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## The United Nations Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement

Jared Genser

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The United Nations Security Council's Implementation  
of the Responsibility to Protect:  
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for Improvement  
Jared Genser \*

**Abstract**

*When it was codified and adopted by the United Nations (U.N.) system in 2005, the doctrine of the Responsibility to Protect (R2P) was meant to provide an implementation mechanism for the international community to respond to governments that were perpetrating mass atrocity crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity against their own people. As R2P is now in its second decade of existence as a codified norm, it is important to comprehensively evaluate past implementation of R2P by the United Nations Security Council—the U.N. body charged with taking collective action when all other diplomacy has failed and atrocity crimes are being committed or are imminent. This Article analyzes eleven country-specific case studies, which demonstrate that the presence of certain conditions enable the U.N. Security Council to successfully implement its R2P mandate. Further, when the identified conditions are absent, implementation is generally unsuccessful. Given these conditions, this Article identifies recommendations for strengthening international institutions so that implementation of R2P by the Security Council in the coming decades will successfully save civilian populations from mass atrocity crimes.*

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\* Jared Genser (B.S. Cornell University 1995; M.P.P. Harvard University 1998; J.D. University of Michigan 2001) is Managing Director of Perseus Strategies and Adjunct Professor of Law at Georgetown University Law Center. He would like to thank Anna Verney, Elise Baranouski, Antonia David, and Julia Kuperminc for their superb research and editing assistance.

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## I. INTRODUCTION

It has been thirteen years since the 2005 United Nations (U.N.) World Summit, and, with it, the adoption of the Responsibility to Protect (R2P). With the highly visible atrocities being committed in Syria and the recent renewed focus on the human rights conditions in the Democratic People's Republic of Korea, the question of how successfully the United Nations Security Council (Security Council) can implement its responsibilities under R2P has again risen to the forefront of international politics. As the doctrine of R2P is well into its second decade after being formally adopted by the U.N. system, a comprehensive evaluation of its application since 2005 is essential to improving its successful implementation in the decades ahead to protect civilian populations from mass atrocity crimes.

R2P developed in response to the recurring failures of individual states to protect their citizens from genocide, war crimes, crimes against humanity, and ethnic cleansing—collectively considered mass atrocity crimes<sup>1</sup>—as well as a failure of the international community, including the U.N., to prevent these atrocities. At the U.N. Millennium Assembly in 2000, U.N. Secretary-General Kofi Annan challenged the international community to strengthen its protection of vulnerable populations against “gross and systematic violations of human rights,” calling to mind the genocides in Rwanda and Srebrenica.<sup>2</sup> Secretary-General Annan acknowledged that states that perpetrated these crimes against their own populations or stood by while non-state actors did the same would have to confront the idea that humanitarian intervention represented an “unacceptable assault on sovereignty.”<sup>3</sup>

In response to Annan's challenge, Canada established the International Commission on Intervention and State Sovereignty, which developed and published the 2001 report entitled *The Responsibility to Protect*, introducing the concept of R2P for the first time.<sup>4</sup> Following the Commission's report, a more

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<sup>1</sup> While ethnic cleansing is not a crime under international law in its own right, acts of ethnic cleansing may constitute one of the other three mass atrocity crimes described. See U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 3, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility to Protect*].

<sup>2</sup> U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century*, 48, U.N. Doc. A/54/2000 (Mar. 27, 2000) [hereinafter *We the Peoples*]. For a history of U.N. engagement with humanitarian intervention and discussion of the challenges it represented to the U.N. in 2004, prior to the adoption of R2P, see Sir Adam Roberts, *The United Nations and Humanitarian Intervention*, in HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 71 (Jennifer M. Welsh ed., 2004).

<sup>3</sup> U.N. Secretary-General, *We the Peoples*, *supra* note 2, at 48.

<sup>4</sup> INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 1 (2001), <https://perma.cc/28Z5-X9EL> [hereinafter *The Responsibility to Protect*] (“The

narrowly-framed formulation of R2P was adopted by the U.N. High Level Panel on Threats, Challenges and Change in the 21st Century and in the Secretary-General's report *In Larger Freedom: Towards Development, Security, and Human Rights for All*.<sup>5</sup> The evolution and narrowing of the principle in these two reports provided the basis for the adoption of R2P into the U.N. system.

At the 2005 World Summit, over 170 heads of state and government—one of the largest such gatherings in history<sup>6</sup>—agreed to adopt R2P and defined it in paragraphs 138 and 139 of the World Summit Outcome Document, which was adopted by the U.N. General Assembly shortly thereafter.<sup>7</sup> Paragraphs 138 and 139 of the World Summit Outcome Document, the text which provides the operative basis for the doctrine,<sup>8</sup> explains that R2P affirms existing requirements in international treaty law and customary international law: “each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity” and is responsible for “the prevention of such crimes, including their incitement, through appropriate and necessary means.”<sup>9</sup> The World Summit Outcome Document recognizes that the international community should assist states in exercising that responsibility and in building their protection capacities.<sup>10</sup> It further says that the international community—through the U.N.—is responsible for using appropriate means,

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report[s] . . . central theme, reflected in the title, is ‘The Responsibility to Protect’, the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but that when they are unwilling or unable to do, that responsibility must be borne by the broader community of states.”). The genesis of the Commission’s understanding of state sovereignty as encompassing responsibilities and its formulation of “the responsibility to protect” was in the work of the U.N.’s First Special Rapporteur on the Rights of Internally Displaced Persons Francis Deng in the 1980s on states’ obligations to accept life-supporting protection and assistance for their citizens, where they are unable to provide it, and the international responsibility to act where a state’s failure to do so threatens a large number of lives. See THOMAS G. WEISS, HUMANITARIAN INTERVENTION 25 (2d ed. 2012). Deng also served as the first U.N. Special Adviser on the Prevention of Genocide from 2007 until 2012.

<sup>5</sup> See U.N. Secretary-General, *Note by the Secretary-General, in A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change*, ¶ 5, U.N. Doc. A/59/565 (Dec. 2, 2004); U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶¶ 34, 35, U.N. Doc. A/59/2005/Add.3 (Mar. 21, 2005).

<sup>6</sup> William W. Burke-White, *Adoption of the Responsibility to Protect*, in THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME 17, 21 n.18 (Jared Genser et al. eds., 2011).

<sup>7</sup> G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Oct. 24, 2005).

<sup>8</sup> Burke-White, *supra* note 6, at 22.

<sup>9</sup> G.A. Res. 60/1, *supra* note 7, at ¶ 138.

<sup>10</sup> *Id.*

including those provided in Chapters VI through VIII of the U.N. Charter,<sup>11</sup> to help protect populations against mass atrocity crimes when a state is “manifestly failing” to protect its population. Under such circumstances, the international community should take collective action, through the United Nations and including, if necessary, by the Security Council on a case-by-case basis in a “timely and decisive manner.”<sup>12</sup>

The Security Council welcomed the adoption of the World Summit Outcome Document in a resolution of its own one month after the World Summit ended,<sup>13</sup> highlighting the importance of cooperation between the U.N. and regional organizations in maintaining international peace and security. Several months later, in April 2006, the Security Council adopted Resolution 1674, which went further to explicitly reaffirm the “responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity” as defined in paragraphs 138 and 139 of the World Summit Outcome Document, and to call on states to meet that responsibility.<sup>14</sup>

The strategy for implementing R2P within the U.N. system was subsequently defined by Secretary-General Ban Ki-moon in his 2009 report, *Implementing the Responsibility to Protect*.<sup>15</sup> The strategy consisted of three pillars drawn from the framework of the relevant World Summit Outcome Document paragraphs: the protection responsibilities of the state (Pillar I), international assistance and capacity-building (Pillar II), and the timely and decisive response of the international community once a state has failed to protect its own civilian population (Pillar III).<sup>16</sup> The World Summit Outcome Document and Secretary-General’s reports outline the obligations of U.N. member states to respond collectively in a timely and decisive manner when a state is manifestly failing to protect its population.<sup>17</sup> In implementing R2P, the Security Council serves an integral role. While there are numerous ways for the Secretary-General and other U.N. agencies to engage to prevent mass atrocity crimes, R2P calls on the Security Council to use the full range of its powers under Chapters VI to VIII of the U.N. Charter if and when other actions are insufficient. The Security

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<sup>11</sup> For specific mechanisms under Chapters VI and VII, see Section II(A), *infra*.

<sup>12</sup> G.A. Res. 60/1, *supra* note 7, at ¶ 139.

<sup>13</sup> S.C. Res. 1631, ¶ 8 (Oct. 17, 2005).

<sup>14</sup> S.C. Res. 1674, ¶ 4 (Apr. 28, 2006). In the same year, the U.N. Security Council also recalled this earlier reaffirmation in the second paragraph to the preamble of its Resolution 1706 on the Darfur crisis. See S.C. Res. 1706, ¶ 2 (Aug. 31, 2006).

<sup>15</sup> *Implementing the Responsibility to Protect*, *supra* note 1.

<sup>16</sup> *Id.*, at 2. For more detailed explanations of each Pillar, see Section II(B), *infra*.

<sup>17</sup> U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, ¶ 31, U.N. Doc A/66/874-S/2012/578 (July 25, 2012).

Council's leadership and engagement with implementing R2P is therefore essential to the ultimate success or failure of R2P.

To date, no independent analysis has been conducted to evaluate various conditions that have led to successful or unsuccessful implementations of R2P by the Security Council in country-specific contexts. An analysis of Security Council implementation of R2P provides important guidance for future implementation of its mandate. This Article undertakes that analysis in three parts.

Section II explains the Security Council's role in implementing R2P given the specific responsibility assigned to the Council by R2P's original text and the U.N. Charter.

Section III discusses the Security Council's engagement with R2P in eleven country-specific cases where mass atrocity crimes were occurring. Section III is divided into three subsections. Subsection A examines three successful implementations of R2P by the Security Council while Subsection B examines four unsuccessful implementations based on various conditions that were present or absent in the country-specific R2P crises. This Article identifies three conditions that have generally needed to be present for the Security Council to successfully implement its R2P mandate: (1) there must be no government obstruction from the state in which mass atrocity crimes are being perpetrated, or, if government obstruction exists, one of the five permanent members of the Security Council (P5 member) must provide political will to overcome obstruction; (2) there must be cooperation between regional organizations and the Security Council; and (3) the Council must have the capacity to respond rapidly to the unfolding situation. As Subsection A demonstrates, all three conditions are necessary for successful implementation, while the absence of these conditions is more likely to lead to unsuccessful R2P implementation by the Security Council.

