

# MILITARY LAW REVIEW

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Volume 225  
Issue 4

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## **“NO SUBSTITUTE FOR VICTORY”<sup>1</sup>: AN EVALUATION OF NATO STATE PRACTICE IN KOSOVO AND LIBYA AND THE IMPORTANCE OF SUCCESS ON THE LAW OF HUMANITARIAN INTERVENTION**

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### I. Introduction

Since 2011, hundreds of thousands of civilians have been killed in Syria’s non-international armed conflict.<sup>2</sup> In Aleppo, women and children have been killed and maimed on a daily basis without regard for

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<sup>1</sup> Gen. of the Army Douglas MacArthur, Farewell Address to Congress (April 19, 1951) (82d Cong., 97 Cong. Rec. 4125 (1951)).

<sup>2</sup> See Max Fisher, *Straightforward Answers to Basic Questions About Syria’s War*, N.Y. TIMES, Sept. 19, 2016.

humanitarian norms of conduct.<sup>3</sup> Elsewhere in Syria, countless innocents have been slaughtered by the so-called Islamic State, an organization that has redefined the scope and breadth of human depravity: prisoners are burned alive, children crucified and beheaded, children as young as eight years old recruited as soldiers and suicide bombers, homosexuals cast from towers to their deaths, women and young girls sold into sexual slavery, ethnic and religious minorities virtually exterminated, and irreplaceable cultural heritage defaced and destroyed on an unprecedented scale.<sup>4</sup>

The conflict in Syria also has had collateral effects that impact peace and security regionally and internationally. Chief among these is the migration of approximately five million people from Syria, with approximately three million fleeing to Turkey and at least another million fleeing to other European countries.<sup>5</sup> Millions more have been displaced internally within Syria.<sup>6</sup> The rapid influx of migrants has imposed often onerous financial costs on host states, burdened border infrastructure, and contributed to social, political, and cultural tensions impacting the viability of governments and the solidarity of the European Community.<sup>7</sup> The Syrian internal conflict also has facilitated the rise of the Islamic State and other terrorist groups who have increased their activity in the Middle East, in Europe, and throughout the world.<sup>8</sup>

For five years, the world has watched this debacle in horror, seemingly powerless to check it. The United Nations, whose primary purpose is to “[t]o maintain international peace and security,”<sup>9</sup> has failed to shepherd a solution, largely sidelined as an effective force for want of Security Council unanimity. International actors, enfeebled by international and domestic political considerations, likewise have failed to intervene either collectively or unilaterally on behalf of the suffering.<sup>10</sup> Instead, the international response to Syria has been characterized by insufficient humanitarian aid, a series of failed diplomatic missions, military

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<sup>3</sup> *Id.*

<sup>4</sup> AMNESTY INTERNATIONAL, ESCAPE FROM HELL (2014), [http://www.amnestyusa.org/sites/default/files/escape\\_from\\_hell\\_\\_torture\\_and\\_sexual\\_slavery\\_in\\_islamic\\_state\\_captivity\\_in\\_iraq\\_mde\\_140212014\\_.pdf](http://www.amnestyusa.org/sites/default/files/escape_from_hell__torture_and_sexual_slavery_in_islamic_state_captivity_in_iraq_mde_140212014_.pdf) (retrieved Mar. 3, 2017).

<sup>5</sup> See S.C. Res. 1244, U.N. Doc. S/RES/2332 (Dec. 21, 2016).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*; see also Fisher, *supra* note 2.

<sup>9</sup> U.N. Charter. art. 1, ¶ 1 [hereinafter U.N. Charter].

<sup>10</sup> See Simon Adams, *Failure to Protect: Syria and the UN Security Council*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT OCCASIONAL PAPER SERIES NO. 5 (2015) at 4-6.

interventions limited primarily to serve narrow Big Power interests, and an increasingly xenophobic inclination in European and American public opinion.<sup>11</sup>

The Syrian internal conflict also has represented a disaster for the world order itself. First, the conflict has provided yet another instance to showcase the inability of the United Nations to reliably respond to even the most extreme of humanitarian disasters.<sup>12</sup> In addition, the failure of the North Atlantic Treaty Organization (NATO) to assert leadership in formulating a collective response to the raging war on its very doorstep has weakened the alliance as a premier guarantor of international security.<sup>13</sup> Finally, the Syrian internal conflict has undermined the viability of humanitarian intervention as a legal doctrine, which already was highly contested, as well as “Responsibility to Protect” (R2P), which in past years seemed to be taking root as a basis for preserving and restoring peace and justice.<sup>14</sup> In short, the failure to act in Syria has undermined confidence in international institutions, world security, and the rule of law.

How did we get here? Is the failure to respond adequately to the Syrian humanitarian crisis a special case or does it reflect a diminishment of confidence in humanitarian intervention as a practicable response to humanitarian disasters and as a principle of law? This dissertation seeks to address these questions by comparing humanitarian interventions by the NATO in Kosovo and Libya, the effects of state practice on customary international law in each case, and what this recent history tells us about the status of the law of humanitarian intervention today.

Ultimately, this article argues that the success of a humanitarian intervention is not only important, but essential—not only for those who are victimized by human rights violations—but for the formation of state practice and customary international law. This is shown by first suggesting measures, including those suggested by R2P, by which the success of a humanitarian intervention can be assessed. In this regard, this

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<sup>11</sup> *Id.*

<sup>12</sup> See *Failing Syria: Assessing the impact of UN Security Council resolutions in protecting and assisting civilians in Syria*, Syrian American Medical Association (2015).

<sup>13</sup> See *The War of Western Failures: Hopes for Syria Fall with Aleppo*, DER SPIEGEL ONLINE (Feb. 17, 2016), <http://www.spiegel.de/international/world/the-siege-of-aleppo-is-an-emblem-of-western-failure-in-syria-a-1077140.html>.

<sup>14</sup> See Muditha Halliyade, *Syria - Another Drawback for R2P?: An Analysis of R2P's Failure to Change International Law on Humanitarian Intervention*, 4 IND. J. L. & SOC. EQUALITY 215 (2016).

article defines humanitarian intervention and reviews the process by which state practice and *opinion juris* impacts the development of customary international law, as well as the spectrum of legal theories that consider humanitarian intervention as a descriptive and normative concept. Then, within this framework, this article compares the Kosovo and Libya interventions as functions of NATO state practice, assesses their success or failure, and discusses what impact this had on customary international law and humanitarian intervention. Finally, this article concludes with the observation that the evolution of humanitarian intervention, both descriptively and normatively, is impacted not only by the legal bases on which humanitarian interventions, as state action, are based, and by the moral convictions and political motivations underlying such actions, but, more importantly, by their practical real-world outcomes.

## II. Assessing the Success of a Humanitarian Intervention

What makes a humanitarian intervention a success or a failure? This chapter examines the descriptive and normative components of humanitarian intervention, first by offering a definition of humanitarian intervention in its descriptive or generic sense and then by discussing the concept of state practice and its interaction with customary international law. Finally, with a view of the descriptive and normative, we propose measures, including those suggested by R2P doctrine, by which we later evaluate the success of the Kosovo and Libya interventions.

### A. Defining Humanitarian Intervention

In its generic or descriptive sense, humanitarian intervention is state practice involving a forcible intervention for purposes of humanitarian protection irrespective of authorization from the UN Security Council.<sup>15</sup> In a normative sense, on the other hand, humanitarian intervention denotes the “right” under customary international law to intervene for

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<sup>15</sup> See Dino Kritsiotis, *Humanitarian Intervention*, in *ENCYCLOPEDIA OF GLOBALIZATION* (Roland Robertson & Jan Aart Scholte eds, Routledge 2007) vol. 2, at 583-587 (discussing humanitarian intervention descriptively and normatively); see also George Wright, *A Contemporary Theory of Humanitarian Intervention*, 4 *FLA. INT'L L. J.* 435 (1989) (discussing range of intervention from “verbal remarks” to “dictatorial interference . . . in the internal affairs of another state”); Thomas Franck & Nigel Rodley, *After Bangladesh: the Law of Humanitarian Intervention by Military Force*, 67 *AMERICAN J. OF INT'L LAW* 275 (1973) (discussing humanitarian intervention in normative sense).

humanitarian purposes. This paper compares a humanitarian intervention invoked under a “right” of humanitarian intervention that lacked UN Security Council authorization—the Kosovo intervention—with one that rested on UN Security Council authorization within a broader framework of R2P doctrine—the Libya intervention. This paper therefore offers a generic definition of humanitarian intervention that encompasses both kinds of humanitarian intervention and as having the following elements:

(1) the breach or threatened breach of a state’s sovereignty by another state, collective of states, non-state actors, or a combination thereof;

(2) for purposes of preventing continued human rights violations and or providing relief to persons within that state who have suffered, are suffering, or are expected to suffer human rights abuses or deprivations of their rights under international humanitarian law; and

(3) regardless of the legal authority, or lack of legal authority, on which the breach of sovereignty rests.<sup>16</sup>

#### B. State Practice and the Normative Dynamic of Humanitarian Intervention

Each humanitarian intervention, as defined above, has a normative component, and its outcome affects the use of humanitarian intervention both as a tool of state practice and as a normative concept generally. As Franck and Rodley pointed out, customary international law is “both more and less than the total of *successful* initiatives by states.”<sup>17</sup> Before going on to address how outcomes impact humanitarian intervention, we

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<sup>16</sup> See DAVID ROBERTSON, A DICTIONARY OF HUMAN RIGHTS 119 (2nd ed. 2004) (defining “humanitarian intervention” as “A doctrine under which one or more states may take military action inside the territory of another state in order to protect those who are experiencing serious human rights persecution, up to and including attempts at genocide.”); SEAN MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 12 (1996), defining “humanitarian intervention” as:

coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorisation from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law.

