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A Case for the Potential for Destabilization as a Threshold Criterion to the Use of Military Action by States Under the Doctrine of Humanitarian Intervention

Richard A.C. Alton* and Jason Reed Struble**

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I. INTRODUCTION

Over the past seventy-five years, most humanitarian interventions have led to the removal of central governments and other authority structures, which in turn has destabilized individual countries as well as regions of the world. Although humanitarian intervention is still needed in today's world, the international community must determine the most likely outcome of abruptly removing central governments and other authority structures before taking unilateral or collective military action under the doctrine of humanitarian intervention, even when taking such action is to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

Idealistically, humanitarian interventions end atrocities and establish peace and prosperity; realistically, however, humanitarian interventions are extraordinary actions by States that are inherently destabilizing regardless of the intervenor's altruistic intent. The doctrine of humanitarian intervention seeks to prevent humanitarian tragedies.¹ Yet, perhaps a State that intervenes in another's internal affairs cannot simultaneously safeguard citizens facing genocide and avoid engaging in active military conflict. Thus, military action under the doctrine of humanitarian intervention is not merely a humanitarian cause but rather a highly explosive affair that can cripple a country's infrastructure and have global ramifications. For instance, the military operations portrayed as a humanitarian intervention in Libya caused economic, cultural, and political destabilization

¹ Arman Sarvarian, *Humanitarian Intervention After Syria*, 36 LEGAL STUD. 20, 22 (2016).

in a country that, before the intervention, ranked among the most productive GDP countries in Africa.²

The legality and ethical legitimacy of past humanitarian interventions by States have been evaluated under various analytical frameworks by jurists, such as Ved P. Nanda, whose research the authors expanded upon in earlier articles examining the legitimacy under customary international law of the humanitarian interventions in Libya³ and Kosovo.⁴ The consequences of the multi-state NATO-led military intervention in Libya in 2011, and the American-led intervention in the Syrian Civil War in 2014, strongly militate in favor of the argument that the Potential for Destabilization (P4D) should be the threshold criterion that States must satisfy before engaging in any further deliberations about unilateral or collective military action under the doctrine of humanitarian intervention to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This is especially so when the ultimate result of an intervention may be the removal of the central government and other authority structures.

Reexamining the criteria by which States establish a case for humanitarian intervention under customary international law is appropriate now, a time when the possibility of military intervention in Latin American countries has simmered in newsfeeds for the past year.⁵ Talks between the U.S. and other Latin American countries

² Cruz A. Echevarría & Javier García-Enríquez, *The Economic Consequences of the Libyan Spring: A Synthetic Control Analysis*, 30 DEF. & PEACE ECON. 592, 593 (2019).

³ See generally Richard A.C. Alton & Jason Reed Struble, *The Constitutionality and Advancement of International Humanitarian Ideals in Libya by NATO and United States' Operations Odyssey Dawn and Unified Protector*, 23 TUL. J. INT'L & COMP. L 1, 9 (2014).

⁴ See generally Jason Reed Struble & Richard A.C. Alton, *The Legacy of Operation Allied Force: A Reflection on its Legality Under United States and International Law*, 20 MICH ST. INT'L L. REV. 293, 300 (2013).

⁵ See generally Carrie Kahn & Alex Leff, *Trump's Venezuela Moves Follow Long History of Intervention in Latin America*, NPR (February 22, 2019, 1:35 PM), <https://www.npr.org/2019/02/22/696057482/trumps-venezuela-moves-follow-long-history-of-intervention-in-latin-america>; Patrick Leet, *Washington Doubles Down on its Military Intervention Script in Venezuela*, NACLA (May 31, 2019), <https://nacla.org/news/2019/06/01/washington-doubles-down-its-military-intervention-script-venezuela>; Frank O. Mora, *What a Military Intervention in Venezuela Would Look Like*, FOREIGN AFFAIRS (March 19, 2019),

have been conducted.⁶ And, after a failed coup, the Venezuelan opposition leader, Juan Guaidó, intimated a desire for U.S. military intervention.⁷ Furthermore, former National Security Advisor John Bolton made hints at military intervention against not only Venezuela, but also Cuba and Nicaragua.⁸ In light of the current political and humanitarian crises in Cuba, Nicaragua, and Venezuela giving rise to calls for action by the international community, it is time to revisit the criteria by which States establish a case for humanitarian intervention under customary international law.

In making a case for P4D to be the threshold criterion that States must satisfy before engaging in any further deliberations about unilateral or collective military action in the name of humanitarian intervention to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, the works of international law jurists, historians, scholars on international relations, moral ethicists, and operational professionals are surveyed. Part II traces the development of P4D born out of the authors' prior research on past humanitarian interventions in Kosovo and Libya. Part III briefly explores definitions of customary international law and humanitarian intervention. Part IV surveys theories from the fields of economics, ethics, and change management, specifically the moral hazard, just war, and the transition model, to further develop P4D. Part V examines alternatives of P4D, such as the treaty-based criteria the Responsibility to Protect (R2P) and Responsibility while Protecting (RWP). Part VI concludes that P4D ought to be the first consideration by States before taking unilateral or collective military action in the name of humanitarian intervention. In Part VII, P4D is

<https://www.foreignaffairs.com/articles/venezuela/2019-03-19/what-military-intervention-venezuela-would-look>.

⁶ Andres Oppenheimer, *A U.S. military intervention in Venezuela is not completely unthinkable anymore amid Trump's rhetoric*, MIAMI HERALD (May 3, 2019, 5:06 PM), <https://www.miamiherald.com/news/local/news-columns-blogs/andres-oppenheimer/article229989249.html>.

⁷ *Venezuela crisis: Guaidó 'considering asking US for military intervention'*, BBC (May 5, 2019), <https://www.bbc.com/news/world-latin-america-48172520>.

⁸ Matt Withers, *John Bolton and the Monroe Doctrine*, THE ECONOMIST (May 9, 2019), <https://www.economist.com/leaders/2019/05/11/john-bolton-and-the-monroe-doctrine>.

applied to potential interventions in Latin America to study P4D's utility in the current international climate.

II. BRIEF REVIEW OF THE HUMANITARIAN INTERVENTIONS IN KOSOVO AND LIBYA

To lay the foundation for the authors' contentions that follow, it is necessary to explore the authors' prior examination of past humanitarian interventions in Kosovo and Libya. The authors' examinations entailed the application of qualifying criteria developed by international jurist Ved P. Nanda. Nanda's criteria stood out to the authors not only for its international recognition but also for its usefulness. The authors' prior examination of the lead-up to each of the military interventions in the former Yugoslavia and in Libya, which were ostensibly taken to avert deepening humanitarian crises, gave birth to P4D. As such, exploring the authors' retrospective conclusions about the military interventions in Kosovo and Libya is key for the establishment of P4D. A review of Nanda's criteria is first looked upon as applied to Kosovo. This is then followed by the authors adding to Nanda's criteria in their examination of the intervention that occurred in Libya.

A. *Kosovo*

NATO's Operation Allied Force in Kosovo was based on a claim of humanitarian intervention;⁹ as such, it had altruistic aims to prevent the suffering of innocent civilians. The authors employed five criteria developed by Ved P. Nanda—(1) necessity, (2) proportionality, (3) purpose, (4) nature of the actors, and (5) maximization of the best outcomes¹⁰—to examine the legitimacy under customary

⁹ Struble & Alton, *supra* note 4, at 313-25.