Finally, Subsection C specifically presents four situations in which implementation of R2P has been stalled due to the institutional design of the Security Council, which enables P5 members to stop all substantive action using their veto. Taking into account the lessons learned from successful and unsuccessful implementations of R2P, Section IV offers recommendations for the Security Council to ensure that the response to future mass atrocity crimes is more successful.

## II. ROLE OF THE U.N. SECURITY COUNCIL AND THE RESPONSIBILITY TO PROTECT

The Security Council is considered “the critical body ultimately responsible for discharging the international response” under the principle of R2P.<sup>18</sup> Subsection A begins by discussing the Security Council’s role in operationalizing R2P, as derived from the text of the World Summit Outcome Document on R2P and the Council’s mandate under the U.N. Charter. Subsection B discusses Secretary-General Ban Ki-Moon’s interpretation of the Security Council’s role, as laid out in his 2009 report entitled *Implementing the Responsibility to Protect*. This discussion provides a foundation for understanding why the Security Council’s engagement on R2P is centrally important to the successful implementation of R2P.

### A. The Primary Texts for Implementing R2P: The World Summit Outcome Document and the United Nations Charter

The starting point for analyzing the role of the Security Council in the implementation of R2P is the text of paragraphs 138 and 139 of the 2005 World Summit Outcome Document, which was adopted by the General Assembly. This text provides the international community’s mandate for R2P:

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 [the mass atrocity crimes of] genocide, war crimes, ethnic cleansing, and crimes against humanity*. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations.<sup>19</sup>

The key innovation of the doctrine is the assertion of an obligation on the part of the international community to protect civilian populations from mass atrocity crimes. The reference to the “international community” here describes, broadly, U.N. member states, regional organizations, the General Assembly, the Security Council, and other U.N. bodies. The obligation on the part of the international community under paragraph 139 is complementary to the

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<sup>18</sup> Burke-White, *supra* note 6, at 30 n.6.

<sup>19</sup> G.A. Res. 60/1, *supra* note 7, at ¶ 139 (emphasis added).

responsibility of the state under paragraph 138 to protect its own population against mass atrocity crimes.<sup>20</sup> Importantly, the adoption of R2P did not impose a new obligation on the international community, but rather clarified an existing responsibility that was already firmly embedded in treaty law and customary international law to prevent mass atrocity crimes.<sup>21</sup>

While the concept of an international responsibility to protect is novel, the proposed means for enacting the concept were already well established, as they are contained within the U.N. Charter. Paragraph 139 of the World Summit Outcome Document does not extend the powers of the international community beyond those already set out in Chapters VI to VIII of the U.N. Charter.<sup>22</sup>

Moreover, while the international community's collective action may arise from the Secretary-General and Secretariat, and while it falls within the competencies of multiple U.N. bodies, the text of paragraph 139 envisages the Security Council as the preeminent U.N. organ responsible for implementing R2P in the U.N. system when all other actions have failed. Collective action by the international community flows through the actions of the Security Council. This is consistent with the role of the Security Council under Article 24 in Chapter V of the Charter, in which members of the U.N. "confer on the Security Council primary responsibility for the maintenance of international peace and security."<sup>23</sup>

It follows that under Chapter VI of the Charter, the Security Council is a key player in the "peaceful settlement of disputes," with the power to make recommendations for resolving situations that it deems "likely to endanger the maintenance of international peace and security."<sup>24</sup> Where the Security Council determines an actual threat to or breach of peace, or an act of aggression under Article 39, Chapter VII of the Charter, the Council may *require* states to undertake action—individually or collectively—to maintain international peace

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<sup>20</sup> *Id.* at ¶ 138.

<sup>21</sup> Burke-White, *supra* note 6, at 25; *see also Implementing the Responsibility to Protect, supra* note 1, at ¶ 18 ("As noted above, the obligations of States that underpin pillar one [under paragraph 138 of the World Summit Outcome Document] are firmly embedded in pre-existing, treaty-based and customary international law.").

<sup>22</sup> This was reiterated in the Secretary-General's 2009 report on operationalizing R2P. *See Implementing the Responsibility to Protect, supra* note 1, at ¶ 3 ("[A]ctions . . . are to be undertaken only in conformity with the provisions, purposes and principles of the Charter of the United Nations.").

<sup>23</sup> U.N. Charter art. 24, ¶ 1.

<sup>24</sup> U.N. Charter arts. 33–38. Also see Janet Benshoof, *Women, Peace, and Security, in THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS* 68, 71 (Jared Genser & Bruno Stagno Ugarte eds., 2014) for a discussion of the Council's powers under Chapters VI and VII, generally, and the distinction between them.

and security. This ability is unique to the Security Council as an organ of the U.N.<sup>25</sup> Under Article 25 of the Charter, it is noted that “[m]embers of the U.N. agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>26</sup> Article 25 has been interpreted as binding member states to implement the Council’s decisions made under Chapter VII,<sup>27</sup> even where the implementation of such decisions might conflict with other international obligations.<sup>28</sup> Under Chapter VII, the Council can impose coercive measures not entailing the use of force and can authorize the use of force when other measures have failed to restore international peace and security.<sup>29</sup>

With broad Chapter VI and VII powers to make decisions and coordinate U.N. action in situations endangering or threatening international peace and security, the Security Council is uniquely placed within the U.N. system to respond powerfully and flexibly to protect populations from mass atrocity crimes. Paragraph 139 of the World Summit Outcome Document recognizes the Security Council’s unique capability in this regard, as it states that collective action would occur “through the Security Council, in accordance with the Charter.”<sup>30</sup> It is important to note that R2P does not legitimize collective action taken outside the U.N., unless such action has the explicit and specific support of relevant U.N. organs.<sup>31</sup>

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<sup>25</sup> The General Assembly can address issues of the maintenance of international peace and security under the “[u]niting for peace” procedure, where the Security Council “fails to exercise its responsibility with regard to international peace and security because of the lack of unanimity among its five permanent members.” *Implementing the Responsibility to Protect*, *supra* note 1, at ¶ 63. However, it is noted that “even in such cases . . . Assembly decisions are not legally binding on the parties.” *Id.*

<sup>26</sup> U.N. Charter art. 25; *see also* Sir Michael Wood, Senior Fellow at the University of Cambridge Lauterpacht Centre for International Law, Hersch Lauterpacht Memorial Lectures, The U.N. Security Council and International Law, First Lecture: The Legal Framework of the Security Council, ¶ 31 (Nov. 7, 2006), <https://perma.cc/UHR4-N5ND> (reaffirming the power of the Security Council under the U.N. Charter to issue binding decisions on members of the U.N.).

<sup>27</sup> THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 25(B)(II) (Bruno Simma et al. eds., 3d ed. 2002).

<sup>28</sup> U.N. Charter art. 103; THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 27, at 266–67 (“Article 103 functions as a de facto international supremacy clause mandating that a state’s U.N. obligations override its other international commitments.”).

<sup>29</sup> U.N. Charter arts. 39–51.

<sup>30</sup> G.A. Res. 60/1, *supra* note 7, at ¶ 139.

<sup>31</sup> Including, for example, what residual obligations or powers might attach to the General Assembly and regional organizations. For a discussion of this, *see* Burke-White, *supra* note 6, at 29.

## B. Characteristics of R2P and the U.N. Security Council's Role in Implementation

The challenge for R2P continues to be the “turning [of] the authoritative and enduring words of the 2005 World Summit Outcome into doctrine, policy and, most importantly, deeds.”<sup>32</sup>

In the 2009 report, *Implementing the Responsibility to Protect*, Secretary-General Ban Ki-moon presented three pillars to define how to implement R2P within the U.N. system. These are: Pillar I, asserting that every state has a responsibility to protect against mass atrocity crimes, which are defined as genocide, war crimes, ethnic cleansing, and crimes against humanity; Pillar II, affirming that the wider international community has a responsibility to encourage and assist states in meeting their Pillar I responsibility; and Pillar III, confirming that if a state manifestly fails to protect its population, the international community must take appropriate collective action in a timely manner in accordance with the U.N. Charter.<sup>33</sup> The Secretary-General delivered his report to the General Assembly, where it enjoyed broad support.<sup>34</sup>

After framing the three-pillared approach, Ban outlined the characteristics of the R2P doctrine in seven subsequent reports released during his tenure as Secretary-General, which were prepared with the assistance of the Special Advisers on the Prevention of Genocide and the Responsibility to Protect and informed by the annual dialogues in the General Assembly.<sup>35</sup> These characteristics of the R2P spoke generally to its implementation within the U.N. system and specifically to the responsibility the Security Council carries as the institution ultimately charged with implementing R2P if other actions have failed to be effective.

1. “Narrow but deep” explains the R2P’s focus on mass atrocities and its broad toolset for prevention and response within the U.N. system.

A central characteristic of R2P is that the implementation of the mandate is

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<sup>32</sup> *Implementing the Responsibility to Protect*, *supra* note 1, at ¶ 67.

<sup>33</sup> *Id.*

<sup>34</sup> INT’L COAL. FOR THE RESPONSIBILITY TO PROTECT, REPORT ON THE GENERAL ASSEMBLY PLENARY DEBATE ON THE RESPONSIBILITY TO PROTECT 4 (Sept. 15, 2009), <https://perma.cc/N9PQ-FCLV> (“Out of the 94 statements delivered, . . . [a] clear majority of governments . . . [w]elcomed the report of the Secretary-General.”); *see also* G.A. Res. 63/308, ¶ 3 (Oct. 7, 2009) (noting the Secretary-General’s report).

<sup>35</sup> *See Core Documents: Understanding RtoP*, ICRTOP, <https://perma.cc/RWG2-2RVM> (last visited Nov. 18, 2017).