*Id.*

<sup>17</sup> Franck & Rodley, *supra* note 15, at 303 (emphasis added).

summarize the relationship between state practice and customary international law and different views on humanitarian intervention as a normative concept.

“International law is not static.”<sup>18</sup> Rather, customary international law is in continual development on the basis of *opinio juris* and state practice.<sup>19</sup> In evaluating state practice and its impact on customary international law, “[t]he international lawyer must impose on events his historical sense of their meaning and relationship to other events; he must also bring to bear a sense of policy perceived from the perspective of mankind.”<sup>20</sup> By comparing a successful humanitarian intervention with a failed one, this paper hopes to demonstrate how the law of humanitarian intervention is in flux and shaped by events and perceptions of those events even as they unfold.

Successful or not, state practice interacts with *opinio juris* in the ongoing development of customary international law. The seminal *Nicaragua Case* addressed this dynamic.<sup>21</sup> In that case, Nicaragua sued the United States in the International Court of Justice, complaining that certain actions by the United States military constituted a breach of Nicaragua’s sovereignty in violation of international law.<sup>22</sup> The Court agreed with Nicaragua, affirming the principle of non-intervention in customary international law.<sup>23</sup> In so ruling, however, it stated the rule that “[r]eliance by a state on a novel right or an unprecedented exception to the principle might, if shared in principle by other states, tend toward a modification of customary international law.”<sup>24</sup> As Professor Dino Kritsiotis has pointed out, “[t]he Court’s verdict in the *Nicaragua Case* made clear that the principle of non-intervention could admit to new exceptions in customary international law where states, through their legal

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<sup>18</sup> *Id.*

<sup>19</sup> *Opinio juris* is the body of law established by courts and tribunals, while state practice is comprised of the actions taken by states and the reasons they assert to justify such actions. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 5 (2004).

<sup>20</sup> Frank & Rodley, *supra* note 15, at 303.

<sup>21</sup> *Military and Paramilitary Activities in and Against Nicaragua (Merits)*, 1986 I.C.J. 14, ¶ 264 (June 27) [hereinafter *Nicaragua Case*] (Judgment) (principle of non-intervention is “the fundamental principle of state sovereignty on which the whole international law rests”).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; see also *Corfu Channel Case (Merits)*, 1949: I.C. J. 4 at 35 (April 9) [hereinafter *Corfu Channel Case*] (Judgment) (“Between independent states, respect for territorial sovereignty is an essential foundation of international relations.”).

<sup>24</sup> *Nicaragua Case*, *supra* note 21, at 109.

actions, deem this appropriate.”<sup>25</sup> Humanitarian intervention as state practice, “accompanied by requisite legal statements or stated convictions,” can “edge[] us towards new normative frontiers.”<sup>26</sup>

When it comes to humanitarian intervention, where the normative frontiers lie is highly contested.<sup>27</sup> Some posit that humanitarian intervention is confined by the text of the UN Charter and UN procedures for obtaining authority to use force.<sup>28</sup> Others argue that a contextual reading of the UN Charter and international law recognizes either a right of humanitarian intervention or, short of that, legitimizes humanitarian intervention on moral or political grounds.<sup>29</sup>

A textual approach to the law of humanitarian intervention relies on the UN Charter and *opinio juris*, as well as on policy grounds, to argue that there is no right of humanitarian intervention under international law. First and foremost, this approach relies on the UN Charter’s express prohibition against the threat or use of force by one state against the other,<sup>30</sup> except in cases of individual or collective self-defense or when use of force is authorized by the UN Security Council.<sup>31</sup> This approach recognizes the primacy of state sovereignty as a foundational principle of customary international law.<sup>32</sup> It also argues that exceptions to the UN Charter’s general prohibition on the use of force should be given a narrow construction to exclude an exception that permits the use of force on purely

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<sup>25</sup> Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT’L L. 1005, 1013 (1998) [hereinafter Kritsiotis].

<sup>26</sup> *Id.* at 1014.

<sup>27</sup> See, e.g., Eliav Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflict as International Agreements*, 344 29 B.U. INT’L L.J. 337, 344-46 (2014); Lori Fisler Damrosch, *Introduction*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 1, 3 (1993); FERNANDO TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2nd ed. 1997) at 133 (discussing different legal theories advanced to justify humanitarian intervention).

<sup>28</sup> Compare Christopher Greenwood, *New World Order or Old*, 55 MOD. L. R. 153, 177 (1992) [hereinafter Greenwood] (“intervention in northern Iraq and the international acceptance of it, is likely to be invoked as evidence that there is a right of humanitarian intervention in international law”); Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT’L L. J. 794, 802-804 (1995)(discussing illegality of intervention).

<sup>29</sup> See John Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT’L L. 205, 201-11 (1969); Quincy Wright, *The Legality of Intervention Under the United Nations Charter*, 51 AM. SOC’Y INT. L. PROCEEDINGS 79, 85 (1957).

<sup>30</sup> U.N. Charter, *supra* note 9, art. 2, ¶ 4.

<sup>31</sup> *Id.*, art 51.

<sup>32</sup> See Nicaragua Case, *supra* note 21, § 264; Corfu Channel Case, *supra* note 22, at 35.

humanitarian grounds.<sup>33</sup> Some even argue that the prohibition on the use of force is a rule of *jus cogens* that cannot be superseded by custom, proscribing any intervention without “legal justification in a positivist sense[.]”<sup>34</sup> Finally, some oppose humanitarian intervention on policy grounds. Franck and Rodley, for example, observed that interventions historically have been motivated not by humanitarian concerns, but by “self-interest” and “power-seeking.”<sup>35</sup> Daniel Joyner argued against a right of humanitarian intervention because it “carries with it profound disadvantages in clarity and susceptibility to abuse,” further arguing that it “could lead to the entire overthrow of the United Nations system . . . and the thrusting of the international community into a new epoch of unrestrained state use of force, nominally justified on humanitarian or other grounds.”<sup>36</sup> Christian Henderson went a step further, opposing humanitarian intervention even when authorized by the UN because open-ended authorizations, such as in Libya and Cote d’Ivoire, can result in “mission creep” beyond appropriate humanitarian aims.<sup>37</sup> Similarly, Fokure Ipinyomi objected to a UN-authorized humanitarian intervention in Cote d’Ivoire on grounds that it concealed a hidden agenda—regime change and the imposition of a “democracy” that was engineered “to satisfy the international community,” not Ivoirians, and thus had the effect of denying Ivoirians “the freedom of choice.”<sup>38</sup>

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<sup>33</sup> See Dapo Akande, *The Legality of Military Action in Syria: Humanitarian Intervention and the Responsibility to Protect*, EJIL TALK! (Aug. 28, 2013), <https://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/> [hereinafter Akande].

<sup>34</sup> Richard Lappin, *Is There a Legal Basis for Military Intervention to Protect Civilians in Syria?*, 84 CEJISS 46, 47 (2014) [hereinafter Lappin]; see also Akande, *supra* note 33, and Kenneth Anderson, *Legality of Intervention in Syria in Response to Chemical Weapon Attacks*, 17 AMERICAN SOCIETY OF INT’L LAW INSIGHTS 21 (2013) [hereinafter Anderson].

<sup>35</sup> Lappin, *supra* note 34, at 47.

<sup>36</sup> Daniel Joyner, *The Kosovo Intervention: Analysis and a More Persuasive Paradigm*, (2002) 113 EUR. J. INT’L L. 597-619 (2002) [hereinafter Joyner]; see also Bartram Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L.R. 1683, 1691 (2000); Kritsiotis, *supra* note 25, at 1020 *et seq.* (summarizing policy objections to humanitarian intervention).

<sup>37</sup> Christian Henderson, *International Measures for the Protection of Civilians in Libya and Cote d’Ivoire*, 60 INT’L & COMP. L.Q. 767-78, 769, 776 (2011).

<sup>38</sup> Fokure Ipinyomi, *Is Cote d’Ivoire a Test Case for R2P? Democratization as Fulfilment of the International Community’s Responsibility to Prevent*, 56(2) J. AFR. LAW 151-74, 160-63, 173-74 (2012); see also David Reiff, *The Road to Hell: Have Liberal Intellectuals Learned Nothing from Iraq*, THE NEW REPUBLIC (Mar. 23, 2011) (voicing skepticism that NATO’s intervention in Libya was intended to protect civilians more than



On the other side of the spectrum is an approach to humanitarian intervention that advances a contextual reading of the UN Charter and *opinio juris* to permit the inference that humanitarian intervention is legal under international law. While acknowledging that international law is based on the law of state sovereignty, not on individual human rights, some argue that the UN Charter and international law should be read together with human rights law to warrant action necessary to protect human rights violations, or at least grave ones. A contextual reading of international law thus infers “the legal authority to enforce” human rights, “including by the use of force.”<sup>39</sup> A narrow reading of UN authority, on the other hand, “has the potential to detract from the universalist aspirations of the global system by posing different and indeed lower standards of protection while providing convenient justifications for human rights violations.”<sup>40</sup> Some have argued, for example, that the exercise of a veto by a permanent member of the UN Security Council thwarting intervention to prevent genocide “would constitute a violation of the vetoing States’ obligation under the Genocide Convention.”<sup>41</sup> A contextual reading of international law also has been advanced as a basis for R2P, specifically, that international actors have not only a right, but an “obligation . . . to intervene in the internal affairs of a state in order to protect civilian populations against mass atrocities.”<sup>42</sup>

### C. Assessing a Humanitarian Intervention’s Success

We have defined humanitarian intervention in its descriptive sense, have described the relationship between state practice and the development of customary international law, and have summarized various views on its normative content. With these fundamentals in mind, we now formulate a possible rubric for assessing the success of a humanitarian intervention as state action before applying these to the

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effect regime change), <https://newrepublic.com/article/85621/libya-iraq-muammar-qaddafi>.

