass atrocities and ensuring accountability for such actions. This perspective underscores the importance of the ICJ and other international institutions in their collective effort to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, thereby embodying the essence of R2P within the realm of international customary law. The Court’s decision to implement measures signifies its concern regarding these allegations and its commitment to prevent violations of the Genocide Convention.

IV.2 Israel’s Perspective and Military Actions: The R2P Core Values and Semi-Kosovo Model

Israel's stance in the conflict with Hamas in Gaza is that its military actions are driven by the commitment to security and self-defence. The Israeli government repeatedly stressed the importance of safeguarding its citizens and land from threats posed by militant groups operating in Gaza.¹¹⁶ This view determines Israel's policy choices and military tactics in addressing perceived security concerns.

Table 1: Comparison of Israel's Military Operation Goals, R2P Principles, and the Kosovo Model.¹¹⁷

Aspect	Israel's Military Operation Goals	R2P Principles	Kosovo Model
Objective	Self-defence against external threats from militant groups in Gaza.	Prevent mass atrocities including genocide, war crimes, ethnic cleansing, and crimes against humanity.	Humanitarian intervention to prevent mass atrocities and ethnic cleansing.
International Legal Basis	Right to self-defence under Article 51 of the UN Charter.	Based on the international community's obligation under international law to protect populations from mass atrocities when the state is unwilling or unable to do so.	Intervention without explicit SC authorisation, justified by humanitarian necessity.
Humanitarian Considerations	Claims of targeting militants and military infrastructure, with	Central focus on protecting civilians from mass atrocities.	Humanitarian intervention aimed at protecting civilian populations.

¹¹⁶ Israel Ministry of Foreign Affairs, 'Israel's Right to Self-Defense: Legal and Diplomatic Aspects' (14 October 2023) <https://www.gov.il/en/departments/general/israels-right-to-self-defense-legal-and-diplomatic-aspects> accessed 29 June 2024.

¹¹⁷ Ari Cicurel and others, 'Israel's Operation Swords of Iron Update 10/11' (Jewish Institute for National Security of America, 11 October 2023) https://jinsa.org/jinsa_report/israels-operation-swords-of-iron-10-11/ [accessed 2 February 2024]; Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press 2008); Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000).

Aspect	Israel's Military Operation Goals	R2P Principles	Kosovo Model
	efforts to minimise civilian casualties.		
Sovereignty and State Consent	Operates within or near its borders, emphasising state sovereignty and territorial integrity.	Involves international action that can override state sovereignty in cases of mass atrocities.	Intervention occurred without the consent of the Federal Republic of Yugoslavia, challenging traditional notions of sovereignty.
Security Council Role	Seeks international legitimacy, but actions are often unilateral or part of a coalition without explicit SC approval.	R2P actions are ideally endorsed by the SC but face challenges due to political veto powers.	Bypassed the SC due to anticipated vetoes, demonstrating a willingness to act without explicit approval for humanitarian purposes.

Table 1 outlines the key aspects of Israel's military goals and compares them with R2P principles and the Kosovo intervention model. It highlights the differences in objectives, legal bases, considerations for humanitarian impacts, views on sovereignty, and the role of the SC in authorising such operations.¹¹⁸ Considering Israel's actions in relation to the R2P and the Kosovo model, it is crucial to acknowledge that the Israel Defence Forces (IDF) acted without SC authorisation. According to Israel, the operations by the IDF aim at countering threats from Hamas and other militant groups and are thus necessary measures to safeguard its citizens and prevent further escalation within Israeli borders.¹¹⁹

Israel's justifications, though not explicitly invoking R2P, show alignment with some of the underlying goals of the principle. Its military operation in Gaza is portrayed as a measure extending beyond immediate retaliation, but instead aimed at preventing mass atrocities against its people and possible future threats posed by Hamas. Israel's decision to launch its military operations against Hamas underline its ability to act without SC approval based on the principles of R2P. This view, while contentious, echoes some of the rhetoric used for NATO's intervention in Kosovo. While not a coordinated international effort as envisioned by the drafters of the R2P doctrine, Israel's approach illustrates how nations could independently apply similar reasoning in conflict scenarios, prompting intricate discussions on the intersection of self-defence, atrocity prevention and international law. However, it also raises questions regarding the balance between state sovereignty, international legal commitments, and collective responsibility in ensuring civilian protection.

As was mentioned before, the intricate political dynamics and veto powers within the SC often hinder effective responses to emerging threats and humanitarian crises. The current Gaza-Israel conflict

¹¹⁸ Ari Cicurel and others, 'Israel's Operation Swords of Iron Update 10/11' (Jewish Institute for National Security of America, 11 October 2023) https://jinsa.org/jinsa_report/israels-operation-swords-of-iron-10-11/ [accessed 2 February 2024]; Alex J Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press 2009); Henkin L, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 *AJIL* 824.