“narrow but deep.”<sup>36</sup> That is, while the application of R2P is narrowly restricted to mass atrocity crimes, it is deep in terms of the broad array of tools available through the U.N. system to address these violations, up to and including action by the Security Council.<sup>37</sup> This encompasses a wide range of implementation instruments, including: *preventative measures* like monitoring and warning systems for mass atrocity crimes, institution-building, and diplomatic efforts; *protective measures* once mass atrocity crimes are committed, including refugee camps for fleeing populations, coercive measures against perpetrators including targeted individual sanctions on travel and finance, and the use of force; and *post-hoc measures* for responding to mass atrocity crimes, including creating international commissions of inquiry, referring cases to the International Criminal Court (ICC) for prosecution, and assisting local efforts for truth and reconciliation.<sup>38</sup>

The depth of engagement required by R2P combined with the breadth of mechanisms available to the U.N. means various organs must be engaged in implementing R2P in coordination with the Security Council. With respect to the U.N.’s intergovernmental organs, the General Assembly is well positioned to contribute to R2P through its mandates under Articles 10 through 14 of the Charter,<sup>39</sup> the *Uniting for Peace* mechanism,<sup>40</sup> and its regional and sub-regional mechanisms.<sup>41</sup> The Secretary-General, Special Advisers—particularly the Special Advisers on the Prevention of Genocide and the Responsibility to Protect—and Special Envoys are central to leading the public international and diplomatic response to mass atrocity crimes, including providing ready access to their good offices.<sup>42</sup> The Secretariat also serves a central role in gathering impartial assessment of information regarding the threat and perpetration of mass atrocity crimes against civilian populations and in ensuring information flows in a timely

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<sup>36</sup> U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, *supra* note 17, at ¶ 9.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at ¶ 30. Generally, the U.N. General Assembly can discuss and make recommendations to member states and the U.N. Security Council, and can call matters to the Council’s attention. *See also* U.N. Charter arts. 10, 14.

<sup>40</sup> *See, for example, Implementing the Responsibility to Protect*, *supra* note 1, at ¶ 57. On November 3, 1950, the U.N. General Assembly adopted Resolution 377A(V), “Uniting for Peace” Resolution, G.A. Res. 377A(V), 5 U.N. GAOR Nov. 3, 1950, which authorizes the General Assembly to seize the U.N. Security Council’s primary responsibility for the maintenance of international peace and security if the Council fails due to lack of unanimity. *See* Christian Tomuschat, *Uniting for Peace*, U.N. AUDIOVISUAL LIBRARY OF INT’L LAW, at 1 (2008), <https://perma.cc/7NQS-P8XR>.

<sup>41</sup> *See, for example, Implementing the Responsibility to Protect*, *supra* note 1, at ¶ 56.

<sup>42</sup> *Id.* at ¶ 10(d).

manner to U.N. decision-makers.<sup>43</sup>

Other U.N. bodies are well placed to contribute to the implementation of R2P by utilizing their good offices for persuasion, education, training, and assistance. These include the U.N. High Commissioner for Human Rights, the U.N. Human Rights Council, the U.N. High Commissioner for Refugees, and the U.N. Emergency Relief Coordinator.<sup>44</sup> Furthermore, U.N. factfinding missions and commissions of inquiry can contribute to preventing further mass atrocity crimes and can assist in establishing the facts and identities of perpetrators in their aftermath.<sup>45</sup> With so many bodies of the U.N. involved in carrying out R2P, the “[leadership] role [of] the Security Council in carrying forward [its] mandate” becomes especially important,<sup>46</sup> as the Charter uniquely enables it to make decisions binding on all member states.

## 2. The U.N. Security Council’s leadership has a critical mandate under R2P.

As envisioned by the World Summit Outcome Document and the General Assembly adoption of the doctrine of R2P, the Security Council is integral in implementing the international community’s timely and decisive R2P response when an R2P crisis emerges. As the U.N.’s most powerful organ, the Security Council ultimately should make “[d]ecisions about collective action, as well as judgments about whether peaceful means are inadequate and whether ‘national authorities are manifestly failing to protect.’”<sup>47</sup> The implementation of the Security Council’s R2P mandate relies upon its capacity to threaten and authorize enforcement measures, as well as to enact Chapter VI and VII resolutions, thereby “challenging the international community to live up to its own responsibilities under paragraph 139 of the Summit Outcome.”<sup>48</sup> The implementation of R2P requires the Security Council’s willingness to engage directly with this aspect of its capacities when implementing R2P.

Considering the depth of engagement the U.N. can pursue, the Security

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<sup>43</sup> *Id.* at ¶ 10(c); see also U.N. Secretary-General, *Early Warning, Assessment and the Responsibility to Protect*, ¶ 5, U.N. Doc. A/64/864 (July 14, 2010) [hereinafter *Early Warning*] (“Decisions about collective action . . . are normally informed, at least in part, by information and assessments provided by the Secretariat. . . . In such cases, the quality and timeliness of the inputs from the Secretariat are vital.”).

<sup>44</sup> See, for example, *Implementing the Responsibility to Protect*, *supra* note 1, at ¶ 30.

<sup>45</sup> U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, *supra* note 17, at ¶ 12.

<sup>46</sup> See, for example, *Implementing the Responsibility to Protect*, *supra* note 1, at ¶¶ 69–70 (noting also that the U.N. General Assembly’s leadership is also important to implementing R2P but a further discussion of its role is beyond the scope of this paper).

<sup>47</sup> *Early Warning*, *supra* note 43, at ¶ 5.

<sup>48</sup> *Implementing the Responsibility to Protect*, *supra* note 1, at ¶ 56.

Council's specific role in implementing R2P primarily lies within Pillar III: to facilitate the collective response of the international community when a state fails to meet its Pillar I responsibility of protecting its own population.<sup>49</sup> While much commentary on the Security Council's role under Pillar III focuses upon its capacity to authorize humanitarian intervention under Article 42 of the U.N. Charter, Pillar III calls on the Council to engage with a much broader range of potential pacific and coercive enforcement measures.<sup>50</sup> These measures include the recommendation or authorization of Chapter VI mechanisms, such as peace negotiations, monitoring or observer missions, and commissions of inquiry.<sup>51</sup> Additionally, when a state fails to respond to those peaceful and diplomatic efforts, the Security Council can also employ more coercive measures under Article 53 of the Charter, such as sanctions, arms embargoes, or referrals to the ICC. Finally, the Security Council can authorize military action through the U.N. or a regional organization, including, for example, establishing a no-fly zone or the deployment of troops.<sup>52</sup> Overall, the Security Council has significant flexibility when responding to an R2P crisis in determining how to implement its responsibility.

An important limitation to address—considered in more detail and country-specific application below<sup>53</sup>—is that although the Security Council has “extraordinary capacity” under the U.N. Charter to address situations of imminent or occurring mass atrocity crimes through implementation of R2P,<sup>54</sup> the Council's institutional architecture imposes constraints upon its capacity to implement the R2P. By structural design, the Security Council maintains an

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<sup>49</sup> *Id.* at ¶¶ 33, 34, 36, 40–42; U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, *supra* note 17, at ¶ 14. For example, in putting into practice the commitment of the international community to assist states in their capacity to meet their R2P obligations, the U.N. Security Council might encourage dialogue between different U.N. organs as well as member states on human rights and humanitarian standards and norms, *see Implementing the Responsibility to Protect*, *supra* note 1, at ¶ 33, as well as monitor thematic areas of concern internationally such as widespread and systematic sexual violence, *id.* at ¶ 34, including requiring reporting from states or the Secretary-General and permitting open debate in the Council on the issue, *id.* at ¶ 36. The Council might also resolve to provide international collective peacekeeping or military assistance to States, with their consent, to assist them in meeting their protection obligations, *id.* at ¶ 40, including by preventative deployment, i.e., to facilitate disarmament, to counter armed groups seeking to intimidate civilians, and to prevent the escalation of armed conflict, *id.* at ¶¶ 40–42.

<sup>50</sup> *See* U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, *supra* note 17, at ¶ 11(c).

<sup>51</sup> *Id.* at ¶¶ 22, 27–28.

<sup>52</sup> *See Implementing the Responsibility to Protect*, *supra* note 1, at ¶¶ 11(c), 56, 58; *see also* U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, *supra* note 17, at ¶¶ 31–32.

<sup>53</sup> *See* Section III, *infra*.

<sup>54</sup> Jared Genser & Bruno Stagno Ugarte, *Conclusion*, in *THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS*, *supra* note 24, at 463.

unequal distribution of power between its members.<sup>55</sup> Five of the Security Council's fifteen members, China, France, the U.K., the U.S., and Russia—that is, its P5 members—carry the institutional advantage of permanent tenure<sup>56</sup> and retain veto power in the Council's non-procedural decision-making by vote under Article 27(2) of the U.N. Charter.<sup>57</sup> Secretary-General Ban Ki-moon noted that their power and tenure impose upon P5 members “particular responsibility” under R2P and he urged them “to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect . . . and to reach a mutual understanding to that effect.”<sup>58</sup> However, a commitment of this kind among the P5 has been elusive, creating a danger of limiting the Security Council's capacity to implement R2P by the political will of its permanent members.

### 3. The three pillars of R2P are equally important.

Finally, the Secretary-General has stressed that all three pillars of R2P are equally important and designed to function interdependently, rather than in isolation.<sup>59</sup> As the Secretary-General stated: “[l]ike any other edifice, the structure of the responsibility to protect relies on the equal size, strength and viability of each of its supporting pillars. . . . [U]nless all three pillars are strong the edifice could implode and collapse.”<sup>60</sup> For the Security Council, this means that the pillars are not designed to be applied sequentially or in an arbitrarily graduated process.<sup>61</sup> Further, there is a degree of overlap between pillars, particularly Pillar II and III. For example, with regard to International Commissions of Inquiry, “international assistance under pillar two . . . relating to RtoP can also be a pillar three action insofar as it constitutes a timely and decisive response.”<sup>62</sup>

While the Security Council's main implementation strength lies with Pillar III, its early engagement to encourage a state's Pillar I responsibility to protect its own civilian population is vitally important. The Secretary-General suggested

<sup>55</sup> Nicole Deller, *Challenges and Controversies*, in *THE RESPONSIBILITY TO PROTECT*, *supra* note 6, at 78.

<sup>56</sup> *Id.*

<sup>57</sup> Genser & Stagno Ugarte, *supra* note 54, at 464–65.

<sup>58</sup> *Implementing the Responsibility to Protect*, *supra* note 1, at ¶ 61.

<sup>59</sup> *Id.* at ¶ 12 (“If the three supporting pillars were of unequal length, the edifice of the responsibility to protect could become unstable.”); *id.* at ¶ 29 (“[N]one of the pillars is designed to work in isolation from the others.”).