<sup>39</sup> Anderson, *supra* note 34, at 2.

<sup>40</sup> Lappin, *supra* note 34, (citation and quotation marks omitted).

<sup>41</sup> Luke Glanville, *The Responsibility to Protect Beyond Borders*, 12 HUM. RTS. L. REV. 1, 23 (2012), quoting Louise Arbour, *The Responsibility to Protect as a Duty of Care in International Law and Practice*, 34 REV. OF INT’L STUDIES 445, 454 (2008); see also Akande, *supra* note 33 (discussing with disapproval argument that violation of human rights implicates the right to pre-emptive self-defense, for example, to counter supposed proliferation of weapons of mass destruction implicated by the use of chemical weapons in Syria).

<sup>42</sup> Anderson, *supra* note 34, at 2-3.

interventions in Kosovo and Libya. We also show how R2P reflects a similar vision of what makes a humanitarian intervention a success.

In offering a rubric for success, we start with the assumption that any given humanitarian intervention arises from state practice situated at the confluence of unique real-world moral, political, and legal circumstances. These circumstances necessarily overlap in an inter-relational dynamic. In using the term “moral,” we refer to a given community’s general repugnance of and natural impulse to alleviate human suffering, sometimes by political and legal means.<sup>43</sup> By “political,” we mean the power landscape, relationships, and processes that must be navigated or surmounted to give action to a moral impulse or legal right or duty. Finally, by “legal” we mean what is authorized by positive law, as distinguished from what is considered, more broadly, legitimate, i.e., what is viewed as moral, arguably legal or just, logical, or reasonable. So informed, the following specific measures by which to assess a humanitarian intervention’s success are offered:

(1) the extent to which it was moral, e.g., mitigated or increased human rights violations and human suffering;

(2) the extent to which it positively or negatively impacted state sovereignty and the state’s internal political, economic, social, legal, and cultural institutions;

(3) whether it advanced or undermined regional and international peace and security, e.g., by promoting international security institutions or, alternatively, by exacerbating regional or international rivalries;

(4) whether it was legal or, if not so, legitimate, e.g., whether it was authorized by law or, short of that, exhausted procedures for obtaining authorization based on colorable legal arguments;

(5) in what ways it further established or eroded an already established legal doctrine, confirmed or disconfirmed a new principle of law, or promoted or undermined a legal theory premised on legal, policy, or moral grounds; and

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<sup>43</sup> My definition of “moral” is based on Karl Popper’s definition of “negative utilitarianism.” See KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* vol. I, ch.5, note 6 (1952).

(6) whether it strengthened or weakened the rule of law and the institutions emplaced to safeguard and advance the rule of law.

As noted, R2P also suggests similar measures for assessing a humanitarian intervention. In its original formulation of R2P, the report of the International Commission on Intervention and State Sovereignty (ICISS), describes R2P as a moral program for action motivated by an impulse to remedy the most serious human rights violations.<sup>44</sup> As a practical guide, the ICISS Report offers a number of principles by which to determine when a humanitarian intervention should be initiated.<sup>45</sup> These principles contemplate a just cause threshold before an intervention may be initiated, satisfaction of certain precautionary principles, e.g., “right intention” and “last resort,” invocation of the “right authority,” and observation of certain “operational principles” in its implementation.<sup>46</sup> The ICISS Report also recognizes that intervention “can only be justified if it stands a reasonable chance of success, that is, halting or averting the atrocities or suffering that triggered the intervention in the first place,” or “if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all.”<sup>47</sup> R2P thus invokes cost-benefit balancing as a measure of success, much as the rubric proposed above does, and offers practical, success-oriented measures for guiding state practice. As detailed further below, these measures reflect the same balance of interests—moral, political, and legal—on which the above formulation is based.

First, R2P is centered on the moral, as we have defined it—on protection of the values encompassed by international human rights. Some have asked, what exactly is R2P? Is it a legal regime, a political doctrine, or something else?<sup>48</sup> First and foremost, R2P proposes a response to human suffering and the protection of human rights consistent with principles of state sovereignty and the UN Security Council’s

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<sup>44</sup> INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), THE RESPONSIBILITY TO PROTECT: REPORT ON THE COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY ¶ 4.11 *et seq.*, p. 31 (2001) (hereinafter ICISS Report).

<sup>45</sup> *Id.* at XII.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* ¶ 4.41, p. 36.

<sup>48</sup> THOMAS WEISS, LIBYA, R2P, AND THE UNITED NATIONS IN POLITICAL RATIONALE AND CONSEQUENCES OF THE WAR IN LIBYA 235 (Dag Henriksen & Ann Karin Larssen eds., 2016); B.C. Nirmal, *Responsibility to Protect: A Political Doctrine or An Emerging Norm (With Special Reference to the Libyan and Syrian Crises)*, 57:3 JILI 333-375 (2001).

responsibility to maintain peace and security.<sup>49</sup> R2P has thus been aptly described as “a multifaceted political concept based on existing principles of international law . . . [that] does not alter the basic contours of the legal framework governing the use of force” under the UN Charter and customary international law.<sup>50</sup>

R2P also acknowledges the political. For instance, it provides guidance, consistent with the UN Charter, as to who should take the lead in mounting a humanitarian intervention, recommending that “collective intervention be pursued by a regional or sub-regional organization acting within its defining boundaries.”<sup>51</sup> As a political tool, it is different from “humanitarian intervention [which] automatically focuses upon the use of military force . . . [and] overlooks the broad range of preventive, negotiated and other non-coercive measures that are central to R2P.”<sup>52</sup>

Finally, R2P offers a program for negotiating the legal aspects of humanitarian intervention. In keeping with its pragmatic program, R2P acknowledges the legal and political realities of the UN Security Council that preclude military intervention “in every case where there is justification for doing so,” but nonetheless recommends that military intervention should be considered when there is reason to do so.<sup>53</sup> The ICISS Report thus suggests that a humanitarian intervention may be successful even if, strictly speaking, it is illegal. At the same time, it recognizes the paramountcy of the UN system for authorization of use of force.<sup>54</sup> It also does not seek to displace a “right” of humanitarian intervention, to the extent such a right exists, but rather to re-tool it in a broader context.<sup>55</sup> In this sense, the ICISS Report does not advocate so much for a change in thinking about international law than in a change in

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<sup>49</sup> ICISS Report, *supra* note 44, at VII, XII, XII, 1.

<sup>50</sup> Andrew Garwood-Gowers, *The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?*, 36(2) UNSW L.J. 36(2), 594-618, 600 (2013) [hereinafter Garwood-Gowers]; see also Jennifer Welsh, *Statement by Special Advisor on RtoP Jennifer Welsh at the Thematic Discussion in the UN General Assembly on Ten Years of the Responsibility to Protect: From Commitment to Implementation* (Feb. 26, 2016) (taking similar position).

<sup>51</sup> ICISS Report, *supra* note 44, ¶¶ 6.31, 6.32, 53-54.

<sup>52</sup> Simon Adams, *Libya and the Responsibility to Protect*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT OCCASIONAL PAPER SERIES NO. 3, 11 (2012) [hereinafter Adams].

<sup>53</sup> ICISS Report, *supra* note 44, ¶ 4.42, 36.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*; see also Adams, *supra* note 52.

how states should behave in a very real world in which international law is but one fact of many.<sup>56</sup>

As indicated by the measures discussed above as reflected in R2P, state practice interposes humanitarian intervention at the intersection of inter-dependent moral, political, and legal interests. And the crux of this intersection is whether the humanitarian intervention succeeds or fails. As we hope to demonstrate below, a humanitarian intervention will be considered successful if it minimally satisfies and balances these interests. A humanitarian intervention will be considered a failure, on the other hand, if it fails to achieve this balance of interests.

### III. The Humanitarian Intervention in Kosovo

Was the humanitarian intervention in Kosovo successful according to the measures discussed above? If it was successful, what made it so? If viewed as successful, what impact did this have on state practice and on the humanitarian intervention's status in customary international law?

#### A. Background

The Balkans is a region that has experienced ethnic tensions dating back hundreds of years.<sup>57</sup> Chief among the ethnic rivalries is that between the Serbians and Kosovo-Albanians. After a series of military defeats at the hands of the Ottoman Turks in the 15th and 16th centuries, ethnic Albanians came to supplant ethnic Serbians in Kosovo.<sup>58</sup> By the 20th Century, Albanians formed the overwhelming majority in Kosovo, while the minority Serbs still considered Kosovo their historical homeland.<sup>59</sup> This dynamic occasionally led to outright violence, for example, during the First Balkan War (1912-13) and World War I (1914-18).<sup>60</sup> Following the disintegration of the Ottoman and Austro-Hungarian empires after World War I, Kosovo became part of a predominantly Serbian Yugoslav state, and the ethnic Albanians suffered ethnic and political repression.<sup>61</sup>

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<sup>56</sup> *Id.* ¶ 2.28, 16.

<sup>57</sup> László Gulyás, *A Brief History of the Kosovo Conflict with Special Emphasis on the Period 1988-2008*, 27 *HISTORIA ACTUAL ONLINE* 141, 141-142 (Jan. 2012), <https://dialnet.unirioja.es/servlet/articulo?codigo=3861597>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 142.