¹⁰ Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law—Part I*, 20 DENV. J. INT'L L. & POL'Y 305, 330 (1992) [hereinafter Nanda Part I]; Ved P. Nanda, *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention Under International Law—Part II*, 26 DENV. J. INT'L L. & POL'Y 827, 827-28 (1998) [hereinafter Nanda Part II]; see also Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 CAL W. INT'L L.J. 203, 1974, at 258-67 (employing a three-prong

international law of the humanitarian intervention by NATO in Kosovo. Nanda's five criteria were applied retrospectively because they provided a balanced analytical framework to examine whether such a humanitarian intervention was warranted in the first place. The authors posited that if a majority of the five criteria were satisfied, then (arguably) NATO's bombing of Kosovo was legally justified under the doctrine of humanitarian intervention. The authors determined that NATO's operation in Kosovo could not be legally justified under the doctrine of humanitarian intervention.¹¹

This determination that the intervention was not legally justifiable was based upon the failure of key elements of Nanda's five criteria. The NATO operation in Kosovo was unnecessary because there were no widespread incidents of gross, persistent, and systematic violations of basic human rights in Kosovo before NATO's operation and bombing campaign.¹² Before March of 1999, the month that the ethnic Albanian delegation signed the peace plan but the Serbian representatives rejected it,¹³ "the numbers of Kosovo-Albanians killed, raped or expelled up to this point were low"¹⁴ After rejecting the peace plan, Serbian military and police forces ramped up the intensity of their operations against ethnic Albanians in Kosovo.¹⁵ Furthermore, the aggression used by NATO was disproportionate. The absence of casualties among NATO forces but

analysis of the substantive, procedural and preferential criteria of humanitarian intervention under customary international law).

¹¹ Struble & Alton, *supra* note 4, at 325.

¹² *Id.* at 318 (citing AM. ASS'N FOR THE ADVANCEMENT OF SCI. ET AL., POLITICAL KILLINGS IN KOSOVA/KOSOVO, MARCH-JUNE 1999: A COOPERATIVE REPORT BY THE CENTRAL AND EAST EUROPEAN LAW INITIATIVE OF THE AMERICAN BAR ASSOCIATION AND THE SCIENCE AND HUMAN RIGHTS PROGRAM OF THE AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE 11 (2000)); *NATO Strikes Over Kosovo Continue to Divide, 10 Years On*, DEUTSCHE WELLE (Mar. 24, 2009), <http://www.dw-world.de/dw/article/0,,4121076,00.html>.

¹³ STEVEN WOEHREL & JULIE KIM, CONG. RSCH. SERV., RL31053, KOSOVO AND U.S. POLICY 3 (2006).

¹⁴ MICHAEL BYERS, WAR LAW 101 (2005).

¹⁵ *NATO and Kosovo: Historical Overview*, NATO, <http://www.nato.int/kosovo/history.htm> (last visited Feb. 11, 2019).

the killing of innocent Kosovars seriously undermined any altruistic justification for military intervention.¹⁶

The NATO operation failed to meet its purpose, which was purportedly set between U.S. national security interests and humanitarian concerns.¹⁷ In May of 1998, the North Atlantic Council set forth NATO's two main objectives for the conflict in Kosovo: (1) to help to achieve a peaceful resolution of the crisis by contributing to the response of the international community; and (2) to promote stability and security in neighboring countries with particular emphasis on Albania and the former Yugoslav Republic of Macedonia.¹⁸ In June of 1998, President Clinton issued an Executive Order that declared a "national emergency" to deal with the threat of regional destabilization posed by the conflict in Kosovo¹⁹ and NATO began to consider military options.²⁰ NATO's core objectives of the airstrikes that followed were "[t]o prevent more human suffering, more repression, more violence against the civilian population of Kosovo."²¹ In September of 1998, the United Nations (U.N.) Security Council adopted Resolution 1199,²² which called for a cease-fire and expressed deep concern about the excessive use of force by Serbian security forces and the Yugoslav army.²³

NATO's Operation Allied Force in Kosovo failed the nature of the actors' criterion. Despite NATO being comprised of several nations, NATO was the sole actor. NATO lacked a mandate from the U.N. Security Council, diminishing the need to address whether it was "collective or unilateral."²⁴

¹⁶ Struble & Alton, *supra* note 4, at 320 (citing Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847, 856 (1999)).

¹⁷ *Id.* at 321.

¹⁸ NATO, *supra* note 15.

¹⁹ Exec. Order No. 13,088, 63 Fed. Reg. 32109 (June 9, 1998).

²⁰ *See generally id.*

²¹ Ved P. Nanda, *NATO's Armed Intervention in Kosovo and International Law*, 10 USAFA J. LEG. STUD. 1, 8 (2000) (citing Press Release, NATO, Press Statement – by Dr. Javier Solana, Secretary General of NATO, (Mar. 23, 1999)).

²² S.C. Res. 1199 (Sept. 23, 1998).

²³ *Id.*

²⁴ Nanda Part II, *supra* note 10, at 827; *See also* Fonteyne, *supra* note 10, at 266-67 (stating that "collective operations should be preferred over individual measures. While it is true that intervention does not gain in legality by being collective rather than individual, there is nevertheless a presumption that collective

Lastly, the NATO operation failed to maximize the best outcome because it effectively precluded any joint proceedings in attempts at negotiating a settlement between Kosovo and Serbia, therefore leaving the only option as a unilateral declaration of independence by Kosovo.²⁵

B. *Libya*

After NATO's Operation Allied Force, the authors continued to examine other humanitarian interventions, such as the two NATO and U.S.-backed military actions in Libya named Operation Odyssey Dawn and Operation Unified Protector. As with Operation Allied Force in Kosovo, NATO's Operation Odyssey Dawn and Operation Unified Protector were couched in terms of humanitarian intervention. Operation Odyssey Dawn aimed to end the humanitarian crisis and stop the killing of civilians.²⁶

In examining the legitimacy of NATO's humanitarian intervention in Libya, the authors again applied Nanda's five criteria while developing an additional criterion to address the destabilizing nature of humanitarian interventions.²⁷ Thus, the criteria used were: (1) necessity, (2) proportionality, (3) purpose, (4) nature of the actors, (5) maximization of the best outcomes, and (6) P4D.²⁸ As with Kosovo, the authors concluded that the military action could not be justified under the doctrine of humanitarian intervention because Nanda's five criteria in addition to the P4D criterion were not satisfied.

Briefly, as to each criterion, and delving into necessity first, it became unclear whether NATO and the U.S., as sanctioned by the U.N., were intervening in a civil war or genocide, thus calling into question the necessity of the joint operations.²⁹ Concerning purpose, as the NATO airstrikes progressed it became clear that their aim was targeting Gaddafi and his fellow authority figures,³⁰ which called into question the Operations' ostensible purpose of protecting

action is more likely to ensure the relative purity of the intentions required from the intervenors.”).

²⁵ Struble & Alton, *supra* note 4, at 325.

²⁶ Alton & Struble, *supra* note 3, at 25-26.

²⁷ *Id.* at 21.

²⁸ *Id.*

²⁹ *Id.* at 22-23.

³⁰ *Id.*

civilians from violence. Moreover, if the goal of airstrikes were to protect civilians, then the targeting of authority structures would raise questions about the proportionality and purpose of the joint Operations.³¹ Regarding the nature of the actors, there was a collective response with the U.N. noting calls from the United Arab League.³² However, questions soon began to circulate about whether NATO was simply serving as the military arm for the U.N. Security Council, in contravention of NATO's role.³³ The joint operations failed to maximize the best outcome. NATO coalition forces launched Operation Odyssey Dawn on March 19, 2011.³⁴ By 2014, the date of the authors' Libya publication, it was evident that Operation Odyssey Dawn and Operation Unified Protector each failed to maximize the best outcome.³⁵ That determination remains true today.

U.S. and NATO operations quickly ended after the death of Gaddafi.³⁶ With the strongman Gaddafi gone and elimination of virtually all other authority structures, a civil war erupted in Libya,³⁷ or it quickly expanded at the very least if prior assessments concluding that the country was already embroiled in a civil war are taken at face value. After the fall of the regime, there was an uptick in violence directed at international parties in the region, such as the U.S., United Kingdom, and Italian diplomats, and members of the Red Cross.³⁸ There also was an outflux of weapons and fighters from Libya to neighboring countries, such as Mali, Niger, and Syria,³⁹ as well as a brewing refugee crisis in Libya.⁴⁰ Libyan officials

³¹ *Id.* at 23-26.