¹¹⁹ Ari Cicurel and others, 'Israel's Operation Swords of Iron Update 10/11' (Jewish Institute for National Security of America, 11 October 2023) https://jinsa.org/jinsa_report/israels-operation-swords-of-iron-10-11/ [accessed 2 February 2024].

emphasises the necessity for an approach to international intervention supported by the principles of ICIL, considering also the experiences of the Kosovo intervention.¹²⁰ Israel's military operation in response to the Hamas attack amidst the lack of a unified international position on the issue bring to the fore the limitations within the UN system and the R2P framework in preventing mass atrocities and protecting civilian lives. The intricate dynamics between unilateral action and R2P principles demonstrate the pressing need to reform how the international community responds to crises, indicating the necessity for an adaptable and effective approach that draws upon lessons learned from past experiences, such as in Kosovo.

IV.3 Implications for R2P's Future: Analysis of the ICJ Order with Norm Cycle Theory

The ICJ plays a role in resolving disputes that relate to the fundamental principles of the global order, such as the prohibition of genocide as outlined in the Genocide Convention. The ICJ's order in the case *South Africa v. Israel* emphasises the seriousness and urgency of the allegations and underscores the court's mandate to uphold the law in times of atrocities. While not explicitly authorising a humanitarian intervention, this judicial intervention highlights the moral obligation of the international community to address accusations of atrocities.

When analysing the ICJ's order using Norm Cycle Theory, we can explore its implications across three interconnected stages: Norm emergence, norm cascade and norm internalisation.¹²¹ The court's decision to bring attention to and validate concerns regarding the risk of genocide indicates a phase of norm emergence, potentially motivating both state and non-state actors to advocate and enforce stronger protective measures. Norm cascade would point to the court's authoritative stance in achieving broader acceptance of protection principles and the adoption of intervention norms particularly in cases involving severe human rights violations, leading to a shift in global behaviour. Finally, during norm internalisation these principles would become ingrained in international customary law and state practices.

This iterative process demonstrates how court rulings can influence the development of standards with regards to the R2P and humanitarian intervention, consequently setting examples that shape the conduct and expectations of states.¹²² According to Ribeiro, the involvement of emerging powers in shaping norms furthermore reveals the complexity of the geopolitical landscape.¹²³ These countries often advocate for an approach to the R2P which involves respecting state sovereignty while recognising the importance of preventing atrocities. This perspective challenges the notion that intervention is solely a violation of sovereignty or a moral duty, instead suggesting that the international community must navigate these tensions thoughtfully and pragmatically.

To understand the frameworks that support intervention without SC authorisation in cases like in Gaza, it is essential to incorporate principles from ICIL into R2P. Despite the importance placed on SC authorisation for interventions in Article 103 of the UN Charter, it is crucial to acknowledge that the UN is also bound by international law.¹²⁴ The provisional measures ordered by the ICJ in the case *South Africa v. Israel* along with discussions surrounding R2P and ICIL suggest that Article 103 can coexist

¹²⁰ Henkin L, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 AJIL 824; Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press 2010).

¹²¹ Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887.

¹²² Henkin L, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 AJIL 824.

¹²³ Ribeiro MMLA, 'R2P and the Pluralist Norm-shapers' (2020) 42(1) *Contexto Internacional* 9.

¹²⁴ De Wet E, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law' in d'Aspremont J and Besson S (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017).

with other norms.¹²⁵ This becomes particularly relevant as the prevention and prohibition of genocide is now widely recognised as *jus cogens*, and hence binding on all states and taking precedence over conflicting treaties or customary rules.¹²⁶

The call for intervention in situations like the Gaza Strip is not only about upholding legal standards; it also reflects a moral obligation to prevent mass atrocities. Although Article 103 might indicate a preference for SC authorisation, the principles of R2P backed by ICIL and the recognition of genocide prevention as a *jus cogens* norm imply that there are moral grounds for interventions aimed at stopping mass atrocities even without explicit approval from SC.¹²⁷ By addressing the scenarios covered by the R2P framework, the global community is able to create a precise and efficient strategy to consider both the nature of state sovereignty and the importance of collaboration in handling such humanitarian emergencies.

IV.4 Redefining Sovereignty and Intervention

According to the Israeli government, its military response to threats from Gaza aim to protect its citizens from threats and prevent the escalation of violence within its borders and against its citizens.¹²⁸ When viewed through the lens of the Norm Cycle Theory, these actions align with the core principles of R2P, even though they were taken without SC authorisation. Israel's independent military operation, which is presented as an act of self-defence and pre-emptive measure, illustrates a phase in the cycle where state actions contribute to redefining and reshaping norms regarding intervention and sovereignty.¹²⁹ In return, Israel's actions also underscore the need for responsive strategies in tackling intricate humanitarian emergencies—a stance that echoes the insights put forth by the Norm Cycle Theory regarding evolving international norms.¹³⁰

Applying the theory of Norm Cycle to the case of Israel and the broader framework of R2P brings attention to the development of norms surrounding state sovereignty, humanitarian intervention and safeguarding civilians. Likewise, the need for responsive approaches to intervention as demonstrated by previous interventions like in Kosovo emphasises the ongoing negotiation and reassessment of norms within the global community. This dynamic interplay between state actions, judicial rulings and evolving norms underscores the significance of incorporating ICIL into the R2P doctrine. While Article 103 of the UN Charter establishes SC authorisation as law, peremptory norms such as the prevention and punishment of genocide also binds the international community.¹³¹ Therefore, interpreting Article 103 must accommodate these coexisting norms while allowing for a nuanced application of R2P principles that can address limitations within the SC framework effectively and respond appropriately to crises.