Violence between Serbs and Albanians erupted again during World War II.<sup>62</sup> After World War II, the non-aligned Socialist movement of Josip Tito attempted to replace Serbian and Albanian nationalism with an overarching pan-Slavic nationalism.<sup>63</sup> For over forty years, Tito's Yugoslavia prevented violence through a policy that exercised strict political and administrative control while granting Kosovar Albanians rights in the areas of language, culture, and education.<sup>64</sup>

Tito's structure came crashing down with the dissolution of the Soviet Union. Yugoslavia itself broke up largely along ethnic lines into Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, and a Federal Republic of Yugoslavia (FRY) composed of Montenegro and Serbia, of which Kosovo was a part.<sup>65</sup> Fearful of Serbian repression, Kosovo formed the Republic of Kosova in 1990 as part of a looser Yugoslav confederation and declared its independence in 1992.<sup>66</sup> The Kosovo Liberation Army (KLA) was formed at about the same time and, in a series of armed attacks and sabotage operations, challenged Serbian control of Kosovo.<sup>67</sup> In 1998, Serbian-led FRY forces responded with a violent crackdown that gave rise to ethnic cleansing and other atrocities.<sup>68</sup>

The Serbian crackdown in Kosovo resulted in immediate attention from international institutions. On March 31, 1998, the UN Security Council issued UNSCR 1160 which called for a political solution that contemplated an autonomous Kosovo within the FRY; established an arms blockade on the FRY, including Kosovo; and directed investigation of Serbian actors for possible prosecution by the International Criminal Tribunal for the former Yugoslavia (ICTY), established in 1993.<sup>69</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See Albrecht Schnabel & Ramesh Thakur, *Kosovo, The Changing Contours of World Politics, and the Challenge of World Order* and Marie-Janine Calic, *Kosovo in the Twentieth Century: A Historical Account*, in *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship* (Albrecht Schnabel & Ramesh Thakur eds. 2000).

<sup>66</sup> SNEZANA TRIFUNOVSKA, *YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION* 237 (1994); NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* 356-7 (1998); Aydin Babuna, *Albanian national identity and Islam in the post-Communist era*, 8(3) *PERCEPTIONS* 43-69 (Sept.-Nov. 2003).

<sup>67</sup> ARMEND BEKAJ, *THE KLA AND THE KOSOVO WAR; FROM INTRA-STATE CONFLICT TO INDEPENDENT COUNTRY*, *BERGHOF CONFLICT RESEARCH* 17-20 (2010).

<sup>68</sup> *Id.* at 21-23; see also Adam Roberts, *NATO's 'Humanitarian War' over Kosovo*, 41(3) *SURVIVAL* 102, 112 (1999) [hereinafter Roberts].

<sup>69</sup> S.C. Res 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998).

Subsequently, a Serbian offensive in the summer of 1998 killed an estimated 1,500 Kosovar Albanians and displaced approximately 300,000 who fled their homes to escape Serbian violence.<sup>70</sup> In September 1998, the UN Security Council issued UNSCR 1199, which called for a cessation of hostilities, action to “avert the impending humanitarian catastrophe,” and renewed political talks.<sup>71</sup> The UN Security Council did not authorize use of force or a humanitarian intervention in either UNSCR 1160 or UNSCR 1199.<sup>72</sup>

#### B. NATO State Practice in Kosovo

NATO began to take notice of Kosovo as early as 1992, well before the atrocities of 1998 and 1999. Deploring the Serbian’s “systematic gross violations of human rights and international humanitarian law, including the barbarous practice of ‘ethnic cleansing’” in Bosnia-Herzegovina, NATO also expressed “deep[] concern about possible spillover of the conflict, and about the situation in Kosovo.”<sup>73</sup> NATO viewed the possible “explosion of violence in Kosovo” as a “serious threat to international peace and stability and security” that “would require an appropriate response by the international community.”<sup>74</sup> NATO called for “restoration of autonomy to Kosovo within Serbia” as well as “a UN preventive presence in Kosovo”<sup>75</sup> as part of a “negotiated and just settlement.”<sup>76</sup>

Under the threat of NATO airstrikes, the Serbians agreed in October 1998 to partial withdrawal of Serbian security forces from Kosovo; deployment of 2,000 unarmed monitors under the aegis of the Organization for Security and Cooperation in Europe (OSCE); and aerial verification by NATO.<sup>77</sup> The UN Security Council endorsed this agreement in UNSCR 1203, but did not authorize force to enforce it.<sup>78</sup>

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<sup>70</sup> Roberts, *supra* note 68, at 112.

<sup>71</sup> S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998).

<sup>72</sup> *Id.*

<sup>73</sup> North Atlantic Cooperation Council, *Statement on Former Yugoslavia*, (NATO Archives) (Dec. 17, 1992).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> NATO Archives, North Atlantic Cooperation Council, Press Release M-NACC(92) 109, Dec. 18, 1992).

<sup>77</sup> NATO Archives, Meeting of the North Atlantic Council in Foreign Ministers Session, Press Release M-NAC-2(98) 143 (Dec. 8, 1998); *see also* Roberts, *supra* note 68, at 11; NATO Archives, Final Communiqué of the Meeting of the North Atlantic Council in Foreign Ministers Session, Press Release M-NAC-D-2(98) 152 (Dec. 17, 1998).

<sup>78</sup> S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998).

Notwithstanding this apparent breakthrough, Serbian atrocities continued, including the killing of at least forty-five ethnic Albanians in the village of Recak.<sup>79</sup> The FRY's good faith in complying with OSCE monitoring and NATO verification was questioned when ICTY investigators were denied access to Recak.<sup>80</sup> Condemning the massacre, NATO Secretary General Javier Solana announced his decision to dispatch to Belgrade the Chairman of the North Atlantic Council's Military Committee and the Supreme Allied Commander Europe "to impress upon the Yugoslav Authorities the gravity of the situation and their obligation to respect all their commitments to NATO."<sup>81</sup> On January 30, 1999, the North Atlantic Council issued an ultimatum, demanding the FRY's full compliance with UNSCRs 1160, 1199, and 1203, as well as full cooperation by FRY authorities with ICTY investigations of the Recak massacre.<sup>82</sup> Citing the Recak massacre, the need to avert a "humanitarian catastrophe" in general, and the Kosovo situation's "threat to peace and security in the region," NATO warned that, in the event of non-compliance, "NATO is ready to take whatever measures are necessary . . . by compelling compliance with the demands of the international community and the achievement of a political settlement."<sup>83</sup>

NATO's unilateral military intervention in the Kosovo war commenced on March 24, 1999, with a bombing campaign directed at Yugoslav targets in Belgrade and elsewhere.<sup>84</sup> The so-called Operation Allied Force was the first NATO military operation initiated without UN Security Council authorization. As such, the military campaign violated NATO's own charter, the North Atlantic Treaty, which at Article 1 enjoins its member states to "refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations."<sup>85</sup> The North Atlantic Treaty makes it clear in Article 7 that the

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<sup>79</sup> YUGOSLAV GOVERNMENT WAR CRIMES IN RACAK, HUMAN RIGHTS WATCH (1999); *see also* MILOSEVIC ET AL. "KOSOVO" - SECOND AMENDED INDICTMENT; *see also* Roberts, *supra* note 68, at 113.

<sup>80</sup> International Criminal Tribunal Yugoslavia, Press Statement from the Prosecutor regarding Kosovo Investigation, (Jan. 20, 1999).

<sup>81</sup> NATO Archives, Statement by the Secretary General of NATO, Press Release (1999) 003 (Jan. 17, 1999).

<sup>82</sup> NATO Archives, Statement by the North Atlantic Council on Kosovo, Press Release (1999) 012 (Jan. 30, 1999).

<sup>83</sup> *Id.*

<sup>84</sup> INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, AND LESSONS LEARNED 193 (2000) [hereinafter *Kosovo Report*].

<sup>85</sup> The North Atlantic Treaty, art. 1, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter *The North Atlantic Treaty*].



UN Security Council, not NATO, has “the primary responsibility . . . for the maintenance of international peace and security.”<sup>86</sup>

Operation Allied Force also was inconsistent with NATO’s Strategic Concept. At the beginning of the bombing campaign, NATO’s Strategic Concept that had been issued on November 7, 1991, applied, while a new Strategic Concept came into effect as of April 24, 1999.<sup>87</sup> The 1991 Strategic Concept provided that NATO’s “essential purpose, set out in the Washington Treaty and reiterated in the London Declaration, is to safeguard the freedom and security of all its members by political and military means in accordance with the principles of the United Nations Charter.”<sup>88</sup> Similarly, the 1999 Strategic Concept emphasized its commitment “to the Washington Treaty and the United Nations Charter.”<sup>89</sup> Moreover, nothing in either version of NATO’s Strategic Concept specifically made humanitarian intervention a task, let alone a priority, within NATO’s ambit. Indeed, human rights or humanitarian emergencies were referenced only in passing, and humanitarian intervention was not mentioned at all in either version.<sup>90</sup> Rather, NATO’s strategy broadly prioritized “a stable security environment in Europe, based on the growth of democratic institutions and commitment to the peaceful resolution of disputes, in which no country would be able to intimidate or coerce any European nation or to impose hegemony through the threat or use of force”; “[t]o deter and defend against any threat of aggression against the territory of any NATO member state”; and “[t]o preserve the strategic balance within Europe.”<sup>91</sup> Saving Albanians from Serbians did not seem to clearly fall within NATO’s remit except to the extent that doing so might advance the security interests of NATO members.<sup>92</sup> Nonetheless, NATO, contravening both the UN Charter and the North Atlantic Charter, justified its unilateral military action not only

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<sup>86</sup> *Id.* art. 7.