³² *See generally* S.C. Res. 1973 (Mar. 17, 2011).

³³ Alton & Struble, *supra* note 3, at 27.

³⁴ Jeremiah Gertler, *Operation Odyssey Dawn (Libya): Background and Issues for Congress*, CONG. RSCH. SERV. (Mar. 30, 2011), <https://fas.org/sgp/crs/natsec/R41725.pdf>.

³⁵ Alton and Struble, *supra* note 3, at 27-33.

³⁶ *UN Security Council votes to end Libya operations*, BBC NEWS (Oct. 27, 2011), <https://www.bbc.com/news/world-africa-15481143>.

³⁷ Jonathan M. Winer, *Origins of the Libyan Conflict and Options for its Resolution*, MIDDLE EAST INST., (Feb. 2019), https://www.mei.edu/sites/default/files/201903/Origins_of_the_Libyan_Conflict_and_Options_for_its_Resolution.PDF (policy paper 2019-4).

³⁸ *Id.* at 28.

³⁹ *Id.* at 28-32.

⁴⁰ *Id.* at 32-3.

confirmed the movement of weapons into Syria.⁴¹ And Taureg militias, which had been fighting for Gaddafi, returned to Mali to fight for control of their home country.⁴² Malian President, Amadou Toumani Touré, was unable to deal effectively with this onslaught of fighters returning home and was ousted by the military that he had controlled.⁴³ Removing President Touré destabilized an otherwise generally healthy administration, which up to that point had a budding relationship with the U.S.

Towards the end of 2018, the U.N.-backed GNA was forced to call a state of emergency in the capital.⁴⁴ The LNA leader, General Khalifa Haftar, portrayed his struggle as necessary to end the mayhem caused by warring militias⁴⁵ as he advanced on the capital, calling for further U.S. intervention.⁴⁶ Human Rights Watch best summarized the situation:

Unaccountable militias—some linked to the interior and defense ministries of the United Nations-backed Government of National Accord (GNA), and others linked to the Libyan National Army (LNA) affiliated with the rival Interim Government—continued to clash with each other in various parts of the country,

⁴¹ *Id.* at 31-2 (citing C.J. Chivers, Eric Schmitt & Mark Mazzetti, *In Turnabout, Syria Rebels Get Libyan Weapons*, N.Y. TIMES (Jun. 21, 2013), available at <http://www.nytimes.com/2013/06/22/world/africa/in-a-turnabout-syria-rebels-get-libyan-weapons.html?pagewanted=all>).

⁴² *Id.* at 31.

⁴³ *Id.*

⁴⁴ *Civil War in Libya*, Council on Foreign Relations (May 29, 2019), <https://www.cfr.org/interactive/global-conflict-tracker/conflict/civil-war-libya>.

⁴⁵ David D. Kirkpatrick, *Libyan Forces Fighting for the Capital Disavow Extremists*, N.Y. TIMES (Apr. 13, 2019), <https://www.nytimes.com/2019/04/13/world/africa/libya-tripoli-khalifa-hifter.html> (“A former officer in Muammar el-Qaddafi’s army, General Haftar broke with the dictator in the 1980s and received C.I.A. support before fleeing to Virginia, where he lived for two decades. He returned to Libya shortly before the NATO intervention in 2011 hoping to lead the revolution against Colonel Qaddafi. Sidelined by the rebels, he re-emerged in 2014, waging a battle against Islamists in the eastern city of Benghazi. After years of fighting, he gained control over eastern Libya. Then he set his sights on Tripoli.”); Frederic Wehrey and Jeffrey Feltman, *Libya Is Entering Another Civil War. America Can Stop It.*, N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/opinion/libya-civil-war.html>.

⁴⁶ Wehrey and Feltman, *supra* note 45.

as efforts to reconcile main parties in the east and west failed. In Libya's south, Tebu, Tuareg, and Arab armed groups continued to clash for control of territory and resources.⁴⁷

As of May 2019, the Council on Foreign Relations noted there were approximately 60,000 refugees and another nearly 200,000 internally displaced persons as a result of the Libyan civil war, which has engrossed the country since the downfall of Gaddafi.⁴⁸

As recently as May 2020, Libya remains chaotic and ungovernable.⁴⁹ James Roscoe, in his speech to the U.N., noted concern over Russia's new involvement in the country. Specifically, the concerns include, "the recent transfer of Russian aircraft from Syria to Libya's putschist Gen. Khalifa Haftar to aid him in his campaign against the U.N.-recognized government."⁵⁰ All of this confirms Libya remains destabilized, causing further issues for the Arab region as a whole. This also comes at a time with escalating human rights concerns against Kurds in Syria from Turkish invasions and Syria potentially becoming a Russian protectorate, all while Israeli forces go after Iranian-backed Syrian forces.⁵¹ This becomes important as there may be a traceable impact from the U.S. and NATO

⁴⁷ *Libya, Events 2018*, HUMAN RIGHTS WATCH (2018), <https://www.hrw.org/world-report/2019/country-chapters/libya>.

⁴⁸ *Civil War in Libya*, *supra* note 44.

⁴⁹ Mustafa Fetouri, *Why is Libya so chaotic and ungovernable?*, MIDDLE EAST MONITOR (May 21, 2020), <https://www.middleeastmonitor.com/20200521-why-is-libya-so-chaotic-and-ungovernable/>.

⁵⁰ *US, UK concerned over growing evidence of Russian involvement in Libya*, DAILY SABAH (May 31, 2020), <https://www.dailysabah.com/politics/us-uk-concerned-over-growing-evidence-of-russian-involvement-in-libya/news>.

⁵¹ Khairallah Khairallah, *The new rules of the game in Syria*, THE ARAB WEEKLY (Jan. 06, 2020), <https://thearabweekly.com/new-rules-game-syria>; *Report: Russia building new military base in northeast Syria*, AL-MONITOR (May 28, 2020), <https://www.al-monitor.com/pulse/originals/2020/05/russia-new-military-base-northeast-syria.html>; Amberin Zaman, *Turkey's assault against Syrian Kurds leaves trail of misery and spin*, AL-MONITOR (May 29, 2020), <https://www.al-monitor.com/pulse/originals/2020/05/turkey-incursion-syria-refugees-burn-victims-accusations.html>; *Israeli aircraft reportedly pound military outposts in Syria*, AL JAZEERA (May 5, 2020), <https://www.aljazeera.com/news/2020/05/syria-israeli-jets-hit-military-outposts-aleppo-province-200505022122693.htmls>

Operations in Libya destabilizing the region and spilling over into Syria.

III. WORKABLE DEFINITIONS OF CUSTOMARY INTERNATIONAL LAW AND HUMANITARIAN INTERVENTION

The serious issues that continue after U.S. and NATO military operations call into question the basis of humanitarian intervention in modern practice, or at least those interventions under the guise of that claim. Before exploring P4D as a standalone threshold criterion, we must first visit upon workable definitions of customary international law and humanitarian intervention.

A. *Defining Customary International Law: Durin's Bane*

To understand the doctrine of humanitarian intervention one must first understand its relationship to customary international law. Customary international law is one component of international law, the other is treaties.⁵² The doctrine of humanitarian intervention remains within the realm of customary international law despite efforts to bring it within the purview of the U.N. Charter.⁵³ Indeed, the doctrine of humanitarian intervention was born out of custom and remains solely in the domain of customary international law.⁵⁴

One of the main issues with the current state of customary international law is that it is enveloped in “deep legal theory and ideology.”⁵⁵ In turn, the doctrine of humanitarian intervention is deeply

⁵² See generally Alexei Paish, *The Useful and Necessary Distinction Between Customary International Law and Treaties*, MCCARTHY TETRAULT (Oct. 11, 2016), <https://www.mccarthy.ca/en/insights/blogs/vestra-vox/useful-and-necessary-distinction-between-customary-international-law-and-treaties>.