<sup>60</sup> *Id.* at Summary; *id.* at ¶ 12. See also Edward C. Luck, *From Promise to Practice: Implementing the Responsibility to Protect*, in *THE RESPONSIBILITY TO PROTECT*, *supra* note 6, at 97 (“[E]ach of the three [pillars] is essential to a balanced and effective strategy.”).

<sup>61</sup> U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, *supra* note 17, at ¶ 13.

<sup>62</sup> *Id.* at ¶ 12.

that “credible and proportionate action under pillar three, in accordance with the Charter, may help to encourage States to assume their responsibilities under pillar one.”<sup>63</sup> For example, Security Council-imposed sanctions can serve as a warning to states of the Council’s willingness to apply tougher measures should the state continue to fail to meet its Pillar I protection responsibilities while signaling to the international community that it is committed to implementing its R2P responsibilities.<sup>64</sup>

### III. THE U.N. SECURITY COUNCIL’S IMPLEMENTATION OF R2P IN COUNTRY-SPECIFIC SITUATIONS

This Section examines the Security Council’s implementation of its R2P mandate in eleven country-specific cases where mass atrocity crimes were committed and the Security Council has invoked R2P in some capacity.<sup>65</sup> It is further divided into three subsections to better evaluate specific conditions that have facilitated the successful or unsuccessful implementation of R2P by the Security Council.

When examining the past thirteen years of R2P implementation by the Security Council, there are three conditions that emerge as being determinative for whether the Security Council successfully or unsuccessfully implements R2P. First, there is either no obstruction by the government committing mass atrocity crimes, or, if government obstruction does take place, an interested P5 country provides the political will to overcome the government obstruction. Second, cooperation exists between regional organizations—like the African Union (A.U.) or neighboring regional powers—and the Security Council to coordinate the R2P response given the particular crisis in each country. Third, the Security Council has at its disposal a rapid response capacity to react to the perpetration of atrocity crimes in an efficient and effective manner to protect civilians.

Subsection A examines three case studies in which the Security Council successfully implemented R2P: Côte d’Ivoire, Libya, and Mali. After discussing the historical, political, and cultural background that led to the outbreak of atrocity crimes on a widespread and systematic scale, each case will trace the

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<sup>63</sup> *Id.* at ¶ 17.

<sup>64</sup> *Implementing the Responsibility to Protect*, *supra* note 1, at ¶ 57.

<sup>65</sup> While the case can arguably be made for R2P crises in more countries, this paper focuses on eleven countries where atrocity crimes reached a high enough threshold to be considered widespread and systematic. Further, this article will only examine cases where atrocities were largely being committed by state actors or opposition groups acting as state actors, since the principle of R2P as functioning under the U.N. imparts obligations and responsibility on state actors rather than non-state actors. Countries where atrocities were being committed almost exclusively by terrorist organizations will not be discussed.

actions by the Security Council, as well as other authorities, organizations, and individuals, in responding to the crisis. Evidence demonstrates that the Security Council successfully implemented R2P in these cases because all three conditions were met in each case, which allowed the Council to act in a timely and decisive manner to protect civilians from mass atrocity crimes.

Looking through the lens of the same three conditions, Subsection B examines four country-cases where either one or two of these conditions were substantially lacking, leading to unsuccessful implementations of R2P. The four cases—the Democratic Republic of the Congo, Sudan, South Sudan, and the Central African Republic—fail at least one condition, thus preventing the mobilization of forces and resources necessary to stop mass atrocity crimes as the crises were developing. These cases are considered unsuccessful in the sense that the implementation of R2P was not timely or decisive and failed to prevent mass atrocity crimes.

Finally, Subsection C evaluates the impact of a fourth condition: the Security Council veto. Examining the role of the veto in the cases of Yemen, Syria, Myanmar, and the Democratic People's Republic of Korea demonstrates the devastating impact that the internal composition of the Security Council can have as it effectively stalls the Council R2P response.

## A. U.N. Security Council's Successful Implementation of R2P

For the Security Council to successfully implement its R2P mandate, three conditions must be present: (1) no government obstruction from the state where mass atrocity crimes are occurring, or, if government obstruction does occur, then P5-level interest exists that can overcome government obstruction; (2) cooperation between regional organizations and the Security Council exists to effectively mobilize resources depending on the nature of the crisis; and (3) the Security Council or an external actor acting with the authorization of the Security Council has the capacity to rapidly respond to the crisis. In the following three case studies, all three conditions existed, allowing for successful R2P implementation by the Security Council to prevent further commissions of mass atrocity crimes.

### 1. Côte d'Ivoire

Following opposition contender Alassane Ouattara's resounding electoral victory in Côte d'Ivoire's November 28, 2010 presidential runoff election, incumbent President Laurent Gbagbo announced that he would not accept the results of the election.<sup>66</sup> With Gbagbo refusing to concede office and Ouattara

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<sup>66</sup> *The Crisis in Côte d'Ivoire*, ICRTOP, <https://perma.cc/YRW9-JWNX> (last visited Nov. 3, 2017).

refusing to stand down, each candidate declared himself the winner, took the presidential oath, and appointed a prime minister.<sup>67</sup> As Gbagbo refused to vacate the presidential palace, Ouattara established his seat of government in the Hotel du Golf in the Ivorian capital and was quickly barricaded in by pro-Gbagbo forces.<sup>68</sup> The contested election reignited longstanding tensions and violence between the Christian South, represented by Gbagbo, and the rebel-held Muslim North, represented by Ouattara.

After the election, pro-Gbagbo groups began attacking Ouattara supporters and immigrants from neighboring West African countries, responding to Gbagbo's call to "denounce" foreigners and leave Côte d'Ivoire to the "real" Ivorians.<sup>69</sup> Throughout December 2010, violent clashes increased and combatants on both sides committed war crimes and crimes against humanity, including execution of detainees, targeted killings of civilians and demonstrators, extrajudicial killings, rape and sexual violence, forced disappearance, persecution of non-Ivorian nationals, and destruction of civilian property.<sup>70</sup> By January 13, 2011, there were an estimated 400 civilian deaths, 23,500 refugees in surrounding countries, and 16,000 internally displaced persons (IDPs) as a result of the conflict.<sup>71</sup>

In response to the escalation of violence, the Security Council adopted Resolution 1962 on December 20, 2010, transforming the mandate of the United Nations Operation in Côte d'Ivoire (UNOCI)—which had been stationed in the country since the conclusion of its civil war in 2004<sup>72</sup>—and reauthorizing "all necessary means" for UNOCI to carry out its peacekeeping function and civilian protection mandate, "particularly in light of the current risks for human rights and civilians in the country."<sup>73</sup> The Security Council further reminded Côte d'Ivoire of its Pillar I R2P responsibility to protect its civilian population.<sup>74</sup> Resolution 1962 also invoked an inter-mission cooperation arrangement between UNOCI and the nearby United Nations Mission in Liberia

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<sup>67</sup> *Id.*

<sup>68</sup> Adam Nossiter, *Ivory Coast Leader's Rival Remains Under Blockade*, N.Y. TIMES (Jan. 5, 2011), <http://www.nytimes.com/2011/01/06/world/africa/06ivory.html>.

<sup>69</sup> *Côte d'Ivoire: Crimes Against Humanity by Gbagbo Forces*, HUM. RTS. WATCH (Mar. 15, 2011), <https://perma.cc/6HA7-9YVP>.

<sup>70</sup> *Id.*

<sup>71</sup> U.N. Office of the Special Adviser on the Prevention of Genocide, *Statement Attributed to the U.N. Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire* (Jan. 19, 2011), <https://perma.cc/7JJ3-67XB>.

<sup>72</sup> S.C. Res. 1528 (Feb. 27, 2004).

<sup>73</sup> S.C. Res. 1962, ¶¶ 3, 14, 15 (Dec. 20, 2010).

<sup>74</sup> *Id.* at pmb1.

(UNMIL) to authorize the temporary redeployment of peacekeeping troops from UNMIL to UNOCI.<sup>75</sup>

On December 29, 2010, Special Adviser on the Prevention of Genocide Francis Deng and Special Adviser on the Responsibility to Protect Edward Luck urged the Security Council to view the situation through the lens of R2P, issuing a joint statement reminding all parties in Côte d'Ivoire of their Pillar I obligations under R2P "to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."<sup>76</sup> In early January 2011, Secretary General Ban Ki-moon recommended several measures to the President of the Security Council to ensure UNOCI was able "to make credible efforts to protect civilians."<sup>77</sup> On January 19, 2011, the Special Advisers once again specifically warned about the potential of genocide, crimes against humanity, war crimes, and ethnic cleansing in the country, and recommended "urgent steps should be taken, in line with 'the responsibility to protect,' to avert the risk of genocide and ensure the protection of all those at risk of mass atrocities."<sup>78</sup> Ten days later, the Security Council unanimously adopted Resolution 1967,<sup>79</sup> which authorized the deployment of additional UNOCI military personnel<sup>80</sup> and reiterated that "all necessary means" should be employed to carry out UNOCI's mandate, including "protection of civilians."<sup>81</sup>

By March 2011, a broad group of regional and international bodies, including the A.U. Peace and Security Council,<sup>82</sup> ECOWAS,<sup>83</sup> and the E.U.,<sup>84</sup>

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<sup>75</sup> *Id.* at ¶ 7.

<sup>76</sup> Press Release, U.N. Office of the Special Adviser on the Prevention of Genocide, U.N. Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire (Dec. 29, 2010), <https://perma.cc/53RN-F8RL>.

<sup>77</sup> U.N. Security Council, Letter dated 7 January 2011 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2011/5 (Jan. 10, 2011).

<sup>78</sup> U.N. Office of the Special Adviser on the Prevention of Genocide, *Statement Attributed to the U.N. Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire* (Jan. 19, 2011), <https://perma.cc/4U4K-FN3X>.

<sup>79</sup> S.C. Res. 1967, ¶¶ 3, 14, 15 (Jan. 19, 2011); Press Release, Security Council, Amid Deteriorating Security Situation, Ongoing Political Impasse in Côte d'Ivoire, Security Council Bolsters Peacekeeping Mission There by 2,000 Additional Troops, U.N. Press Release SC/10156 (Jan. 19, 2011).

<sup>80</sup> S.C. Res. 1967, *supra* note 79, at ¶ 1.