¹²⁵ Krivokapic B, 'On the Issue of So-Called "Instant" Customs in International Law' (2017) 9(1) *Danubius Universitas Acta Administratio*.

¹²⁶ Ribeiro MMLA, 'R2P and the Pluralist Norm-shapers' (2020) 42(1) *Contexto Internacional* 9.

¹²⁷ Omer Sender and Michael Wood, 'Between "Time Immemorial" and "Instant Custom": The Time Element in Customary International Law' (2021) 42 *Grotiana* 229.

¹²⁸ Ari Cicurel and others, 'Israel's Operation Swords of Iron Update 10/11' (Jewish Institute for National Security of America, 11 October 2023) https://jinsa.org/jinsa_report/israels-operation-swords-of-iron-10-11/ [accessed 2 February 2024]; Ribeiro MMLA, 'R2P and the Pluralist Norm-shapers' (2020) 42(1) *Contexto Internacional* 9.

¹²⁹ *Ibid.*

¹³⁰ Ribeiro MMLA, 'R2P and the Pluralist Norm-shapers' (2020) 42(1) *Contexto Internacional* 9.

¹³¹ De Wet E, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law' in d'Aspremont J and Besson S (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017).

The incorporation of ICIL into the R2P theory drawing from the insights of the Norm Cycle Theory is important for navigating the realm of international law and humanitarian intervention. It offers a framework for comprehending the nature of norms and how judicial rulings, state actions and theoretical perspectives can contribute to and refine the implementation of R2P principles in times of emergencies and threats to civilian populations. This approach advocates for a responsive and ethically grounded interpretation of international legal responsibilities to prevent mass atrocities.

V. Discussion

The presented analysis combined insights from NATO's involvement in Kosovo and of the ongoing Gaza-Israel conflict to consider different perspectives on humanitarian intervention under the R2P doctrine. By delving into aspects of law, state sovereignty and humanitarian obligations, the paper aimed to offer a nuanced understanding of how these concepts are constantly evolving.

The role played by the ICJ is crucial when it comes to addressing disputes between states around legal principles. Particularly noteworthy is its recent order related to allegations of genocide in the Gaza Strip, which highlights the court's ability to uphold international law while emphasising the obligation of the international community to address accusations of atrocities. By using Norm Cycle Theory, the analysis explored how decisions made by the ICJ can shape the emergence and acceptance of norms surrounding interventions. In this view, NATO's actions in Kosovo set a precedent for interventions without authorisation from the SC, relying on principles like R2P.

By integrating these viewpoints with the concept of ICIL, the article outlined a shift in the formulation and implementation of global norms. This transformation was characterised by the growing acceptance of norms that endorse interventions in humanitarian crises without SC consent. The involvement in Kosovo serves as an illustration of how global collaboration, fuelled by the obligation to prevent atrocities, can set the stage for standard practices. Moreover, the analysis highlights that integrating principles from ICIL with R2P is necessary when dealing with complex modern armed conflicts like those in Gaza. The study suggests that when analysing Article 103 alongside other law principles and norms concerning intervention, there appears to be a trend towards acknowledging a hierarchy of norms. This hierarchy prioritises safeguarding civilians from large-scale atrocities over protecting the principle of non-state sovereignty in extreme situations.¹³²

The discussion also highlighted the constraints of SC authorisation as mentioned in Article 103 of the UN Charter. In this regard, the paper proposes a nuanced interpretation that considers both norms and formal legal frameworks in balancing state sovereignty and the obligation to protect civilians.¹³³ In the realm of law, the rise of the R2P doctrine indicate a shifting willingness within the global community to prioritise safeguarding civilians over state sovereignty as an absolute rule in exceptional circumstances, even though state sovereignty remains highly valued.¹³⁴ The author advocates for a revised R2P doctrine drawing on insights from the Kosovo model and the evolving practices of ICIL that can effectively address crises and overcome the limitations of the SC framework. By embracing a legally sound and ethically driven approach to humanitarian intervention, the global community can navigate the complexities associated with preventing atrocities while ensuring that human rights remain a top priority in international efforts.

¹³² Jennifer M Welsh, *The United Nations and the Responsibility to Protect: Rhetoric, Norms and the Possibility of Action* (Cambridge University Press 2012).

¹³³ Glanville L, 'The Responsibility to Protect Beyond Borders' (2012) 12 *Human Rights Law Review* 1, 3-5.

¹³⁴ Alex J Bellamy, 'The Responsibility to Protect Turns Ten' (2015) 29 *Ethics & International Affairs* 161, 162-163.