⁵³ Sir Daniel Bethlehem KCMG QC, *Stepping Back a Moment – The Legal Basis in Favour of a Principle of Humanitarian Intervention*, EJIL: TALK! (Sep. 12, 2013), <https://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/>.

⁵⁴ See *Humanitarian Intervention: Legal and Political Aspects*, DANISH INSTITUTE OF INTERNATIONAL AFFAIRS (1999), https://www.diiis.dk/files/media/publications/import/extra/humanitarian_intervention_1999.pdf.

⁵⁵ INT'L LAW ASSOC., STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW (2000) [hereinafter ILA],

rooted in legal theory, because it is based on custom.⁵⁶ Consequently, defining customary international law and the doctrine of humanitarian intervention is an exercise that can be likened to Durin's Bane,⁵⁷ where jurists and academics end up digging too deep into legal theory, eventually unraveling the concept they attempted to articulate in the first place.

There is no universally accepted, formal definition of customary international law.⁵⁸ "Customary . . . practice of states followed . . . from a sense of legal obligation," is the definition of customary international law codified in the treatise, Restatement of the Law (Third) The Foreign Relations Law of the United States.⁵⁹ The sixteen-year long committee project undertaken by the preeminent International Law Association (ILA) issued a comprehensive report (ILA Report) on the formation of general customary international law⁶⁰ that defined general customary international law as:

[A] rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future . . . If a sufficiently extensive and representative number of States participate in such a practice in a consistent manner, the resulting rule is one of 'general customary international law' . . . Where a rule of general

<https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf>.

⁵⁶ *Id.*

⁵⁷ J.R.R. Tolkien perhaps explains why some things should be left undisturbed: "they delved too greedily and too deep, and disturbed that from which they fled, Durin's Bane." J.R.R. TOLKIEN, *THE LORD OF THE RINGS* 309 (HarperCollins Publishers 2014).

⁵⁸ Richard A.C. Alton, *An Examination of Historical Reconstruction's Impact on Modern Customary International Law via an Analysis of Medieval Post-Conflict Ransoming of Prisoners*, 39 *SUFFOLK TRANSNAT'L L. REV.* 271, 272 (2016).

⁵⁹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987).

⁶⁰ *See generally* ILA, *supra* note 55.

customary international law exists, for any particular State to be bound by that rule it is not necessary to prove either that State's consent to it or its belief in the rule's obligatory or (as the case may be) permissive character.⁶¹

B. Defining Humanitarian Intervention: Help, Rescue, Or Protect

Humanitarian intervention is a highly controversial concept which has occasioned a deep split among legal publicists.⁶² Humanitarian intervention can be a legitimate and necessary remedy in certain well-defined instances, such as terrorist hostage seizure incidents.⁶³ But because there is no universally accepted, formal definition of humanitarian intervention, defining humanitarian intervention is equally difficult. Fernando Tesón affirmatively states, "I define humanitarian intervention as proportionate help, including forcible help, provided by governments (individually or in alliances) to individuals in another state who are victims of severe tyranny (denial of human rights by their own government) or anarchy (denial of human rights by collapse of the social order)."⁶⁴ Alan Kuperman finds humanitarian intervention, "encompasses any international action that is primarily motivated by the humanitarian desire to protect civilian targets of state violence."⁶⁵ In unpacking the meaning of humanitarian intervention, the Australian philosopher C.A.J. Coady finds the term "is now used to distinguish interventions that are aimed at rescuing foreign people from the harm that is being done, or is about to be done, to them by the state authorities who are responsible for their protection."⁶⁶

These definitions of humanitarian intervention, though formulated differently, do contain major elements that bind them together.

⁶¹ *Id.* at 8.

⁶² Robert A. Friedlander, *Confusing Victims and Victimiziers: Nicaragua and the Reinterpretation of International Law*, 14 DENV. J. INT'L L. & POL'Y 87, 90 (1985).

⁶³ *Id.*

⁶⁴ Fernando R. Tesón, *Ending Tyranny in Iraq*, 19 ETHICS & INTERNATIONAL AFFAIRS 1, 2 (2005).

⁶⁵ Alan J. Kuperman, *The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans*, 52 INT'L STUD. Q. 49, 51-52 (2008).

⁶⁶ C.A.J. Coady, *The Ethics of Armed Humanitarian Intervention*, 45 PEACEWORKS 1, 11-12 (2002).

The terms rescuing, help, and protect intertwine these definitions and lend a cohesiveness. These three terms are also altruistic notations. Coady goes so far as to note a better term of art for this type of intervention would be altruistic intervention.⁶⁷ The base term *humanitarian* is meant as a differentiating signifier between other forms of interventions, such as those for conquest, or cases of self-defense or retaliation.⁶⁸ As such, through the use of the various definitions, a general sense of humanitarian intervention can be given as means of intervention used under the premise to help, rescue, or protect a population suffering, or about to suffer, gross human rights violations in the sovereign territory of another nation.

A workable definition of humanitarian intervention allows for a foundational understanding of its place in international law. But with the focus on the notions of help, rescue, or protect coming to the fore, this also placed an added emphasis on the need to look closer at the human element of these types of intervention. Thus, moving away from the theoretical and into the practical—that is, the actual ground level where people are involved in these conflicts, whether it be victim, military, rebel, refugee, or central government. By incorporating additional fields of study into the topic, the authors conclude that the overall practical understanding of the implementation and impact of humanitarian interventions could be markedly improved.

IV. STRENGTHENING P4D WITH NON-LAW BASED REASONING: ECONOMICS, ETHICS & CHANGE MANAGEMENT

The fields of economics, ethics, and change management each provide support for the elevation of P4D to that of a threshold criterion, as each field has theories that inform the definition and nature of humanitarian intervention. A general failure by some jurists to look beyond the field of international law when addressing the very complex and human-focused concept of humanitarian intervention led the authors to turn to theories developed in economics, ethics,

⁶⁷ *Id.* at 12.

⁶⁸ *See id.* at 11-12; *see also* Onder Bakircioglu, *The Right to Self-Defence in National and International Law: The Role of the Imminence Requirement*, 19 *IND. INT'L & COMP. L. REV.* 1, 1-2, 9 (2009).

and change management to address the practical realities of humanitarian intervention.

A. *Moral Hazard Concept*

Countries that engage in military interventions in the name of humanitarianism should be aware of the moral hazard concept. The moral hazard concept aptly demonstrates the logical examination that P4D encourages before States engage in military intervention for humanitarian reasons. The moral hazard concept raises the issue of whether the act of intervention itself, especially in cases of frequent use, creates a destabilizing situation solely by the mere prospect of its potential use. Internal revolutionaries may take actions to further destabilize a country or region while believing their calls for help will be answered in time by the international community. Paradoxically, assisting frequently causes death to civilians⁶⁹—the very thing that giving assistance was meant to stop. The moral hazard concept begs the question: what are the destabilizing factors of intervention? And that is its connection to P4D.

As Kuperman relays, “[i]n economics, moral hazard is the phenomenon in which the provision of protection against risk (often by insurance) unintentionally promotes irresponsible or fraudulent risk-taking, and thereby perversely increases the likelihood of the undesired outcome.”⁷⁰ Kuperman uses the moral hazard concept to discuss the implications of excessive use of humanitarian intervention. His premise, in its simplest term, is that with the increased use of humanitarian intervention, marginalized groups in a certain sovereign nation are more likely to act out in armed rebellion with the hope that outside military aid will be forthcoming.⁷¹

Kuperman acknowledges, as his definition of humanitarian intervention indicates, that the intent is to protect vulnerable people against state-perpetrated genocide or ethnic cleansing.⁷² However, “by raising expectations of diplomatic and military intervention to protect groups targeted by such retaliation, creates moral hazard that

⁶⁹ Kuperman, *supra* note 65, at 49.

⁷⁰ *Id.* at 50.