<sup>81</sup> *Id.* at ¶ 8.

<sup>82</sup> The African Union adopted African Union High Implementation Panel [AUHIP]'s recommendation of recognizing Outtara as president on March 10, 2011. *See* African Union Peace and Security Council, Report of the Chairperson of the Commission on the Situation in Côte d'Ivoire, at ¶¶ 3, 5, PSC/PR/2 (CCLXXIII) (Apr. 21, 2011), <https://perma.cc/JG4D-JJTN>; African Union Peace and Security Council, Communique of the 265th Meeting of the Peace and Security Council, PSC/AHG/COMM.1 (CCLXV) (Mar. 10, 2011), <https://perma.cc/4QRD-LNND>.

had condemned the violence against civilians, recognizing Ouattara as the winner of the presidential election and calling on Gbagbo to step down. ECOWAS further requested that the Security Council strengthen UNOCI's mandate and permit the use of force to ensure that Gbagbo step down.<sup>85</sup> The Human Rights Council, for its part, established an independent, international commission of inquiry into the alleged abuses and rights violations on March 25, 2011.<sup>86</sup>

Despite these measures, pro-Gbagbo forces began using heavy weapons—including “mortars, rocket-propelled grenades, and heavy machine guns”—against civilians and U.N. peacekeepers.<sup>87</sup> Additionally, a three-day period of fighting between pro-Gbagbo forces and pro-Ouattara forces in late March 2011 led to a massacre of civilians in the town of Duékoué, with Ivan Šimonović, Assistant Secretary-General of the Office of the High Commissioner for Human Rights, estimating that 255 civilians were killed<sup>88</sup> and some human rights organizations putting the number as high as 1,000.<sup>89</sup> The Duékoué massacre internally displaced a further 28,000 civilians.<sup>90</sup>

On March 30, 2011, the Security Council responded to these developments by adopting Resolution 1975, which reiterated UNOCI's “all necessary means”

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<sup>83</sup> Economic Community of West African States (ECOWAS) Commission, Final Communiqué, at ¶ 25, ECW/HSG/ABJ/39 (Mar. 23-24, 2011), <https://perma.cc/WT78-T7XF> (expressing concern for the “fast deteriorating security and humanitarian situation” and urging the “speedy transfer of power” from Gbagbo to Ouattara).

<sup>84</sup> Presidency Conclusions D/10/5, ¶ 11, Brussels European Council (Jan. 25, 2011), <https://perma.cc/Q2EG-YL22> (“It called on all Ivorian leaders, both civilian and military, who have not yet done so to place themselves under the authority of the democratically elected President, Mr. Alassan Ouattara.”).

<sup>85</sup> U.N. Security Council, Letter dated 24 March 2011 from the Permanent Representative of Nigeria to the United Nations addressed to the President of the Security Council, Annex, ¶¶ 11, 12, U.N. Doc. S/2011/182 (Mar. 24, 2011).

<sup>86</sup> Human Rights Council Res. 16/25, U.N. Doc. A/HRC/RES/16/25, at ¶ 10 (Mar. 25, 2011).

<sup>87</sup> U.N. Secretary-General, *Twenty-seventh Progress Report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, ¶¶ 44, 48, 64, U.N. Doc. S/2011/211 (Mar. 30, 2011); see also Adam Nossiter, *Strikes by U.N. and France Corner Leader of Ivory Coast*, N.Y. TIMES (Apr. 4, 2011), <http://www.nytimes.com/2011/04/05/world/africa/05ivory.html>.

<sup>88</sup> Press Release, Press Conference on Situation in Côte d'Ivoire by Assistant Secretary-General of New York Office of United Nations High Commissioner for Human Rights, at ¶ 7 (Apr. 11, 2011), <https://perma.cc/7WXU-PQFR>.

<sup>89</sup> *Ivory Coast Massacre Kills 1,000: Agency*, CBC NEWS (Apr. 2, 2011), <http://www.cbc.ca/news/world/ivory-coast-massacre-kills-1-000-agency-1.1014298> (stating that the Red Cross reported 800 civilians killed and Caritas reported excess of 1,000 civilians killed).

<sup>90</sup> Press Release, Top U.N. Official Tells Security Council Post-Electoral Crisis in Côte d'Ivoire Ended; Says ‘I Remain Hopeful’, as Country Moves towards Reconciliation, Reconstruction, ¶ 18, U.N. Press Release SC/10223 (Apr. 13, 2011).

mandate to “protect civilians under imminent threat of physical violence . . . including to prevent the use of heavy weapons against the civilian population” and imposed targeted sanctions against Gbagbo and his inner circle for the “obstruct[ion of] the work of UNOCI” and the “commi[ssion of] serious violations of human rights and international humanitarian law.”<sup>91</sup> In a press conference following the unanimous adoption of the resolution,<sup>92</sup> Security Council members invoked the Council’s R2P mandate, stating: “Let there be no doubt that this situation is a collective global responsibility. We must act now.”<sup>93</sup>

Just days later, on April 4, 2011, Secretary-General Ban Ki-moon gave his formal authorization for a U.N. and French military response, pursuant to Resolution 1975.<sup>94</sup> Later that afternoon, a U.N. military helicopter fired directly on Gbagbo’s forces, taking out their heavy weapons systems and effectively preventing any further use of heavy artillery against civilians.<sup>95</sup> This intervention reversed the course of the conflict, and Gbagbo was arrested by Outtara’s forces eight days later.<sup>96</sup> In May 2011, the Prosecutor of the ICC commenced an investigation into the possible commission of war crimes and crimes against humanity<sup>97</sup> and ultimately issued arrest warrants for Gbagbo on November 23, 2011, for four counts of crimes against humanity—for murder, rape, other inhumane acts, and persecution—committed during the 2010–2011 post-election violence.<sup>98</sup>

The crisis in Côte d’Ivoire demonstrated the full power of the Security Council’s timely and decisive action under R2P in the face of mass atrocity crimes. It is also an example where all three conditions were met to allow the Security Council to act to avert further atrocities, leading to a successful

<sup>91</sup> S.C. Res. 1975, ¶¶ 6, 12 (Mar. 30, 2011).

<sup>92</sup> See, for example, U.N. SCOR, 66th Sess., 6058th Mtg., at 2, U.N. Doc. S/PV.6508 (Mar. 30, 2011).

<sup>93</sup> *Id.* Ambassador Ogwu for Nigeria stated, “Let there be no doubt this is a situation of collective global responsibility.” *Id.*

<sup>94</sup> U.N. Security Council, Letter dated 4 April from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2011/221 (Apr. 5, 2011). The letter requests the U.N. Operation in Côte d’Ivoire “with the support of the French forces” to engage to protect civilians. French president Nicolas Sarkozy echoed that U.N. Secretary-General Ban Ki-moon had requested French military assistance in accordance with Resolution 1975. See *Ivory Coast Fighters Surround Presidential Palace*, THE GUARDIAN (Apr. 5, 2011), <https://perma.cc/ZQ3Q-6G84>.

<sup>95</sup> Rukmini Callimachi & Marco Chown Oved, *U.N. Helicopter Fires at Gbagbo Ivory Coast Forces*, SALON (Apr. 4, 2011), <https://perma.cc/6QA5-7SG3>.

<sup>96</sup> *The Crisis in Côte d’Ivoire*, ICRTOP, *supra* note 66.

<sup>97</sup> Decision Assigning the Situation in the Republic of Côte d’Ivoire to Pre-Trial Chamber II, ICC-02/11-1-Anx (May 20, 2011), <https://perma.cc/4ZLD-TRTZ>.

<sup>98</sup> Prosecutor v. Gbagbo, ICC-02/11-01/15, <https://perma.cc/9EBY-JLTR>. Gbagbo’s trial began on January 28, 2016 and is ongoing as of publication. For updates on the case, visit *Gbagbo and Blé Goudé Case*, Int’l Crim. Ct., <https://perma.cc/C7DW-3UPD> (last visited Nov. 18, 2017).

implementation of R2P. Here, the Security Council response faced no obstruction from the legitimate and democratically-elected government and was therefore able to respond efficiently to the growing threat of heavy weapons against civilian communities. Further, the Security Council was able to quickly escalate its level of engagement in response to the direct threat of heavy weapons because of the regional support from the AU and ECOWAS. Both supported Ouattara as the legitimate president of Côte d'Ivoire. Additionally, ECOWAS explicitly requested the Security Council strengthen UNOCI's mandate, which it did shortly thereafter. Finally, the Security Council had the rapid response capacity, as UNOCI and French troops were already deployed and able to carry out the Secretary-General's orders to protect civilians from heavy artillery on the day they were issued. When UNOCI used military force against pro-Gbagbo troops, it did so with the explicit and limited intent of protecting civilian populations by disarming the heavy artillery systems Gbagbo's forces had deployed previously. All together, the Security Council responded to the escalating crisis within one month after violence initially broke out. Therefore, the Security Council's full engagement with its R2P mandate following the election violence in Côte d'Ivoire demonstrated a successful implementation of R2P and prevented countless additional civilian casualties.

## 2. Libya

In early 2011, Libyans began to protest against the four-decade rule of Colonel Muammar Qaddafi. The demonstrations commenced in Benghazi and spread throughout the country.<sup>99</sup> Qaddafi responded with extreme brutality, deploying "heavy armor, artillery, the air force, and even foreign fighters against his own citizens."<sup>100</sup> On February 22, 2011, Qaddafi gave a speech in which he urged the cleansing of Libya "house by house" to find the "cockroaches" protesting against him.<sup>101</sup> Qaddafi then ordered his air force to bomb opposition-held Benghazi, Libya's second largest city.<sup>102</sup>

In response, the League of Arab States held an emergency meeting that same day and suspended Libya's membership.<sup>103</sup> The Libyan representative to the League of Arab States stepped down the same day, stating: "I have resigned

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<sup>99</sup> Philippe Kirsch & Mohamed S. Helal, *Libya*, in THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS, *supra* note 24, at 396.

<sup>100</sup> *Id.*

<sup>101</sup> *Libya Protests: Defiant Gaddafi Refuses to Quit*, BBC NEWS (Feb. 22, 2011), <https://perma.cc/E8QE-8Y7G>.

<sup>102</sup> *Libya Air Force Pilots Refuse Orders to Bomb Opposition-held Benghazi*, HAARETZ (Feb. 23, 2011), <https://perma.cc/QE3U-6DCG>.