<sup>87</sup> NATO Archives, The Alliance’s Strategic Concept, agreed by the Heads of State and Government participating in the meeting of the North Atlantic Council in London (Nov. 7, 1991) [hereinafter 1991 Strategic Concept].

<sup>88</sup> *Id.* ¶ 15.

<sup>89</sup> NATO Archives, The Alliance’s Strategic Concept, approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C., Press Release NAC-S(99) 65, ¶ 10 (Apr. 24, 1999) [hereinafter 1999 Strategic Concept].

<sup>90</sup> *Id.* ¶¶ 19, 20, 49, 50.

<sup>91</sup> 1991 Strategic Concept, *supra* note 87, ¶ 20. The 1999 Strategic Concept similarly lists “Security,” “Consultation,” and “Deterrence and Defence” as its fundamental tasks. 1999 Strategic Concept, *supra* note 89, ¶ 10.

<sup>92</sup> 1991 Strategic Concept, *supra* note 87, ¶ 20.

on security grounds but on its conviction that it needed to avert a “humanitarian catastrophe.”<sup>93</sup>

NATO’s Kosovo air campaign was concluded on June 11, 1999, by which time FRY authorities had substantively acceded to all the key demands made by NATO at the outset of the campaign and as set forth in UNSCRs 1160, 1199, and 1203.<sup>94</sup> The day before, the UN Security Council issued UNSCR 1244, authorizing a peacekeeping force to guarantee NATO’s political and humanitarian objectives.<sup>95</sup> A NATO-sponsored peacekeeping force was permitted access to Kosovo, where it remains to the present day.<sup>96</sup> NATO’s commitment to the management of ethnic tensions in the region was open-ended.<sup>97</sup> While there was loss of civilian life during and after the campaign, atrocities on the scale that occurred before the campaign were averted.<sup>98</sup> Displaced persons were able to return to their homes, and the ICTY was able to prosecute violations of human rights and humanitarian rights that occurred in Kosovo.<sup>99</sup> Not only were the immediate objectives of the campaign accomplished, but human rights also were protected both in the short term and in the long term.

### C. The Kosovo Intervention’s Impact on Customary International Law

With reference to the rubric for success articulated in Chapter I above, NATO’s intervention in Kosovo can be regarded, on the whole, as a success because it balanced moral, political, and legal interests in a manner that mitigated human rights violations, advanced regional peace and security, utilized international security institutions and processes, including the UN, NATO, and the ICTY, and enhanced the legitimacy of a “right” of humanitarian intervention. It also played a role in motivating formulation of R2P as a broader framework for addressing human rights violations, even serving to some extent as a model for R2P. While the intervention negatively impacted FRY sovereignty, failed to fully resolve

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<sup>93</sup> NATO Archives, Statement by the North Atlantic Council on Kosovo, Press Release (1999) 012 (Jan. 30, 1999).

<sup>94</sup> Roberts, *supra* note 68.

<sup>95</sup> S.C. Res. 1244, U.N. Doc S/RES/1244 (June 10, 1999).

<sup>96</sup> *Id.*

<sup>97</sup> *See, e.g.*, NATO Archives, The Warsaw declaration on Transatlantic Security, issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw (July 8-9, 2016) at ¶ 9.

<sup>98</sup> *Kosovo Report*, *supra* note 84, at 107.

<sup>99</sup> *Id.*

regional ethnic tensions, and was initiated without UN Security Council authorization, on balance it was successful and largely was regarded as such.

The NATO intervention in Kosovo was not without its critics, particularly early on when its successes were still tentative.<sup>100</sup> Opinions also differed on how to assess the impact of the Kosovo intervention on international law.<sup>101</sup> Bruno Simma, for example, argued that NATO's intervention eroded NATO's legal core of "subordination to the principles of the UN Charter," and he cautioned against using Kosovo as a basis for turning NATO's exceptional "resort to illegality" "into a general policy."<sup>102</sup> For many others, however, the Kosovo intervention demonstrated an alternative to the UN Security Council's often unworkable monopoly on the use of force. The Independent International Commission on Kosovo, chaired by Nelson Mandela, identified as one of the intervention's key lessons the acknowledgment that the "[UN] Charter as originally written is not satisfactory for a world order that is increasingly called upon to respond to humanitarian challenges."<sup>103</sup> Rooting its assessment of the intervention in an expansive reading of legal sources, the Kosovo Commission further found that, while the "'right' of humanitarian intervention is not consistent with the UN Charter if conceived as a legal text, . . . it may, depending on context, nevertheless, reflect the spirit of the Charter as it relates to the overall protection of people against gross abuse."<sup>104</sup> The Kosovo intervention's perceived legitimacy encouraged many to take up with renewed energy "the presentation of a principled framework . . . to guide future responses in the face of imminent or unfolding humanitarian catastrophe."<sup>105</sup> In making recommendations for such "a principled framework," the Kosovo Commission built on what was viewed as the NATO intervention's success, to bridge "the gap between legality and legitimacy."<sup>106</sup> The positive outcome of the Kosovo intervention had the effect of legitimizing

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<sup>100</sup> See, e.g., Kofi Annan, *Two concepts of sovereignty*, THE ECONOMIST, Sept. 16, 1999 [hereinafter Annan, *Two concepts of sovereignty*].

<sup>101</sup> See, e.g., Javier Solana, *NATO's Success in Kosovo*, FOREIGN AFFAIRS, Nov./Dec. 1999; Wesley Clark, *Waging Modern War: Bosnia, Kosovo and the Future of Combat*, Public Affairs 417–19 (2001); Wallace Thies, *Compellence Failure or Coercive Success: The Case of NATO and Yugoslavia*, 22 COMPARATIVE STRATEGY 243, 244 (2003).

<sup>102</sup> Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EJIL 1, 22 (1999).

<sup>103</sup> *Kosovo Report*, supra note 84, at 185.

<sup>104</sup> *Id.* at 186.

<sup>105</sup> *Id.* at 190.

<sup>106</sup> *Id.* at 194, 291.

what was an illegal use of force under positive international law and also stirred enthusiasm for what would become R2P.

This was particularly important because the acceptance of the legitimacy, let alone the legality, of humanitarian intervention had been in flux over the preceding twenty years. After the soul-searching that followed the brutal Rwandan genocide in 1994, many important international figures and institutions coalesced around the view that humanitarian intervention, subject to a regime of restrictions and contingencies, was a necessary exception to the general proscription against the use of force in the internal affairs of a sovereign state absent authorization by the UN Security Council or circumstances warranting self-defense.<sup>107</sup> This consensus relied not only on the still-fresh horrors of Rwanda, but also on the success of the humanitarian intervention in Kosovo. As Kofi Annan argued, “in cases where forceful intervention does become necessary, the Security Council . . . must be able to rise to the challenge.”<sup>108</sup> However, when it could not do so, “[t]he choice must not be between council unity and inaction in the face of genocide—as in the case of Rwanda—and council division, but regional action, as in the case of Kosovo.”<sup>109</sup> Importantly, Annan also emphasized long-term commitment as essential to success: “when fighting stops, the international commitment to peace must be just as strong as was the commitment to war. In this situation, too, consistency is essential.”<sup>110</sup>

Both Rwanda and Kosovo foreshadowed and justified Annan’s call in 2000 for a fundamental rethinking of the role of humanitarian intervention in advancing global peace and justice.<sup>111</sup> When ICISS answered Annan’s invitation by issuing its report on R2P, it showcased both the cautionary tale of Rwanda and the success of Kosovo in formulating new approaches to humanitarian intervention.<sup>112</sup> In many respects, ICISS presented NATO’s experience in Kosovo as an example of how humanitarian

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<sup>107</sup> See, e.g., Kofi Annan’s *Reflections on Intervention*, Thirty-Fifth Annual Ditchley Foundation Lecture (June 26, 1998); Roberts, *supra* note 68, at 105.

<sup>108</sup> Annan, *Two Concepts of Sovereignty*, *supra* note 100.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Kofi Annan, *We The Peoples: The Role of the United Nations in the 21st Century*, United Nations, Department of Public Information (New York, 2000) at 47-48 (“ . . . if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?”). *Id.*

<sup>112</sup> ICISS Report, *supra* note 44 at I, VII, ¶¶ 1.2, 1.4, 1.6, 1.22, 2.2, 5.26, 5.30, 6.34, 6.36, 7.11.

intervention could be executed to positive effect.<sup>113</sup> Indeed, NATO's intervention in Kosovo in 1999 in large measure followed the prescription for humanitarian intervention ICISS later laid out in its report.<sup>114</sup> Notably, the Kosovo intervention met what ICISS described as a humanitarian intervention's basic objective—"always to achieve quick success."<sup>115</sup> The failure in Rwanda had made R2P a moral imperative, while NATO's success in Kosovo had shown that humanitarian intervention was practically feasible.

Ultimately, Kosovo was seen by many as building on past successful humanitarian interventions, e.g., in Liberia in 1990 and northern and southern Iraq in 1991-1992, to advance humanitarian intervention as a sometimes necessary alternative to UN Security Council inaction.<sup>116</sup> It also served as a basis for advancing R2P as a new doctrine for the protection of human rights.<sup>117</sup> Why was this? In Kosovo, actions spoke louder than words. Nothing in NATO policy spoke to intervention to avert gross violations of human rights and humanitarian law, yet NATO action resoundingly affirmed its conviction that it should do so. Pragmatic problem solving spoke louder than policy. NATO patiently sought to avoid military action and maximized use of UN processes before acting meaningfully to protect human rights. Finally, NATO was committed to preserving its success by establishing a long-term security structure. The results tell the rest of the story—Kosovo and the Balkans have been at peace for nearly a generation. Until the intervention in Libya, these results were crucial in helping to endorse humanitarian intervention as a tool of state practice while also bridging the gap between the legitimacy and legality of humanitarian intervention under customary international law.