⁷¹ *See generally id.* at 51.

⁷² *Id.* at 50.

unintentionally fosters rebellion by lowering its expected cost and increasing its likelihood of success.”⁷³ As Kuperman explains,

In some cases, moral hazard promotes irresponsibility: for example, a group’s leaders will acquire arms and secede from the state even though they know this may trigger state retaliation that they cannot defend against, because they expect the international community either to deter such retaliation or intervene on their behalf in the event of violence. In other cases, moral hazard promotes outright fraud: for example, rebels will attack state officials deliberately intending to provoke retaliation against their own group’s civilians, to attract international intervention that they deem necessary to attain their political goals. In practice, intervention does sometimes help rebels attain their goals, but usually it is too late or inadequate to avert retaliation against civilians. Thus, the emerging norm causes some genocidal violence that otherwise would not occur.⁷⁴

One could argue that the moral hazard concept was tested in the Arab Spring, and more fundamentally in Libya and Syria following the uprisings in Tunisia and Egypt and the international responses to them.⁷⁵ Kuperman published his work on the moral hazard concept in 2008—two years before the Arab Spring and three years before Operation Odyssey Dawn in Libya and the start of the Syrian conflict.⁷⁶ His thoughts about the moral hazard concept and its effect

⁷³ *Id.* at 51.

⁷⁴ *Id.*

⁷⁵ See Alan J. Kuperman, *A Model Humanitarian Intervention?*, 38 INT’L SECURITY 105, 123 (2013) (“It is not yet known whether the expectation of intervention triggered the rebellion, because the main agitators have yet to write or tell their story. A few weeks into the uprising, however, the rebel leaders clearly viewed prospective NATO intervention as vital, in light of the government’s superior military resources.”).

⁷⁶ See Kuperman, *supra* note 65 at 49; *Arab Spring*, HISTORY, <https://www.history.com/topics/middle-east/arab-spring> (last updated Jan. 17, 2020); JEREMIAH GERTLER, CONG. RSCH. SERV., R41725, OPERATION ODYSSEY DAWN (LIBYA): BACKGROUND AND ISSUES FOR CONGRESS (2011); Lucy Rodgers, David Gritten, James Offer and Patrick Asare, *Syria: The story of the conflict*,

on military intervention seem to have been verified by events occurring in Libya post-publication.⁷⁷

In Libya, the international intervention was well documented and the intervention's destabilizing after-effects well felt. In Syria, the world was presented with an underequipped revolution meeting first-hand with a well-equipped and nefarious government response,⁷⁸ thus leading to one of the greatest humanitarian crises of the new millennium. The international assistance for the revolutionaries has proven inadequate to avert retaliation from the Syrian government and the country has spent the better part of a decade killing itself from within.

B. *Ethical Considerations*

The inclusion of ethics facilitates a bigger picture discussion of the doctrine of humanitarian intervention in terms of the realities of war and military intervention, above and beyond the nuances of the doctrine. Bringing ethics into the discussion of humanitarian intervention allows for words such as *paradox*, *paradigms*, and *morality* to gain stronger significance in the legal understanding of humanitarian intervention. Ethics reminds jurists of the paradox of using violence to quell violence, and the never-ending cycle that it creates. Calling a military intervention humanitarian does not make it any less violent. Not coming to terms with that means we are unable to effectuate the change we hope for: the end of tyranny and the end of gross human rights violations. Violence is destabilizing because it causes death and destruction, but the hope is that death and destruction will be minimal compared to the advances made. Coady notes this specifically when discussing what gives the world or a region the best chance at stability and peace.⁷⁹ Therefore, before any military intervention, the potential intervenors must clearly understand the potential for domestic or regional destabilization, which is

BBC NEWS (Mar. 11, 2016), <https://www.bbc.com/news/world-middle-east-26116868>.

⁷⁷ E-mail from Alan J. Kuperman, Ph.D. to Richard A.C. Alton, Esq. (Jan. 28, 2019) (affirming the idea that the moral hazard contributed to the perpetuation, if not the initiation, of the Libya intervention).

⁷⁸ See generally Lina Sinjab, *Syria conflict: from peaceful protest to civil war*, BBC NEWS (Mar. 15, 2013), <https://www.bbc.com/news/world-middle-east-21797661>.

⁷⁹ See C.A.J. Coady, *supra* note 66, at 24.

ethics' connection to P4D, and that which moves it beyond Nanda's criteria.

Coady defines ethics as something that "should form a vital part of the body of knowledge we have and continue to seek about the most sensible and sustainable answers to the question 'How should we live?'"⁸⁰ In bringing ethics to the table, Coady utilizes Just War Theory.⁸¹ "The primary ethical machinery for considering whether aggressive war can be humanitarian must at least begin with the 'just war tradition.'"⁸² As such, ethical considerations involve a much older historical context, well beyond the time frames typically examined when assessing recent military actions taken in the name of humanitarian intervention.⁸³

As to our current undertaking in using ethics to better understand humanitarian intervention, Coady continues, "humanitarian intervention has to overcome the presumptive case against aggressive war and has to discharge the other requirements of just war theory."⁸⁴ Coady delivers this understanding by proffering moralistic ideas of good and evil, "[t]his includes attention to the immediate good likely to be achieved and evil averted by intervention set against any violation of rights to self-determination involved, and against the consequences for world stability and peace that may be in prospect further down the road."⁸⁵ As a tool, Coady asserts, "[e]thics is not only a matter of calculating consequences, but it does include the calculating of consequences and the weighing of different goods and evils, and just war theory reflects this in its requirements, especially that of proportionality."⁸⁶

In searching for a root cause, Coady finds, "[i]n addition, the attractions of decisive violence frequently tend to distract us from

⁸⁰ *Id.* at 13.

⁸¹ *Id.* at 18.

⁸² *Id.*

⁸³ *See generally id.* (noting that the root of modern-day humanitarian intervention should not be cut off by the normal customary international law Westernized threshold of the Treaty of Westphalia, but there may exist earlier forms of such actions as Just War, and its similar counterparts in Muslim and Chinese ideologies, serves as the potentially verifiable historical root to modern-day humanitarian intervention).

⁸⁴ *See* C.A.J. Coady, *supra* note 68, at 24.

⁸⁵ *Id.*

⁸⁶ *Id.*

the more fundamental, though less glamorous, task of reconsidering and reconstructing our domestic and international politics so that our world will be a somewhat less dangerous and exploitative place for all its inhabitants.”⁸⁷ Humanitarian intervention is undoubtedly, regardless of the negative or positive view of its necessity, painted in altruistic violence. Coady’s work asks us to acknowledge that paradox and prepare ourselves for its consequence.⁸⁸ However, as noted in Coady’s comment above, the world may be better suited in rooting out the base cause of the need for intervention as opposed to adding further violence regardless if that violence is called humanitarian.

Coady posits “Can an ‘aggressive’ war be humanitarian?”⁸⁹ As Coady notes, jurists seeking to differentiate war and humanitarian intervention are not seeing the forest for the trees, and “may be influenced by the feeling, shared by many enthusiasts for humanitarian intervention, that it is really a form of policing rather than war.”⁹⁰ While Coady acknowledges that may be the case in some instances, the reality is “interventions require warriors rather than police, though police may be useful, if hard to come by, after an intervention.”⁹¹ However, Coady finds that this realization of the paradox of humanitarian intervention is in part recognized in international law:

So the air of paradox is connected with the morally problematic nature of resort to war, and this explains, to a large degree, the strong bias in international law and the UN Charter against military intervention, which must be viewed in light of the revulsion against the horrors associated with the great aggressive wars of the twentieth century.⁹²

C. *Transition Model*

Examining humanitarian intervention in the light of change management and the transition model helps decipher events that have occurred in the wake of such interventions. The transition

⁸⁷ *Id.* at 36.

⁸⁸ *See id.* at 17.

⁸⁹ *Id.* at 17-19.