<sup>103</sup> *Arab League Suspends Libya Delegation—TV*, REUTERS (Feb. 22, 2011), <https://perma.cc/KPC7-VS5U>.

my post because it is dishonourable to serve a regime which kills its people and annihilates them in this inhumane manner.”<sup>104</sup> The Security Council immediately issued a press statement welcoming the League’s position and condemning Qaddafi’s repression of the demonstrators.<sup>105</sup> The statement specifically called upon the Libyan government “to meet its responsibility to protect its population,”<sup>106</sup> yet the regime continued attacking cities in which demonstrations were occurring. On February 25, 2011, the Secretary-General briefed the Security Council on indiscriminate killings and the shooting of peaceful demonstrators in Libya and urged the Council to “be mindful of the urgency of the moment.”<sup>107</sup> On the same day, the Human Rights Council issued a resolution calling on Libya to “meet its responsibility to protect its population,” noting that the government’s violations potentially amounted to crimes against humanity.<sup>108</sup>

The following day, on February 26, 2011, the Security Council unanimously adopted Resolution 1970, in which it “condemn[ed] the violence and use of force against civilians,” stated that the attacks against civilians “may amount to crimes against humanity,” and “recall[ed] the Libyan authorities’ responsibility to protect its population.”<sup>109</sup> Acting under Article 41 of Chapter VII of the U.N. Charter,<sup>110</sup> the Security Council adopted measures including an arms embargo, travel bans, and asset freezes against the government’s senior leadership, explicitly citing their involvement and complicity in “ordering, controlling, or otherwise directing, the commission of serious human rights abuses.”<sup>111</sup> The Council also referred the situation to the ICC and expressed its willingness to

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<sup>104</sup> Jack Shenker, *Arab League Urged to Condemn Gaddafi by Angry Protesters in Egypt*, THE GUARDIAN (Feb. 23, 2011), <https://perma.cc/DZU9-AJ58>.

<sup>105</sup> Press Release, Security Council, Security Council Press Statement on Libya, U.N. Press Release SC/10180-AMR/2120 (Feb. 22, 2011).

<sup>106</sup> *Id.*

<sup>107</sup> Press Release, Security Council, Fundamental Issues of Peace, Security at Stake, Secretary-General Warns as He Briefs Security Council on Situation in Libya, U.N. Press Release SC/10185 (Feb. 25, 2011).

<sup>108</sup> Human Rights Council Res. S-15/2, *Situation of Human Rights in the Libyan Arab Jamahiriya*, U.N. Doc. A/HRC/S-15/2, at ¶¶ 1–2, (Feb. 25, 2011).

<sup>109</sup> S.C. Res. 1970, pmb. (Feb. 26, 2011).

<sup>110</sup> U.N. Charter art. 41:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

<sup>111</sup> S.C. Res. 1970, *supra* note 109, at ¶ 22(a).

take stronger measures if the Libyan authorities failed to comply.<sup>112</sup>

Within Libya, the protesters formed armed groups to fight against the regime and advanced on multiple fronts in early March 2011.<sup>113</sup> In response, Qaddafi's forces launched an offensive that pushed the rebels back toward Benghazi.<sup>114</sup> While international support for military intervention had initially been slim and rebel groups on the ground themselves opposed military intervention, the imminent threat of a massacre in Benghazi by Qaddafi's forces changed many minds. On March 7, the Gulf Cooperation Council (GCC) passed a resolution calling on the Security Council to take "all necessary measures" to protect civilians in Libya.<sup>115</sup> The League of Arab States adopted a resolution on March 12, calling on the Security Council, "in view of the deterioration in the situation in Libya, to shoulder its responsibilities and take the measures necessary to immediately impose a no-fly zone on Libyan military aircraft and establish safe havens in areas that are exposed to bombardment, as precautionary measures that will provide protection for the Libyan people."<sup>116</sup>

Empowered by the resolutions of the GCC and the League of Arab States, the Security Council adopted Resolution 1973 on March 17, 2011, recalling the terms of Resolution 1970, "[r]eiterating the responsibility of the Libyan authorities to protect the Libyan population[,] and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians."<sup>117</sup> The resolution also expressed the Security Council's "determination to ensure the protection of civilians and civilian populated areas."<sup>118</sup> The operative parts of the resolution authorized member states that have properly notified the Secretary-General "to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack" in Libya and established a no-fly zone to help protect civilians.<sup>119</sup>

After notifying the Secretary-General,<sup>120</sup> the U.S.-led coalition began

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<sup>112</sup> *Id.*

<sup>113</sup> Kirsch & Helal, *supra* note 99, at 400.

<sup>114</sup> Chris McGreal, *Libya Rebels Face Last Stand as Gaddafi Forces Zero in on Benghazi*, THE GUARDIAN (Mar. 15, 2011), <https://perma.cc/WP2M-8ALJ>.

<sup>115</sup> Kirsch & Helal, *supra* note 99, at 401.

<sup>116</sup> U.N. Security Council, Letter dated 14 March 2011 from the Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2011/137 (Mar. 15, 2011).

<sup>117</sup> S.C. Res. 1973, pmbl. (Mar. 17, 2011).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at ¶¶ 4–12.

<sup>120</sup> See generally Permanent Rep. of Canada, Letter dated 17 March 2011 from the Permanent Representative of Canada to the United Nations addressed to the Secretary-General, U.N. Doc. S/2011/154 (Mar. 20, 2011); Permanent Rep. of France, Letter dated 18 March 2011 from the

preparations two days later and established a no-fly zone shortly thereafter.<sup>121</sup> NATO assumed leadership of the military intervention and proceeded to target the heavily armed ground troops loyal to Qaddafi, dealing a serious blow to those forces approaching opposition-held Benghazi.<sup>122</sup> NATO gradually intensified bombing of Qaddafi's forces and, by August 2011, rebels took control of Tripoli and declared a victory for the revolution.<sup>123</sup> Following the rebel victory, the Security Council transformed its mandate to post-conflict

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Permanent Representative of France to the United Nations addressed to the Secretary-General, U.N. Doc. S/2011/150 (Mar. 20, 2011); Permanent Rep. of U.S., Letter dated 18 March 2011 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2011/152 (Mar. 20, 2011); Permanent Mission of Denmark, Note verbale dated 18 March from the Permanent Mission of Denmark to the United Nations addressed to the Secretary-General, U.N. Doc. S/2011/153 (Mar. 20, 2011); Permanent Rep. of U.K., Letter dated 18 March 2011 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General, U.N. Doc. S/2011/149 (Mar. 20, 2011); President of S.C., Letter dated 18 March 2011 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S/2011/151 (Mar. 18, 2011); Permanent Rep. of France, Letter dated 19 March 2011 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, U.N. Doc. S/2011/155 (Mar. 20, 2011); Permanent Rep. of U.K., Letter dated 19 March 2011 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General, U.N. Doc. S/2011/157 (Mar. 20, 2011); Permanent Rep. of Lebanon, Identical letters dated 19 March 2011 from the Permanent Representative of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/65/792-S/2011/159 (Mar. 20, 2011); Permanent Rep. of Italy, Letter dated 19 March 2011 from the Permanent Representative of Italy to the United Nations addressed to the Secretary-General, U.N. Doc. S/2011/158 (Mar. 20, 2011); Permanent Mission of Qatar, Letter dated 19 March 2011 from the Chargé d'Affaires a.i. of the Permanent Mission of Qatar to the United Nations addressed to the Secretary-General, U.N. Doc. S/2011/163 (Mar. 21, 2011); Permanent Rep. of Ukraine, Identical letters dated 19 March 2011 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2011/164 (Mar. 21, 2011); Permanent Mission of France, Letter dated 22 March 2011 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, U.N. Doc. S/2011/175 (Mar. 23, 2011); Permanent Mission of Senegal, Letter dated 22 March 2011 from the Permanent Representative of Senegal to the United Nations addressed to the Secretary-General, U.N. Doc. S/2011/172 (Mar. 22, 2011). Also see generally the letters sent to the U.N. Security Council informing the Council of member states' decisions to act pursuant to and in accordance with Resolution 1973, sent between March 17-22, 2011, and available on pages 4-6, *UN Documents for Libya: Security Council Letters*, SEC. COUNCIL REP., <https://perma.cc/QYD2-HD3Q> (last visited Nov. 18, 2018).

<sup>121</sup> Elisabeth Bumiller & David D. Kirkpatrick, *NATO Agrees to Take Command of No-Fly Zone in Libya*, N.Y. TIMES (Mar. 24, 2011), <http://www.nytimes.com/2011/03/25/world/africa/25libya.html>.

<sup>122</sup> Chris McGreal, *Coalition Attacks Wreak Havoc on Ground Troops*, THE GUARDIAN (Mar. 20, 2011), <https://perma.cc/W2ZS-TE9Q>.

<sup>123</sup> Thomas Erdbrink & Liz Sly, *In Libya, Moammar Gaddafi's Rule Crumbling as Rebels Enter Heart of Tripoli*, WASH. POST (Aug. 22, 2011), <https://perma.cc/929B-HHFM>.

peace-building, establishing the U.N. Support Mission in Libya (UNSMIL) on September 16, 2011 through Resolution 2009, which also partially lifted the sanctions regime on the country.<sup>124</sup> On October 27, Security Council Resolution 2016 ended the no-fly zone and authorization for use of force to protect Libyan civilians.<sup>125</sup> Meanwhile, Qaddafi was captured and killed extrajudicially in Libya on October 20, 2011.<sup>126</sup>

Unfortunately, the interim government formed after Qaddafi's overthrow faced its own challenges in protecting civilians, as numerous militias previously united against Qaddafi began fighting each other.<sup>127</sup> However, the Security Council's engagement during the post-Qaddafi period has shied away from explicitly invoking R2P and has instead been focused on state-building.