#### IV. The Humanitarian Intervention in Libya

While success in Kosovo enhanced the standing of humanitarian intervention generically and with respect to customary international law, failure in Libya eroded it.

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<sup>113</sup> *Id.* at 16, 44, 45, 54, 59, 66.

<sup>114</sup> *Id.* at 57-67.

<sup>115</sup> *Id.* at XII, 37, 57.

<sup>116</sup> Compare Michael Reisman, *Kosovo's Antinomies*, 93 AJIL 860, 861-862 (1999) with Joyner, *supra* note 36; see also Greenwood, *supra* note 28 (discussing Iraq intervention).

<sup>117</sup> ICISS Report, *supra* note 44, at 16, 44, 45, 54, 57-67.

### A. Background

On December 17, 2010, an impoverished Tunisian fruit seller by the name of Mohamed Bouazizi doused himself with gasoline and set himself on fire after local officials confiscated his wheelbarrow of fruit for refusing to pay a bribe.<sup>118</sup> Bouazizi died eighteen days later.<sup>119</sup> Bouazizi's act of self-immolation touched off a popular revolt that toppled the 23-year regime of Tunisian President Zine El Abidine Ben Ali within a matter of days.<sup>120</sup> The revolution in Tunisia galvanized opponents of long-standing authoritarian regimes in neighboring countries, including Egypt, Syria, and Libya, regionalizing popular uprisings that came to be known as the Arab Spring.<sup>121</sup> The suddenness and scale of the Arab Spring came as a surprise to states and international institutions.<sup>122</sup> Within weeks of Bouazizi's death, regimes that had stood for decades and seemed all but impregnable were swept away not only in Tunisia, but also in Egypt and Libya, while coming under assault in Syria and elsewhere.<sup>123</sup>

Events moved with particular rapidity in Libya. There, localized protests over government corruption in mid-January 2011<sup>124</sup> quickly developed into a more generalized revolt by February.<sup>125</sup> A National Conference for the Libyan Opposition staged a "Day of Rage," which resulted in the torching of police stations and government controlled media in Libya's biggest cities.<sup>126</sup> The regime of Libyan dictator Muamar Qaddafi responded to the revolt with increasing brutality, resorting to torture, rape, and the killing of civilians.<sup>127</sup> The opposition formed a National Transitional Council, which began calling itself "the Libyan Republic," and internal armed conflict ensued with government and rebel

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<sup>118</sup> Peter Beaumont, *Mohammed Bouazizi: the dutiful son whose death changed Tunisia's fate*, THE GUARDIAN (Jan. 20, 2011), <https://www.theguardian.com/world/2011/jan/20/tunisian-fruit-seller-mohammed-bouazizi>.

<sup>119</sup> *Id.*

<sup>120</sup> *Ben Ali gets refuge in Saudi Arabia*, AL JAZEERA ENGLISH (Jan. 16, 2011), <http://www.aljazeera.com/news/middleeast/2011/01/201111652129710582.html>.

<sup>121</sup> ROGER OWEN, THE RISE AND FALL OF ARAB PRESIDENTS FOR LIFE 172-83 (2012).

<sup>122</sup> *Id.* at 172-73.

<sup>123</sup> *Id.* at 172-77.

<sup>124</sup> *Libyans Protest over Delayed Subsidized Housing Units*, ALMASRY ALYOUM (Jan. 16, 2011), <https://web.archive.org/web/20110322055904/>.

<sup>125</sup> *Libyan Police Stations Torched*, AL JAZEERA (Feb. 16, 2011), <http://www.aljazeera.com/news/africa/2011/02/20112167051422444.html>.

<sup>126</sup> *Popular Protest in North Africa and the Middle East (V): Making Sense of Libya*, International Crisis Group, Middle East/North Africa Report No. 107, (June 6, 2011) at 3.

<sup>127</sup> *Id.* at 4-5.

bases of operation centered in the western and eastern parts of the country, respectively.<sup>128</sup>

International actors quickly called on the Qaddafi regime to desist from human rights violations. On February 25, 2011, action was taken to suspend Libya from the United Nations Human Rights Council, which invoked R2P by calling on the Libyan regime “to meet its responsibility to protect its population.”<sup>129</sup> Referencing the reported use of tanks, helicopters and military aircraft and the killing of thousands of civilians, the UN High Commissioner for Human Rights condemned the government’s “reported mass killings, arbitrary arrests, detention and torture of protestors” and warned that such “attacks against the civilian population may amount to crimes against humanity.”<sup>130</sup> Independent observers, including Amnesty International, also confirmed the Qaddafi regime’s systematic violations of human rights and called for action.<sup>131</sup> On February 26, 2011, the UN Security Council, also invoking the “Libyan authorities’ responsibility to protect its population,” adopted UNSCR 1970, which referred reported human rights violations by the Libyan regime to the International Criminal Court, ordered an arms embargo, and froze the Libyan regime’s financial assets abroad.<sup>132</sup> Barely three weeks later, the UN Security Council adopted UNSCR 1973. “Reiterating the responsibility of the Libyan authorities to protect the Libyan population,” the UN Security Council, among other things, “[a]uthorize[d] Member States . . . acting nationally or through regional organizations or arrangements . . . to take all necessary measures. . . to protect civilians and civilian populated areas under threat of attack in [Libya] while excluding a foreign occupation force of any form on any part of Libyan territory[.]”<sup>133</sup> UN Secretary-General Ban Ki-moon declared that UNSCR 1973 “affirms, clearly and unequivocally, the international community’s determination to fulfil its responsibility to

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<sup>128</sup> *Id.* at 3, 23 *et seq.*; Statement of the National Transitional Council (Mar. 5, 2011), <https://web.archive.org/web/20110314133238/http://ntclibya.org/english/>.

<sup>129</sup> *UN rights council recommends suspending Libya, orders inquiry into abuses*, UN News Centre (Feb. 25, 2011), <http://www.un.org/apps/news/story.asp?NewsID=37626#.WDIbxxCQwc8>.

<sup>130</sup> *Id.*

<sup>131</sup> *See The battle for Libya: Killings, disappearances, and torture*, AMNESTY INTERNATIONAL (Sept. 13, 2011), <https://www.amnesty.org/en/documents/MDE19/025/2011/en/>; *Arab States Seek Libya No-Fly Zone*, AL JAZEERA (Mar. 12, 2011), <http://www.aljazeera.com/news/africa/2011/03/201131218852687848.html>.

<sup>132</sup> S.C. Res. 1970, U.N. Doc S/RES/1970 (Feb. 26, 2011).

<sup>133</sup> S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) [hereinafter S.C. Res. 1973].

protect civilians from violence perpetrated upon them by their own government.”<sup>134</sup>

#### B. NATO State Practice in Libya

The French initiated military action against Libya on March 19, 2011, with NATO taking over operational control of the action on March 25, 2011.<sup>135</sup> Again, under the leadership of NATO, air power was deployed to stop human rights abuses on the ground. This time, the use of force was authorized by the UN Security Council.<sup>136</sup> NATO’s intervention came in the form of an air campaign—the so-called operation “Unified Protector”—which targeted Libyan air defense capabilities, government facilities, military facilities, and military troop formations on the ground without contemplating a follow-on ground campaign.<sup>137</sup>

Unlike the NATO intervention in Kosovo, the Libya air campaign did not on its face violate NATO’s charter, at least to the extent that the intervention was consistent with the UN Security Council’s authorization.<sup>138</sup> The Libya intervention was also in line with NATO’s new Strategic Concept, adopted in November 2010 at the NATO Summit in Lisbon, which committed NATO “to the principles of individual liberty, democracy, human rights and the rule of law[,]” as well as to the “purposes and principles of the Charter of the United Nations and to the Washington Treaty, which affirms the primary responsibility of the Security Council for the maintenance of international peace and security.”<sup>139</sup> While neither the 1999 Strategic Concept in force during the Kosovo campaign nor the 2010 Strategic Concept in force during the Libya campaign expressly made humanitarian intervention or R2P a core NATO task, it is difficult to read the 2010 Strategic Concept without finding in it the imprint of R2P doctrine as the guiding basis for the Libya intervention. Addressing its

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<sup>134</sup> Ban Ki-moon, STATEMENT BY THE SECRETARY-GENERAL ON LIBYA (Mar. 17, 2011), <http://www.un.org/sg/statements/?nid=5145> (retrieved Nov. 27, 2016).

<sup>135</sup> PRECISION AND PURPOSE: AIRPOWER IN THE LIBYAN CIVIL WAR 108 (Karl Mueller ed., 2015) [hereinafter Mueller].

<sup>136</sup> S.C. Res. 1973, *supra* note 133, ¶ 8 (authorizing member states to “take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack”).

<sup>137</sup> Mueller, *supra* note 135, at 43 *et seq.*

<sup>138</sup> The North Atlantic Treaty, *supra* note 85, art. 1 (prohibiting use of force by NATO in “manner inconsistent with the purposes of the United Nations.”).