⁹⁰ *Id.* at 17.

⁹¹ *Id.*

⁹² *Id.*

model allows for a micro examination of what humans need to cope with change and stresses the importance that any transition be natural.⁹³ Individuals need time to work through loss or change; they need a neutral zone to gain insight and build their new beginning. Having their new beginning thrust upon them whilst amid an ending has a destabilizing result upon the person. The same is true for a country going through a transition, having their new beginning forced upon them can have a deteriorating effect as can be seen playing out in Libya. Therein lies the transition model's connection to P4D.

The transition model is a tool used by professionals in change management.⁹⁴ Change management is a professional discipline geared towards guiding organizations and the individuals that make up those organizations through dealing with how to prepare and successfully adopt change.⁹⁵ The transition model was developed by change consultant William Bridges.⁹⁶ Transition, according to Bridges, comes in three stages: (1) an ending, loss, or a letting go, (2) a neutral zone, and (3) a new beginning.⁹⁷

In discussing change generally, Bridges raises questions that speak also to countries undergoing regime change, regardless if that previous regime was villainous. "Why is letting go so difficult? This is a puzzling question, especially if we have been looking forward to change. It is frightening to discover that some part of us is still holding on to what we used to be, for it makes us wonder whether the change was a bad idea."⁹⁸ Bridges acknowledges, "that letting go is at best an ambiguous experience."⁹⁹ Transition, in this sense, is not solely moving from one point to the other; it is an experience

⁹³ *Bridges' Transition Model*, WILLIAM BRIDGES ASSOC. TRANSITION MGMT. LEADERS, <https://wmbridges.com/about/what-is-transition/> (last visited Sept. 7, 2020).

⁹⁴ Ben Janse, *Bridges Transition Model*, TOOLSHERO (June 12, 2019), <https://www.toolshero.com/change-management/bridges-transition-model/>.

⁹⁵ *What is Change Management?*, PROSCI INC., <https://www.prosci.com/resources/articles/what-is-change-management> (last visited Sept. 7, 2020).

⁹⁶ *Bridges' Transition Model*, MIND TOOLS, <https://www.mindtools.com/pages/article/bridges-transition-model.htm>, (last visited Sept. 7, 2020) [hereinafter *Transition Model*].

⁹⁷ See generally WILLIAM BRIDGES, *TRANSITIONS: MAKING SENSE OF LIFE'S CHANGES* 4 (2d ed. 2004); see also Janse, *supra* note 94.

⁹⁸ BRIDGES, *supra* note 97, at 11.

⁹⁹ *Id.* at 13.

absorbed into the person who is transitioning. Both the loss and the transition leave vestiges of themselves in the individual. Individuals, Bridges finds, naturally desire a quick transition.¹⁰⁰ Yet, there lies importance in a natural transition as opposed to a forced, rapid move from an ending to a new beginning.

The neutral zone in the transition model represents that time spent between the ending and the new beginning.¹⁰¹ Bridges refutes the idea that it should be likened to the act of crossing a street.¹⁰² The realization that the neutral zone serves a purpose rather than an obstacle, a tool rather than a nuisance, is at the core of the transition model.¹⁰³

Individuals, while desirous of change, usually believe the neutral zone is more of a nuisance and an obstacle.¹⁰⁴ Bridges notes, “[p]eople often ask whether there isn’t some way to speed up transition, to get it over sooner; when they do, they are usually thinking of the time in the neutral zone when very little seems to be happening.”¹⁰⁵ However, the neutral zone affords individuals the ability to fully divest from the past, and “as does any unfolding natural process, the neutral zone takes its own sweet time.”¹⁰⁶ More concerning, arbitrary acts of speeding up the neutral zone process can have the reverse effect. “Far from bringing you out the neutral zone sooner, such tactics usually set you back and force you to start over again.”¹⁰⁷ As a word of warning, Bridges concludes, “[f]rustrating though it is, the best advice is to opt for the turtle and forget the hare.”¹⁰⁸

The neutral zone allows for insight and germination of new ideas.¹⁰⁹ It is a necessary element in change and will undoubtedly occur after any loss or ending; the speed at which it occurs may also be uncontrollable. Bridges is speaking on an individual level of how people transition from one stage to the next. This may appear to be

¹⁰⁰ *Id.* at 143.

¹⁰¹ *Id.* at 141.

¹⁰² *Id.* at 133-34.

¹⁰³ *Id.* at 133.

¹⁰⁴ *Id.*

¹⁰⁵ BRIDGES, *supra* note 97, at 143.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 174.

a microelement in the discussion of a macro topic such as humanitarian intervention, but if it does, then the realization that when dealing with humanitarian intervention we are dealing with individual human beings has been lost. That is a key connection between the transition model and humanitarian intervention, and in turn, P4D, that we are dealing with people and the changes wrought upon them, regardless if that change was demanded.

The transition model is another tool outside of the legal realm that may be used to consider the importance of P4D in humanitarian intervention. Change movement consultant, Sean E. Reynolds (Veteran U.S. Navy), acknowledged the similarities about destabilizing organizational change and the resulting destabilization often seen after the abrupt removal of authority structures on the international stage as noted in the authors' earlier works.¹¹⁰ As Reynolds notes, concerning the relationship between change management on an individual level and to that of an international level:

Understanding that groups and organizations behave like organisms we can understand that cultures behave and interact with one another like organisms irrespective of borders. In the context of International Relations, change management is the deliberate methodical management of controlling specific outcomes through the transitions one or more culture, or nation, faces as a result of intervention.¹¹¹

Libya and Kosovo again serve as good examples of how Bridges's warning about taking a step back can play out if a transition is forced to speed up. During the period that Libya was in the midst of a revolution—the Arab Spring—U.S. and NATO operations in the region sped the transition along by assisting the revolution under the umbrella of humanitarian intervention.¹¹² The death of Gaddafi brought an end to the U.S. and NATO operations.¹¹³ As

¹¹⁰ E-mail from Sean E. Reynolds, LSSMBB, MBA, CPM, to Richard A.C. Alton, Esq. (Apr. 11, 2019) (on file with author).

¹¹¹ E-mail from Sean E. Reynolds, LSSMBB, MBA, CPPM, to Richard A.C. Alton, Esq. (June 3, 2019) (on file with author).

¹¹² Alan J. Kuperman, *A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign*, 38 INT'L SECURITY 105, 135-36 (2013).

¹¹³ Alton & Struble, *supra* note 3, at 35.

opposed to ushering in a jubilant time of renewal and a stronger Libya, the country fell into the grips of a civil war that has lasted for more than half a decade.¹¹⁴ Likewise, NATO operations in Kosovo effectively ended any possibility of any joint proceedings between Kosovo and Serbia,¹¹⁵ leaving Kosovo's declaration of independence the only option, and thus dashing any hope for natural healing between the two nations. These findings evince that while forced intervention may speed along a transition the effects can be detrimental.

Additionally, Bridges's comment on its best to let the neutral zone play out in its time¹¹⁶ rings the same of Coady's conclusion that while less glamorous, rooting out the fundamental causes that lead to humanitarian intervention may serve the best in the long term, if not the short term.¹¹⁷ Taken in connection with the warnings supplied by Kuperman, we begin to build a comprehensive framework for the need of pushing P4D to the fore. Rapidly forcing change, even welcome change, during a transitional time such as a revolution can have a destabilizing turn on a population. That understanding is key to P4D.

V. PRE-EXISTING THRESHOLDS: R2P & RWP

P4D is not the only standalone threshold criterion or principle when it comes to humanitarian intervention. R2P and RWP are two other well-recognized principles.¹¹⁸ By comparing and contrasting P4D to treaty-based criteria R2P and RWP, we strengthen the case that P4D should be a standalone criterion in the framework of humanitarian intervention.