Despite controversy over the type and extent of NATO's engagement after the expiration of the R2P mandate,<sup>128</sup> the Security Council's full R2P engagement in Libya was meaningful, timely, and decisive. Even though the Security Council faced government obstruction as Qaddafi himself opposed intervention, the strong support by the U.S., the U.K., and France—as well as a broad coalition of other countries—was enough to overcome government obstruction. After the Security Council adopted Resolution 1973 authorizing use of force to establish a no-fly zone, all three countries notified the Council of their decision to take action and begin operations within two days following the resolution adoption. Additionally, the R2P crisis in Libya also demonstrated the importance of the cooperation between regional bodies and the Security Council. The League of Arab States was the first to condemn Qaddafi's actions and a strong regional support by the League and the GCC helped push for R2P intervention. Both the GCC and the League of Arab States called on the Security Council to take all necessary measures and the League specifically requested the establishment of a no-fly zone as a preventative measure to protect the Libyan people. The Security Council responded by authorizing the request and mobilizing the resources of member states to establish a no-fly zone within one

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<sup>124</sup> S.C. Res. 2009, ¶ 12 (Sept. 16, 2011).

<sup>125</sup> S.C. Res. 2016, ¶¶ 5–6 (Oct. 27, 2011).

<sup>126</sup> Kareem Fahim et al., *Violent End to an Era as Qaddafi Dies in Libya*, N.Y. TIMES (Oct. 20, 2011), <http://www.nytimes.com/2011/10/21/world/africa/qaddafi-is-killed-as-libyan-forces-take-surt.html>.

<sup>127</sup> *Libya Post-Qaddafi*, ICRTOP, <https://perma.cc/AS5J-KGSB> (last visited Nov. 3, 2017).

<sup>128</sup> Criticisms of the R2P intervention in Libya include (1) the NATO mission's possible complicity in indiscriminate attacks on civilians, see Human Rights Council, Report of the International Commission of Inquiry on Libya, ¶ 86, U.N. Doc. A/HRC/19/68 (Mar. 8, 2012); and (2) the danger of transforming an R2P to regime change, which was beyond U.N. Security Council mandate, see Louis Charbonneau, *U.N. Chief Defends NATO from Critics of Libya War*, REUTERS (Dec. 14, 2011), <https://perma.cc/A4YT-4MHT>.

week. Finally, the third condition—rapid response capacity—was also present, as the military power of the U.S., U.K., France, and other NATO and coalition countries was fully operationalized within one week of the Security Council authorizing use of force to protect civilians. Within three weeks, the Security Council was able to quickly escalate its response from invoking Libya's Pillar I responsibility to protect its citizens to a full "all necessary means" use of force mission to protect civilians facing mass atrocity crimes perpetrated by Qaddafi's forces on the ground.

The R2P mission resulting from Resolution 1973 was considered a decisive element in stopping mass atrocity crimes against the civilian population in Libya. During the General Assembly informal debate on R2P in 2012, the Libyan delegation was unequivocal in Libya's support for R2P and noted that "the international community's rapid and decisive response via UNSC resolutions 1970 and 1973 averted a massacre and saved lives in the city of Benghazi."<sup>129</sup> As a doctrine to protect against crimes against humanity and gross human rights abuses, the delegation called R2P "one of the greatest achievements in the field of human rights this century."<sup>130</sup>

### 3. Mali

On March 22, 2012, a group of Malian soldiers staged a successful coup d'état, sending the president of Mali into hiding and triggering the establishment of a transition government.<sup>131</sup> The group embodied a growing frustration within the Malian military over the inability of the Malian government to provide sufficient resources to fight Tuareg separatist rebels in northern Mali.<sup>132</sup> The Tuareg, a nomadic community from Saharan regions of Africa, had been fighting the Malian government since the mid-1990s, seeking self-determination in northern Mali.<sup>133</sup> The National Movement for the Liberation of Azawad (MNLA), composed of various Tuareg groups, had formed in October 2011 and was bolstered by the substantial increase of weapons and arms coming from neighboring Libya following the downfall of Muammar Qaddafi.<sup>134</sup> The

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<sup>129</sup> GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, "TIMELY AND DECISIVE RESPONSE": SUMMARY OF THE INFORMAL INTERACTIVE DIALOGUE OF THE U.N. GENERAL ASSEMBLY ON THE RESPONSIBILITY TO PROTECT HELD ON 5 SEPTEMBER 2012 4, <https://perma.cc/89UW-Z28D> (last visited Nov. 18, 2017).

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

<sup>131</sup> *Conflict in Mali*, ICRTOP, at ¶ 4, <https://perma.cc/EV78-M3LU> (last visited Nov. 3, 2017).

<sup>132</sup> Adam Nossiter, *Soldiers Overthrow Mali Government in Setback for Democracy in Africa*, N.Y. TIMES (Mar. 22, 2012), <http://www.nytimes.com/2012/03/23/world/africa/mali-coup-france-calls-for-elections.html>.

<sup>133</sup> *Conflict in Mali*, *supra* note 131, at ¶ 2.

<sup>134</sup> Nossiter, *supra* note 132.

frustrations within the Malian military had grown further as the MNLA won a series of important military victories in northern Mali in January 2012, leading to the coup in March.<sup>135</sup>

The A.U. and ECOWAS responded promptly to the coup by suspending Mali's membership and imposing sanctions.<sup>136</sup> The Security Council issued a press statement on the day of the coup condemning the upset of a democratically-elected leader<sup>137</sup> and, on March 26, issued a presidential statement in support of regional bodies pursuing solutions to the political and humanitarian crisis.<sup>138</sup>

Seeking to take advantage of the post-coup political vacuum, MNLA joined with Ansar Dine, a militant Islamic rebel group with ties to Al-Qaeda, to extend its control over northern Mali. Between March 30 and April 1, the combined forces captured key cities in three northern states, culminating in a declaration of independence from Mali on April 6.<sup>139</sup> MNLA, Ansar Dine and various other Islamist groups<sup>140</sup> imposed a strict form of sharia law over its controlled territories in northern Mali and committed crimes against humanity and war crimes against civilians, including extrajudicial and arbitrary killings, torture, amputations, rape and other sexual violence, the recruitment of child soldiers, and "pillaging of hospitals, schools, aid agencies, and government buildings."<sup>141</sup> By April 2012, 107,000 Malians had been internally displaced and 177,000 had fled to neighboring countries as refugees.<sup>142</sup>

On July 3, 2012, the Human Rights Council condemned the human rights violations committed by MNLA and terrorist groups in northern Mali.<sup>143</sup> Just

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<sup>135</sup> *Conflict in Mali*, *supra* note 131, at ¶ 3.

<sup>136</sup> *AU Suspends Mali's Membership After Coup*, REUTERS (Mar. 23, 2012), <https://perma.cc/2TS7-GJUU>; *Emergency Mini-Summit of ECOWAS Heads of State and Government on the Situation in Mali*, ECOWAS (Mar. 29, 2012), <https://perma.cc/N49J-9BKJ>.

<sup>137</sup> Press Release, Security Council, Security Council Press Statement on Mali Crisis, U.N. Press Release SC/10590-APR/2359 (Mar. 22, 2012).

<sup>138</sup> S.C. Pres. Statement, ¶ 3, 2012/7 (Mar. 26, 2012).

<sup>139</sup> *Conflict in Mali*, *supra* note 131, at ¶ 7.

<sup>140</sup> Other notable Islamist groups included Al-Qaeda in the Islamic Maghreb (AQIM) and the Movement for Unity and Jihad in West Africa (MUJAO). These groups had their own aims but supported Ansar Dine in its efforts in northern Mali. See U.N. Secretary-General, *Report of the Secretary-General on the Situation in Mali*, ¶ 4, U.N. Doc. S/2012/894 (Nov. 29, 2012).

<sup>141</sup> *Mali: War Crimes by Northern Rebels*, HUM. RTS. WATCH (Apr. 30, 2012), <https://perma.cc/APF8-HX6M>; *Mali: Five Months of Crisis: Armed Rebellion and Military Coup*, AMNESTY INT'L (May 16, 2012), <https://perma.cc/ZPH2-SUPU>; *Mali: Islamist Armed Groups Spread Fear in North*, HUM. RTS. WATCH (Sept. 25, 2012), <https://perma.cc/8UXH-9PWU>.

<sup>142</sup> *Mali: War Crimes by Northern Rebels*, *supra* note 141.

<sup>143</sup> Human Rights Council, *Situation of Human Rights in the Republic of Mali*, ¶ 2, U.N. Doc. A/HRC/20/L.20 (July 3, 2012).

two days later, the Security Council adopted its own resolution condemning the violence and expressing support for ECOWAS and the A.U.'s political resolution efforts.<sup>144</sup> In September 2012, ECOWAS formally requested Security Council authorization for the deployment of a stabilization force in Mali,<sup>145</sup> and, in November 2012, the Secretary-General released a report on the deteriorating situation in Mali in which he also recommended a peacekeeping force to “support the [Malian] authorities in their primary responsibility to protect the population.”<sup>146</sup> In response, the Security Council passed Resolution 2085, authorizing the deployment of the African-led International Support Mission in Mali (AFISMA).<sup>147</sup> The resolution reemphasized the Malian government’s Pillar I responsibility to protect civilians, which had been invoked for the first time two months earlier, and further granted full authorization to AFISMA to take “all necessary measures” to “support the Malian authorities in their primary responsibility to protect the population.”<sup>148</sup>

Before AFISMA could deploy, the security situation in Mali took a turn for the worse. Ansar Dine pushed south to capture a strategic area close to the seat of the Malian transitional government, leading the transitional authorities to request urgent assistance from French troops on January 10, 2013.<sup>149</sup> The same day, the Security Council issued a press statement urging the rapid deployment of AFISMA and calling on “Member States to assist the settlement of the crisis in Mali.”<sup>150</sup> In accordance with international law,<sup>151</sup> France responded to the request of the Malian transitional authorities on January 11 and agreed to carry out airstrikes, which it then launched over a period of four days at the end of January, successfully driving rebel and terrorist groups out of strategic cities in northern Mali and restoring territorial control to the Malian government.<sup>152</sup>

In March 2013, the Secretary-General reported to the Security Council that members of Mali’s military were targeting Tuareg and Arab civilians for reprisals

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<sup>144</sup> S.C. Res. 2056, ¶ 1 (July 5, 2012).

<sup>145</sup> S.C. Res. 2071, pmb. (Oct. 12, 2012).

<sup>146</sup> U.N. Secretary-General, *Report of the Secretary-General on the Situation in Mali*, *supra* note 140, at ¶¶ 2–16, 57.

<sup>147</sup> S.C. Res. 2085, ¶ 9 (Dec. 20, 2012).

<sup>148</sup> *Id.* at ¶ 9(d).