<sup>139</sup> NATO Archives, Active Engagement, Modern Defense: Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization, adopted by Heads of State and Government at the NATO Summit in Lisbon (Nov. 19-20, 2010).



role in “crisis management,” the 2010 Strategic Concept invoked “lessons learned from NATO operations, in particular in Afghanistan and the Western Balkans, [that] make it clear that a comprehensive political, civilian and military approach is necessary for effective crisis management.”<sup>140</sup> More telling, perhaps, the 2010 Strategic Concept describes NATO’s role in terms of prevention, “manage[ment] of ongoing hostilities,” e.g., through its “unparalleled capability to deploy and sustain robust military forces in the field,” and, “when conflict comes to an end,” contributions “to stabilisation and reconstruction”—<sup>141</sup> language that clearly echoes R2P doctrine’s three pillars of “prevent, react, and rebuild.”<sup>142</sup>

All this is not surprising. By 2011, R2P had been endorsed by the United Nations at its 2005 World Summit.<sup>143</sup> It also was incorporated as a policy, if not also legal, basis for humanitarian intervention in the official policy statements of most NATO partners, including the United States and France.<sup>144</sup> In his December 2009 speech accepting the Nobel Peace Prize, President Obama stated: “I believe that force can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war.”<sup>145</sup> The Obama Administration later expressly endorsed R2P as part of its National Security Strategy.<sup>146</sup> Similarly, humanitarian intervention as an instrument of R2P appears to have been adopted by NATO state practice, at least in the public expression of its stated convictions and legal commitments. On paper, the Libya intervention appeared to adhere to R2P principle: there was support by

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<sup>140</sup> *Id.* at 19, ¶ 21.

<sup>141</sup> *Id.* at 19-20, ¶¶ 22-24.

<sup>142</sup> See ICISS Report, *supra* note 44, at V (Contents).

<sup>143</sup> United Nations General Assembly, *Resolution adopted by the General Assembly, 2005 World Summit Outcome*, ¶¶ 138-140. UN Doc A/RES/60/1 (Oct. 24, 2005).

<sup>144</sup> See, e.g., Ambassador Susan Rice, Remarks Before the U.N. Security Council (29 January 2009) (declaring that “[t]he United States takes . . . seriously” its responsibility to protect populations subject to human rights abuses) (transcript available at <http://www.state.gov/p/io/rmi/2009/115579.htm>) (retrieved Nov. 11, 2016); Simon Chesterman, “*Leading from Behind*”: *The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya*, (New York University Public Law and Legal Theory Working Papers) Paper 282 (2011); Stewart Patrick, *Libya and the Future of Humanitarian Intervention*, Foreign Affairs (Aug. 26, 2011); Malissa Tucker, *Lines in the Sand: Drawing Meaningful Contours for the Responsibility to Protect Doctrine (In a World at War)*, 2 NATIONAL SECURITY LAW BRIEF 5 (2015) at 27-28.

<sup>145</sup> *Remarks on Accepting the Nobel Prize in Oslo*, 2 PUB. PAPERS 1799, 1801 (Dec. 10, 2009) (quoted in Harold Koh, *The War Powers and Humanitarian Intervention*, 53:4 HOUSTON L. R. 971 (2016) at 980).

<sup>146</sup> THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 48 (2010).

regional institutions; referral to the ICC; a multilateral plan for intervention; and even a clear and undisputedly legal authorization for the use of force. Early in its campaign, NATO identified its three objectives as cessation of “[a]ll attacks and threats of attack against civilians and civilian-populated areas have ended;” withdrawal of the Qaddafi regime’s military forces from populated areas; and the granting of “immediate, full, safe and unhindered humanitarian access to all the people in Libya in need of assistance.”<sup>147</sup> The UN authorization, NATO’s 2010 Strategic Concept, and statements made by NATO at the time of the intervention left little doubt that the Libya campaign was intended as an R2P intervention.

In its actions, however, NATO state practice fell short of the standard for humanitarian intervention formulated by R2P. While in Kosovo NATO’s military intervention was just part of a comprehensive political solution that contemplated a long-term political and security commitment to the troubled region, NATO’s intervention in Libya came to an end, for all intents and purposes, when the military action came to an end. There was little on either side of NATO’s military reaction—neither much prevention nor post-intervention reconstruction. On the front-end of the intervention, the precipitous pace of events in January and February 2011 in Libya may have severely limited successful preventive measures. On the back-end of the intervention, NATO’s option to establish a stabilizing military presence in the region was precluded by the narrow UN authorization under which its intervention proceeded.

In the end, NATO’s involvement in Libya was limited to military action, and even this departed from R2P principles. While the campaign appeared at the start to have proper humanitarian objectives, as it progressed it came to look more and more like an operation to effect regime change, an outcome that aroused considerable cynicism in the region and international community at large, further problematizing an already difficult situation.<sup>148</sup> This objective appeared to be confirmed when on October 21, 2011, the day after Qaddafi was killed, the NATO Secretary General, Anders Fogh Rasmussen, announced the termination

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<sup>147</sup> NATO Archives, Statement on Libya following the working lunch of NATO Ministers of Foreign Affairs with non-NATO contributors to Operation Unified Protector, Press Release (2011) 045 (Apr. 14, 2011); *see also* NATO Archives, Statement on Libya Following the Working lunch of NATO Ministers of Defence with non-NATO Contributors to Operation Unified Protector, Press Release (2011) 071 (June 8, 2011).

<sup>148</sup> As many have commented, this was because UNSCR 1973 was vague and open to varying interpretations. *See, e.g.*, Pierre Thielbörger, *The Status and Future of International Law after the Libya Intervention*, 4 GÖTTINGEN J. INT’L L. 11, 20-24 (2012) [hereinafter Thielbörger].

of Operation Unified Protector.<sup>149</sup> Rasmussen further announced that NATO would have no continuing role in Libya: “We have no intention to keep armed forces . . . in the neighbourhood of Libya. It’s our intention to close the operation. It will be a clear-cut termination of our operation.”<sup>150</sup> He also made clear that the Libyan people were now on their own: “now is the time for the Libyan people to take their destiny fully into their own hands.”<sup>151</sup> NATO’s intervention in Libya was quick in, quick out with no one left behind but the Libyan people.

### C. The Libya Intervention’s Impact on Customary International Law

Professor Thomas Weiss understood what was at stake for R2P in Libya: “If the Libyan intervention goes well, it will put teeth in the fledgling RtoP doctrine. Yet, if it goes badly, critics will redouble their opposition, and future decisions will be made more difficult.”<sup>152</sup> Early on, Weiss and many others hailed the Libya intervention and its application of R2P, primarily because it had secured UN approval in advance, enjoyed the support of regional institutions, and involved no boots on the ground.<sup>153</sup> The intervention in Libya was at first viewed as a success for humanitarian intervention within the framework of R2P—the debate was no longer “whether such an abstract responsibility exists,” but rather about “how R2P should be practically implemented in specific cases and crises.”<sup>154</sup> But even those who early saw success hedged their assessments, allowing that “a final judgment to this effect cannot of course be made until the country’s governance is inclusive, the protection of citizens’ human rights is substantially secure and economic recovery is on a sound footing.”<sup>155</sup>

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<sup>149</sup> Press conference by NATO Secretary General on the latest developments in Libya and Operation Unified Protector (Oct. 21, 2011), [http://www.nato.int/cps/en/natohq/opinions\\_79807.htm](http://www.nato.int/cps/en/natohq/opinions_79807.htm) (retrieved 21 November 2016).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*; see also NATO Archives, Final Statement Meeting of the North Atlantic Council at the level of Foreign Ministers held at NATO Headquarters, Brussels, Press Release (2011) 145 (Dec. 7, 2011).

<sup>152</sup> Thomas Weiss, *RtoP Alive and Well after Libya*, 25 ETHICS & INT’L AFFAIRS 287 (2011).

<sup>153</sup> Thielbörger, *supra* note 148, at 32.

<sup>154</sup> Adams, *supra* note 52, at 17.

<sup>155</sup> Spencer Zifcak, *The Responsibility to Protect After Libya and Syria*, 13 MELBOURNE J. OF INT’L LAW 1 (2012).

In retrospect, claims of success proved premature. On the ground, things went badly. Even though Operation Unified Protector was largely a technical military success, the effect of such success did not appear to achieve UNSCR 1973's underlying aims—a decrease in human suffering and a cessation of human rights abuses. According to the National Transition Council, at least 30,000 died between March and September 2011.<sup>156</sup> While estimates of the exact number were disputed, there was little dispute that both government and anti-Qaddafi forces were responsible for gross violations of human rights. The UN Human Rights Council's International Commission of Inquiry later concluded that anti-Qaddafi forces, "committed serious violations, including war crimes and breaches of international human rights law . . . unlawful killing, arbitrary arrest, torture, enforced disappearance, indiscriminate attacks and pillage."<sup>157</sup> Even NATO "admitted to a small number of civilian casualties caused by technical malfunctions or targeting errors," and a "later investigation by the UN Human Rights Council's International Commission of Inquiry found that sixty civilians were accidentally killed in at least five NATO strikes that went wrong."<sup>158</sup> Qaddafi's extra-judicial killing was itself considered by many to be a war crime.<sup>159</sup>

Since the fall of the Qaddafi regime, Libya has descended into an ongoing internal armed conflict among dueling rebel factions, including adherents of the Islamic State, leading some responsible commentators to characterize Libya as a failed state.<sup>160</sup> Notwithstanding the success of its military operations, NATO, too, commented on "the ongoing violence and the deteriorating security situation in Libya, which threaten to undermine the goals for which the Libyan people have suffered so much and which pose a threat to the wider region."<sup>161</sup> By 2016, with no end to the Libyan internal armed conflict in sight, NATO lamented "[t]he continuing crises and instability across the Middle East and North Africa region, in

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<sup>156</sup> Karin Laub, *Libyan estimate: At least 30,000 died in the war*, THE GUARDIAN (Sept. 8, 2011), <http://www.cnsnews.com/news/article/libyan-estimate-least-30000-died-war>.

<sup>157</sup> United Nations Human Rights Council, A/HRC/19/68, (Mar. 2, 2012) at 2, 15-16, 44, 87, 128-136, 141, 148-149, 156.