¹¹⁴ Frederic Wehrey, 'Our Hearts Are Dead.' *After 9 Years of Civil War, Libyans Are Tired of Being Pawns in a Geopolitical Game of Chess*, TIME (Feb. 12, 2020), <https://time.com/5779348/war-libya-global-conflict/>.

¹¹⁵ Ved P. Nanda, *NATO's Armed Intervention in Kosovo and International Law*, 10 U.S.A.F. ACAD. OF LEGAL STUD. 5-6 (2000).

¹¹⁶ BRIDGES, *supra* note 97, at 143.

¹¹⁷ See C.A.J. Coady, *supra* note 66, at 36.

¹¹⁸ Kai M. Kenkel, *Brazil and the Responsibility While Protecting Initiative*, OXFORD RSCH. GRP. (June 9, 2016), <https://www.oxfordresearchgroup.org.uk/blog/brazil-and-the-responsibility-while-protecting-initiative>.

A. *The Creation And Degradation Of R2P*

In the wake of Kosovo, the International Commission on Intervention and State Sovereignty (ICISS) presented a report titled *The Responsibility to Protect*.¹¹⁹ The R2P doctrine consists of two main criteria.¹²⁰ First, “State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.”¹²¹ Second, “Where a population is suffering serious harm . . . and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”¹²²

These principles were later adopted by the U.N. and manifested themselves as follows:

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

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter,

¹¹⁹ INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 1 (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations.¹²³

However, even with the advent of R2P, the authors found the notion that as soon as crimes against humanity are committed that the international community should step in to be simplistic and vague.¹²⁴ Also, there still exists the possibility for action outside of the purview of U.N. statutes.¹²⁵ The possibility for action outside of the U.N. statutes is also bounded in the reality of inaction on the part of the U.N. Security Council, because of either lack of political will or outright lack of cooperation.¹²⁶ R2P stood as the guiding light for humanitarian intervention until it was questioned and criticized.

B. No One Heeds The Call For Reform: RWP

RWP was born in late 2011, during U.N. Security Council deliberations concerning the advancing Syrian civil war and in the larger discussion of R2P and the U.N. Security Council's role.¹²⁷ It was during this time that the U.N. Permanent Representative of Brazil, Maria Luiza Ribeiro Viotti, presented to the U.N. Secretary-General a concept note, entitled *Responsibility while protecting: Elements for the development and promotion of a concept*.¹²⁸ The concept note addressed "the 'painful consequences' of past interventions—aggravation of existing conflicts, increased incidence both of terrorism and vulnerability of civilian populations, and new cycles of violence—and a 'growing perception' that R2P might be misused for purposes such as regime change."¹²⁹

¹²³ G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138-39 (Oct. 24, 2005).

¹²⁴ Alton & Struble *supra* note 3, at 21.

¹²⁵ See generally Bethlehem, *supra* note 53.

¹²⁶ Ved P. Nanda, *The Future under International Law of the Responsibility to Protect after Libya and Syria*, 21 MICH. ST. INT'L REV. 1, 42 (2013).

¹²⁷ See *id.* at 21-22.

¹²⁸ *Id.* at 31 (citing U.N. Permanent Rep. of Brazil, *Annex to the Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General*, U.N. Doc. A/66/551-S/2011/701 (Nov. 11, 2011)).

¹²⁹ *Id.* at 32 (quoting U.N. Permanent Rep. of Brazil, *Annex to the Letter dated 9 November 2011 from*

RWP was not seen as a means of supplanting R2P with a new theorem, but as a means of checking R2P's original intent with proper mechanisms and assurances.¹³⁰ "The Brazilian proposal suggested the establishment of what could be described as a 'code of conduct' for the practical operationalization of R2P, particularly in its coercive dimensions."¹³¹ As true to its name, RWP sought to put the burden of some of the responsibility of the results of intervention on the international intervenors, not solely on the internal actors. Force is to be used, per RWP, only under the guidance of the U.N. Security Council or in exceptional circumstances approved by the U.N. General Assembly.¹³² Force must be proportionate, not exceed its U.N. mandate, nor cause more harm than it sought to prevent.¹³³ Among the legacy of RWP is that "[i]t attracted a wider range of participants to the discussion by emphasizing not only the moral issues associated with enforcing R2P, but also other problems with the collective security system, such as authority and accountability."¹³⁴

The word legacy is important, as RWP never fully materialized into specific proposals.¹³⁵ It did leave its mark on discussions of R2P.¹³⁶ However, its connectedness to R2P and the U.N. Security Council led to its inability to function outside of it. As Nanda appropriately concluded, "the reality that without political will and cooperation among the permanent members of the Security Council no action is possible at the United Nations."¹³⁷ With an inability to

the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, U.N. Doc. A/66/551-S/2011/701, ¶¶ 9-10 (Nov. 11, 2011)) (sharing an earlier acknowledgment of NATO being used as the military arm of the U.N. in Libya).

¹³⁰ See Marcos Tourinho, Oliver Stuenkel & Sarah Brockmeier, "Responsibility while Protecting": Reforming R2P Implementation, 30 GLOBAL SOCIETY 134, 140 (2016); see also Nanda, *supra* note 126, at 32.

¹³¹ Tourinho, et.al., *supra* note 130, at 141.

¹³² Nanda, *supra* note 126, at 32.

¹³³ *Id.*

¹³⁴ Tourinho, et.al., *supra* note 130, at 141.

¹³⁵ *Id.* at 149.

¹³⁶ *Id.* ("Brazil's initiative successfully articulated the need for responsible means of protection, particularly when military force is used in the name of collective security and humanitarianism.")

¹³⁷ Nanda, *supra* note 126, at 42.

cooperate among the permanent members, R2P has lost some appeal, regardless of whatever RWP sought to add.

VI. P4D AS A STANDALONE THRESHOLD CRITERION

With sabers rattling over potential military intervention in Latin America, the authors believe it is time to present P4D as a standalone threshold criterion. The vacuum left by R2P needs to be filled by a forward-thinking criterion like P4D. Because most recent military actions have had their focus on removing central governments and their authority structures, the international community requires a criterion that directly acknowledges the practical over the theoretical.

So why push P4D beyond Nanda's criteria and beyond R2P and RWP? As for P4D's primary position before Nanda's criteria and those like it, the issue was presented that if all the criteria except P4D were met then a humanitarian intervention might be justified.¹³⁸ This, however, would prove disastrous for entire regions, unleashing the potential to throw not just one country, but dozens to the brink of civil war and chaos. The concern is that international actors would feel legally justified because they had satisfied all other criteria. As such, P4D was pushed to the foreground to avoid this potential issue. As for preceding R2P and RWP, P4D recognizes the ability of humanitarian interventions outside of the inflexible U.N.¹³⁹ and P4D acknowledges the deterioration of R2P as the marquee threshold of humanitarian intervention.¹⁴⁰

The very nature of, and the calculations required by, P4D demand that it be the first consideration. The elevation of P4D to that of a threshold criterion is necessary and appropriate because it frames the most likely outcome of military action by States taken to protect populations from gross human rights abuses. The calculations required by P4D—those used to examine whether global or regional destabilization might occur from failure to exhaust all non-military actions and the potential of removing central governments and other authority structures—need to be made before international actors begin to look at necessity, proportionality, purpose, nature of the actors, and maximization of the best outcomes of any single

¹³⁸ See generally Alton & Struble, *supra* note 3.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

intervention. P4D requires States to examine the potential for destabilizing regions and countries before discussing whether a certain crisis fulfills any of the other criteria for justifying military intervention.

Procedurally, P4D was developed with two central elements: (1) the international community must be satisfied that it has exhausted all plausible nonmilitary actions before taking collective military action, and (2) the international community must take into account the quantifiable result of removing the central government before taking collective military action.¹⁴¹ P4D now requires international actors to examine the potential for destabilizing regions and countries before engaging in a discussion of whether or not the facts satisfy any other criteria for involvement. Before taking collective military action in the name of humanitarian intervention, the international community should determine the most likely outcome of abruptly removing central governments.¹⁴² This is because of the reality that “[i]n the absence of a central government, practical procedural safeguards cannot be put in place to protect civilians from internal threats.”¹⁴³ As a standalone threshold, P4D must be applied to current suggested humanitarian interventions.