<sup>158</sup> *Id.*; see also Adams, *supra* note 52, at 10.

<sup>159</sup> ICC says Muammar Gaddafi killing may be war crime, BBC NEWS (Dec. 16, 2011), <http://www.bbc.com/news/world-africa-16212133>.

<sup>160</sup> See, e.g., Alan Kuperman, *Obama's Libya Debacle: How a Well-Meaning Intervention Ended in Failure*, FOREIGN AFFAIRS (March/April 2015).

<sup>161</sup> NATO Archives, Wales Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales, Press Release (2014) 120 (Sept. 5, 2014) [hereinafter Wales Summit Declaration].

particular in Syria, Iraq and Libya, as well as the threat of terrorism and violent extremism across the region and beyond.”<sup>162</sup>

While NATO’s use of force was couched in terms of R2P, its strategy for protection of Libyan civilians was essentially limited to an air campaign—later morphing into mere “regime change”—and lacked the long-term military, civil, and political commitment NATO employed in Kosovo.<sup>163</sup> Although Operation Unified Protector succeeded in dislodging Qaddafi from power and perhaps in providing Libyan civilians temporary relief from the regime’s human rights abuses, the NATO air campaign created circumstances that resulted in long-term and endemic human rights abuses in Libya by government and non-government actors, including the Islamic State and al-Qaeda.<sup>164</sup> NATO’s campaign in Libya has widely been viewed as a failure, not only in military and strategic terms, but also as a humanitarian intervention under the rubric of R2P.

In the final analysis, the Libya intervention failed to achieve the balance of moral, political, and legal interests necessary to assure a humanitarian intervention’s success. Instead of mitigating human rights violations, it created conditions that increased suffering while also upending Libya’s internal political, economic, social, and legal institutions. It also undermined regional peace and security and exacerbated ethnic rivalries. Although the intervention enjoyed UN Security Council authorization as well as the approval of R2P advocates, this authorization papered-over NATO’s failure to exhaust other legal remedies before resorting to force. Moreover, the operation’s failure damaged the UN’s role in guaranteeing international security and subverted the rule of law by calling into question the effectiveness of UN authority.

The failure of the intervention in Libya also undermined acceptance of humanitarian intervention generically, and it did not advance the notion of a “right” of humanitarian intervention under customary international law. This was illustrated, in part, by the general backlash against R2P, as a mode of humanitarian intervention, following the troubling course of

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<sup>162</sup> NATO Archives, Warsaw Summit Communiqué Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016, Press Release (2016) 100 (Jul. 9, 2016).

<sup>163</sup> NATO Archives, Statement on Libya following the working lunch of NATO ministers of foreign affairs with non-NATO contributors to Operation Unified Protector, Press Release (2011) 45 (Apr. 14, 2011).

<sup>164</sup> Jeffrey Goldberg, *The Obama Doctrine*, THE ATLANTIC, April 2016.

events in Libya.<sup>165</sup> R2P's own godfather, Kofi Annan, stated that "the way the 'responsibility to protect' was used in Libya caused a problem for the concept."<sup>166</sup> India's ambassador to the UN stated that "Libya has given R2P a bad name."<sup>167</sup> President Obama himself acknowledged that failing to follow up in Libya was the "worst mistake" of his presidency.<sup>168</sup> Overall, "[t]he perception that R2P was used as a smokescreen for regime change has undoubtedly undermined the concept's credibility."<sup>169</sup>

Harking back to Annan's "Two Concepts of Sovereignty," it must be remembered that humanitarian intervention as a function of R2P was proposed as a possible alternative to UN Security Council use of force procedures. Ironically, notwithstanding the UN's authorization of force in Libya, NATO's failure in Libya discredited not only the UN and R2P, but also humanitarian intervention generically and with it the "right" of humanitarian intervention in customary international law. Humanitarian intervention, having gained wider acceptance after the success of Kosovo, was relegated after Libya to a position of decided ambiguity. This article suggests that the failed humanitarian intervention in Libya made humanitarian intervention in Syria less palatable, whether under UN Security Council auspices or as a "right" under customary international law.

#### D. Conclusion

On September 5, 2014, three years after the close of the Libya intervention, the heads of state and government participating in the North Atlantic Council summit in Wales issued a declaration expressing their deep concern for "the ongoing violence and the deteriorating security situation in Libya."<sup>170</sup> NATO urged little more than a call on "all parties to cease all violence and engage without delay in constructive efforts

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<sup>165</sup> Adams, *supra* note 52, at 15-17.

<sup>166</sup> Natalie Nougayrède, *Kofi Annan: "Sur la Syrie, à L'évidence, Nous N'avons Pas Réussi"*, [Interview with Kofi Annan: 'On Syria, It's Obvious, We Haven't Succeeded'], LE MONDE (July 7, 2012), [www.lemonde.fr/proche-orient/article/2012/07/07/kofi-annan-sur-la-syrie-a-l-evidence-nous-n-avons-pas-reussi\\_1730658\\_3218.html](http://www.lemonde.fr/proche-orient/article/2012/07/07/kofi-annan-sur-la-syrie-a-l-evidence-nous-n-avons-pas-reussi_1730658_3218.html).

<sup>167</sup> Phillipe Boloignon, *After Libya, the Question: To Protect or Depose?*, LOS ANGELES TIMES (Aug. 25, 2011), <http://articles.latimes.com/2011/aug/25/opinion/la-oe-boloignon-libya-responsibility-t20110825>.

<sup>168</sup> *President Obama: Libya aftermath "worst mistake" of presidency*, BBC News (Apr. 11, 2016), [www.bbc.com/news/world-us-canada-36013703](http://www.bbc.com/news/world-us-canada-36013703).

<sup>169</sup> Garwood-Gowers, *supra* note 50, at 609.

<sup>170</sup> Wales Summit Declaration, *supra* note 161.

aimed at fostering an inclusive political dialogue[.]”<sup>171</sup> Recalling its efforts in Operation Unified Protector “to protect the Libyan people,” NATO stood ready to “support Libya with advice on defence and security institution building”—and nothing more.<sup>172</sup> It is hard to read this as anything more than an admission of failure. After a six month bombing campaign, NATO cut and run, leaving Libyans “to their destiny.” Three years later NATO could offer little more than “advice” in recompense.

At the very same meeting, with no trace of irony, NATO “commended the Kosovo Force (KFOR) for the successful conduct of its mission over the past 15 years.”<sup>173</sup> NATO promised that “KFOR will continue to contribute to a safe and secure environment and freedom of movement in Kosovo [and] . . . will also continue to support the development of a peaceful, stable and multi-ethnic Kosovo [and] . . . to maintain KFOR’s robust and credible capability to carry out its mission . . . [with] any reduction of our troop presence . . . measured against clear benchmarks and indicators, . . . conditions-based and not calendar-driven.”<sup>174</sup> In Kosovo, NATO committed itself to success, and the results were clear for all to see, even if the lessons learned were not applied in Libya.

A comparison of NATO’s involvement in Kosovo and in Libya yields three important observations. First, as the ICISS report warned, humanitarian intervention should be undertaken only if it has reasonable chances of success.<sup>175</sup> According to ICISS’s formula for humanitarian intervention, based in large measure on the success of Kosovo, success requires both an exhaustion of alternative remedies pre-intervention, a legal interest, as well as a long-term commitment post-intervention, a political interest.<sup>176</sup> Libya utterly failed to satisfy these requirements on both sides of the equation—it was hurry in and hurry out. Together with the human suffering caused by Libya’s subsequent civil unrest, the predictable result was a failure to balance the intervention’s moral, political, and legal interests.

Second, a comparison of the Kosovo and Libya interventions shows that success or failure of a humanitarian intervention matters not only for

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> ICISS Report, *supra* note 44, at XII, 37, 57 *et seq.*

<sup>176</sup> *Id.*

the humanitarian intervention itself—as an operation to prevent continued human rights violations—but for the acceptance of humanitarian intervention generically and as a principle under customary international law. No state practice speaks louder than the results of the action itself. Although NATO’s Strategic Concept at the time of the Kosovo air campaign made no pronouncements regarding a right of humanitarian intervention,<sup>177</sup> its success in the Kosovo intervention significantly boosted the prospects of humanitarian intervention by providing a positive, successful example, both as a tool within the rubric of R2P and as a right under customary international law. NATO’s failed Libya intervention, on the other hand, was explicitly pursued as an exercise of NATO and United States policy endorsing humanitarian intervention and R2P and resulted in the significant undermining of R2P and humanitarian intervention as tools of state practice and consequently of humanitarian intervention as a legal principle.

Finally, the legal theory or authority under which a humanitarian intervention is initiated is only one factor—and not a determinative one—in assessing its outcome as well as its impact on humanitarian intervention both generically and normatively. Granted, the further a humanitarian intervention strays from UN Security Council authorization, the more it must rely on moral and political grounds for legitimacy and, ultimately, success. On the other hand, even a humanitarian intervention authorized through UN Security Council procedures can lose its legitimacy if it fails to sustain a balance of moral, political, and legal interests. A humanitarian intervention that fails morally and politically can de-legitimize an otherwise legal humanitarian intervention, while also undermining humanitarian intervention generically and as a legal principle in customary international law. Equally so, a morally and politically successful humanitarian intervention can legitimize a technically illegal humanitarian intervention, while also fortifying humanitarian intervention generically and as a principle of customary international law. Recognizing this dynamic, the Kosovo and Libya interventions show there is a narrower gap to bridge between a legal and illegal humanitarian intervention than meets the eye. In the end, it is the success or failure of a humanitarian intervention as a whole that is crucial.

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<sup>177</sup> The 1999 Strategic Concept, *supra* note 89.