VII. P4D APPLIED TO CURRENT POTENTIAL HUMANITARIAN CRISES

“[T]he only positive way forward for Venezuela is through a negotiated, democratic and peaceful solution stemming from free and fair presidential elections in accordance with international norms.”¹⁴⁴ These are the words taken from a speech by Ambassador James Roscoe, U.K. Acting Deputy Permanent Representative to the U.N., at the Security Council briefing on Venezuela, and were in

¹⁴¹ *Id.* at 34.

¹⁴² *Id.* at 33-36.

¹⁴³ *Id.* at 35.

¹⁴⁴ Ambassador James Roscoe, U.K. Acting Deputy Permanent Representative to the UN, Statement at the Security Council Briefing on Venezuela: Moving Venezuela toward a Democratic Future (May 20, 2020) (transcript of the speech available at <https://www.gov.uk/government/speeches/moving-venezuela-toward-a-democratic-future>).

response to a failed coup called Operation Gideon,¹⁴⁵ which has come to be described as “the dumbest damn coup plot” in Latin American History.¹⁴⁶ This particular coup does not appear to be in response to the federal indictments against Nicolás Maduro and other Venezuelans, which came with an award of \$55 million U.S. Dollars; but the coup no doubt brought it to the forefront.¹⁴⁷ What if the coup had succeeded, or what if it comes to pass that there is sufficient pressure to cause a military intervention in Venezuela, Nicaragua, Cuba, or Syria? We may only need to look to Libya for answers.

A similar fate may be waiting for Latin America if any military action in Venezuela, Nicaragua, or Cuba occurs or another coup succeeds. In discussing the current state of affairs in October 2019, the Washington Post noted, “[t]he crises, while different from country to country, have some common threads. The economy in much of Latin America has slowed. Democratic institutions remain weak. The public is far less tolerant of corruption and poor services. And polarization is rising.”¹⁴⁸ As the Post finds, “[a]ll of this makes for flammable situations.”¹⁴⁹ This was all before a global lockdown to stop the spread of COVID-19, so it is conceivable that the situation has turned from bad to worse.

Libya presented a sufficient model to apply P4D.¹⁵⁰ In 2014, the authors determined that the U.S. and NATO Libyan operations failed to satisfy P4D’s two elements, because the goal was to oust Gaddafi and the international community failed to consider a proper

¹⁴⁵ Matthew Walther, *Did We Just Witness One of the Nuttiest Foreign Policy Blunders in American History?*, THE WEEK (May 7, 2020), <https://www.yahoo.com/news/did-just-witness-one-nuttiest-095759283.html>.

¹⁴⁶ Jeremy Kryt, *Trump Just Inspired the Dumbest Damned Coup Plot in LatAm History, Complete with a QAnon Crazy*, THE DAILY BEAST (May 7, 2020), <https://www.thedailybeast.com/in-venezuela-trump-just-inspired-the-dumbest-coup-plot-in-latin-american-history-complete-with-a-qanon-crazy>.

¹⁴⁷ Joshua Goodman & Scott Smith, *US indicts Venezuela’s Maduro on narcotics charges*, THE ASSOCIATED PRESS (Mar. 26, 2020), <https://apnews.com/d82797206561db03851e47df125c243f>.

¹⁴⁸ Mary Beth Sheridan, *Why political turmoil is erupting across Latin America*, THE WASHINGTON POST (Oct. 10, 2019, 5:41 PM), https://www.washingtonpost.com/world/the_americas/why-political-turmoil-is-erupting-across-latin-america/2019/10/10/a459cc96-eab9-11e9-a329-7378fbfa1b63_story.html.

¹⁴⁹ *Id.*

¹⁵⁰ See generally Alton & Struble, *supra* note 3.

transition for Libya before removing him.¹⁵¹ In doing so an entire region was destabilized; a similar fate awaits Latin Americans if we are foolish enough to go down the same path twice.

The potential for a similar Arab Spring scenario playing out in Venezuela and Latin America is compelling. As of this writing, the Venezuela opposition has already attempted an unsuccessful coup.¹⁵² The opposition has intimated at the possibility of asking for foreign intervention, specifically from the U.S.¹⁵³ How the repercussions of this would be felt if international actors were to answer this call is intriguing, especially in similarly situated countries like Nicaragua. If domestic actors believe their calls for international help will be answered, it may only serve to galvanize revolutions which otherwise would have been internal struggles.

A humanitarian intervention involves an act of violence as much as any other act of violence, regardless of its name. The authors, living in a state (Florida) that has a large number of people with family and friends who are being harmed, tortured, or have been killed in countries such as Venezuela, Nicaragua, and Cuba, cannot ignore that there is the unfortunate balancing act about stopping these harms or causing an unfettered amount of more death. It is the perceived, or even hopeful, benefits of avoiding sitting on the sideline while watching a humanitarian crisis unfold that elevates it to a moral high ground. But, in doing so we cannot ignore the contradiction of stopping violence with violence and the repercussions that follow from it.

It is not hard to see the potential for destabilization spreading to countries such as Ecuador, Peru, Honduras, and Haiti, which were all in the beginning stages of turmoil before the COVID-19 pandemic.¹⁵⁴ No situation is the same, but when stressors already exist in a region, the full-blown immediate destruction of the central government and other authority structures in one country as a result of military intervention may spill over into another, causing an entire region to slip into turmoil, which may, in turn, lead to additional cases of gross human rights abuses.

¹⁵¹ *Id.* at 34, 36.

¹⁵² Venezuela crisis, *supra* note 7.

¹⁵³ *Id.*

¹⁵⁴ Sheridan, *supra* note 148.

If the authors were to apply P4D's central elements—(1) the international community must be satisfied that it has exhausted all plausible nonmilitary actions, and (2) the international community must take into account the quantifiable result of removing the central government and other authority structures before taking collective military action—to the current situation, the conclusion would be clear. While there is no doubt the legitimacy of human rights violations occurring in countries such as Venezuela, Nicaragua, and Cuba, P4D would be a stopgap measure to any full-blown intervention. As James Roscoe notes,¹⁵⁵ the only plausible way forward is through peaceful means that are still ongoing in countries such as Venezuela.

VIII. CONCLUSION

The time is now for P4D to assume the mantle left by the degradation of past criteria such as R2P and RWP. P4D has moved beyond multifaceted and multi-layered criteria such as Nanda's, because the authors recognize the true goal of most current forms of intervention heralded as humanitarian intervention. Human rights violations are occurring across the globe, but intervention is meant to stop violence, not to add to it.

Altruistic humanitarian intervention is still needed in today's world, but questions of its lack of proper utilization can be raised in such overlooked past crises, such as Rwanda, or current ones, such as Myanmar. In practice, most forms of current humanitarian intervention are or have become moves for regime change. The threat of its use in Latin America is beyond concerning. Lives have been destroyed under such interventions, and worse, done so without appropriate forethought. Practically, we as a society must be cognizant that today's revolutions are televised and tweeted about; thus, jurists would be hard-pressed to ignore the reliance on international assistance by victimized groups in sovereign nations to end their plights. Extra caution must be used to prevent an entire continent from being pushed to the brink of war.

P4D is not meant to diminish those subjected to tyrannical regimes. Rather, it is meant as a call to responsible parties: before we unleash the dragons of war upon a population, we need to think

¹⁵⁵ Roscoe, *supra* note 144.

about what that will mean not just tomorrow, but the next day and a thousand days after that. These are dark times; there is no denying that. But we can no longer dabble in war in the name of humanitarian intervention. And if there is no appetite in the international community to fully subjugate a nation that has committed gross human rights violations to ensure the least amount of destabilization, our current form of humanitarian intervention seems to only cause further harm.