<sup>149</sup> Josh Irish & Bate Felix, *Malian Army Beats Back Islamist Rebels with French Help*, REUTERS (Jan. 10, 2013), <https://perma.cc/V5H6-QDVT>.

<sup>150</sup> Press Release, Security Council, Security Council Press Statement on Mali, U.N. Press Release SC/10878-AMR/2502 (Jan. 10, 2013).

<sup>151</sup> Irish & Felix, *supra* note 149.

<sup>152</sup> *Conflict in Mali*, *supra* note 131, at ¶ 15.

and that these groups were at risk of mass atrocity crimes,<sup>153</sup> adding to concerns raised in earlier civil society reports that the Malian military might be perpetrating atrocities against civilians.<sup>154</sup> At the same time, the Malian transitional authorities,<sup>155</sup> the A.U. Peace and Security Council,<sup>156</sup> and ECOWAS<sup>157</sup> urgently requested a U.N. stabilization mission to help enforce peacekeeping under the transitional government.<sup>158</sup>

In response, the Security Council passed Resolution 2100 on April 25, 2013, establishing the Multi-Dimensional Integrated Stabilization Mission in Mali (MINUSMA).<sup>159</sup> MINUSMA had a rare peace enforcement—rather than peacekeeping—mandate, which authorized its 11,200 military personnel and 1,440 police personnel to use all necessary means “to protect, without prejudice to the responsibility of the transitional authorities of Mali, civilians under imminent threat of physical violence.”<sup>160</sup> Resolution 2100 also reemphasized Mali’s Pillar I responsibility to protect its civilian population.<sup>161</sup> MINUSMA was renewed most recently on June 29, 2017,<sup>162</sup> and has continued to operate in Mali, with support from French troops, to assist the political conflict resolution process being mediated by the A.U. and ECOWAS.<sup>163</sup>

While political stability and security in Mali remain elusive,<sup>164</sup> Security Council invocation and implementation of R2P was successful in preventing an escalation to mass atrocity crimes.<sup>165</sup> After Mali requested assistance from the

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<sup>153</sup> U.N. Secretary-General, *Report of the Secretary General on the Situation in Mali*, ¶¶ 16–20, U.N. Doc. S/2013/189 (Mar. 26, 2013).

<sup>154</sup> *Mali: Five Months of Crisis*, *supra* note 141.

<sup>155</sup> U.N. Secretary-General, Letter dated 16 April 2013 from the Secretary-General addressed to the President of the Security Council, 2, U.N. Doc. S/2013/230 (Apr. 16, 2013).

<sup>156</sup> U.N. Secretary-General, Letter dated 15 March 2013 from the Secretary-General addressed to the President of the Security Council, 2, U.N. Doc. S/2013/163 (Mar. 15, 2013).

<sup>157</sup> U.N. Secretary-General, Letter dated 16 April 2013 from the Secretary-General addressed to the President of the Security Council, 2, U.N. Doc. S/2013/231 (Apr. 16, 2013).

<sup>158</sup> *Id.*

<sup>159</sup> S.C. Res. 2100, ¶ 7 (Apr. 25, 2013).

<sup>160</sup> *Conflict in Mali*, *supra* note 131, at ¶ 13; *id.* at ¶¶ 16(c)(i), 17.

<sup>161</sup> S.C. Res. 2100, *supra* note 159, ¶ 17.

<sup>162</sup> S.C. Res. 2295, ¶ 14 (June 29, 2013).

<sup>163</sup> U.N. Secretary-General, *Report of the Secretary-General on the Situation in Mali*, ¶ 2, U.N. Doc. S/2017/271 (Mar. 30, 2017).

<sup>164</sup> *Id.*

<sup>165</sup> As the Multi-Dimensional Integrated Stabilization Mission in Mali (MINUSMA) has remained in Mali, conflict has shifted and it should be noted that the U.N. mission has become a target of terrorist groups operating in the area. With over 100 peacekeepers killed since its deployment, MINUSMA has been deemed “the [U.N.’s] deadliest ongoing peace operation.” Kevin Sieff, *The*

U.N. and French troops to protect against rebel groups, the Security Council issued a supportive press statement of the French troops that were deployed the following day. Further, regional authorities were actively involved in attempting to mitigate the crisis. The A.U. and ECOWAS responded within one week of the coup, and throughout the crisis the Security Council continued to explicitly endorse the A.U. and ECOWAS's political and diplomatic efforts. Additionally, both AFISMA and MINUSMA were authorized by the Security Council in line with ECOWAS's formal requests to deploy U.N. troops to Mali to protect and stabilize the situation on the ground. Finally, the Security Council had rapid response capacity in the form of French military assistance, which was able to be deployed the day following the request by the Malian transitional government to protect civilians and aid its fight against rebel groups. Through its engagement with the conflict in Mali, the Security Council demonstrated strong leadership in implementing R2P in a timely, decisive, and broad manner. With all three conditions met, the Security Council was able to implement and execute its responsibility to protect successfully, helping prevent atrocity crimes from being committed against the Malian people.

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By examining these three country-specific cases, it is apparent that a lack of government obstruction—or the ability to overcome government obstruction through the political will of a P5-member state—as well as cooperation between regional authorities and the Security Council and a rapid response capacity, are vitally important for a successful R2P intervention in the face of mass atrocity crimes.

Mali, Côte d'Ivoire, and Libya demonstrate the varying degrees to which government obstruction may play out in the face of an R2P crisis. In Mali, the sitting government requested intervention from French troops and U.N. assistance to deal with the crisis, meaning the Malian transitional government actively welcomed international assistance. Both Côte d'Ivoire and Libya demonstrate the Security Council's actions when faced with obstruction. While the illegitimate government in Côte d'Ivoire resisted international intervention, the legitimate and democratically-elected president welcomed assistance from the Security Council, similar to the situation in Mali. Libya presented a different set of issues, however, as Qaddafi opposed and obstructed outside assistance as he actively perpetrated atrocity crimes against his own people. There, interest from the U.S., U.K., and France provided political will and military possibility to act even in the face of Qaddafi's obstruction. Therefore, government

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*World's Most Dangerous U.N. Mission*, WASH. POST (Feb. 17, 2017), <https://perma.cc/QT5N-XBNT>.

obstruction in all three R2P success cases was either absent or overcome through P5-level interest.

Further, these cases demonstrated the vital importance of cooperation between regional organizations and the Security Council to determine the best R2P response given the nature of the crisis in each country. In Côte d'Ivoire and Mali, the A.U. and ECOWAS acted efficiently and effectively to condemn the outbreak of violence and atrocity crimes. ECOWAS was particularly active, calling on the Security Council to authorize or strengthen U.N. missions to help protect civilians in affected states. In Libya, the regional GCC and League of Arab States played a major role in requesting the U.N. to authorize a protective no-fly zone. Taking into account various sources of input—such as civil society, the Security Council itself, and the Human Rights Council—the Security Council's subsequent resolutions were supportive of regional organizations and in line with their recommendations. Importantly, the Security Council seized and maintained its leadership role as the international body to implement R2P action while authorizing missions and deploying resources in line with the recommendations of regional authorities.

Finally, all three cases illustrate the importance of a rapid response capacity for the Security Council to act timely and decisively in the face of humanitarian crises. In Côte d'Ivoire, the U.N. had a mission on the ground with which the Security Council could engage by expanding and strengthening its mandate. In the case of Mali, and Libya, the military capacity came from particular member states or a coalition of member states. In all cases, rapid response capacity existed so that troops and resources could be deployed almost immediately following the Security Council decision.

Taken together, the existence of all three conditions led the Security Council to implement its R2P mandate in a timely and decisive manner, as is required by the principle. Their timely and decisive authorization of R2P missions was successful in that it protected civilian populations from imminent or ongoing mass atrocity crimes.

## B. U.N. Security Council's Unsuccessful Implementation of R2P

Employing the same three conditions used in evaluating the Security Council's successful R2P implementation in Subsection A—(1) the level of government obstruction and the political will of a P5 country to overcome government obstruction; (2) the cooperation between regional organizations and the Security Council; and (3) the rapid response capacity to stop mass atrocity crimes—also provides insight into unsuccessful R2P implementation. As the four case studies in this Section illustrate, one or two missing conditions are sufficient to prevent successful implementation of R2P by the Security Council.

While different conditions are missing in each unsuccessful country-case study, one thing is clear: all three conditions are necessary for successful R2P implementation and the absence of a factor impedes the Security Council's ability to implement its R2P mandate.

### 1. The Democratic Republic of the Congo

The ongoing crisis in the Democratic Republic of the Congo (DRC) traces back to the aftermath of the Rwandan genocide in 1994, when Hutu ex-genocidaires crossed the border from Rwanda to the DRC.<sup>166</sup> These extremists formed the Democratic Forces for the Liberation of Rwanda (FDLR) and incited conflict that lasted over a decade and eventually encompassed the Congolese armed forces as well as the armed forces of Uganda and Rwanda, leading to regional instability and security risks.<sup>167</sup> During this time, the Security Council established the U.N. Organization Mission in the Democratic Republic of the Congo (MONUC) in 1999 with a mandate to monitor and assist with a ceasefire agreement and ensure “the protection of human rights.”<sup>168</sup>

However, various peace accords and ceasefire agreements failed to produce political stability, and violence continued throughout the 2000s, driven by ethnic disparities, religious motives, and natural resource competition. Besides fighting the FDLR, the Congolese armed forces also faced opposition from numerous other rebel and insurgent groups.<sup>169</sup> Other groups were backed or comprised of Rwandan and Ugandan armed forces and were committing war crimes in the DRC.<sup>170</sup> In addition to conflicts stemming from ethnic violence, competition for valuable natural resources like gold led to extensive human rights abuses as rebel groups, neighboring countries, and corporations fought to control valuable mines and important trade routes.<sup>171</sup> A report by the Office of the U.N. High

<sup>166</sup> *Crisis in the Democratic Republic of Congo*, ICRTOP, at ¶ 1, <https://perma.cc/NNG2-X5EM> (last visited Nov. 3, 2017).

<sup>167</sup> *Id.*

<sup>168</sup> S.C. Res. 1279, ¶ 5(e) (Nov. 30, 1999).

<sup>169</sup> The Congolese forces were fighting a broad range of groups, including M23, the Mai-Mai Sheka (a group formed in 2009 to help businessmen protect their natural mineral exploitation), the Allied Democratic Forces (a group with links to terrorist networks like Al-Qaeda and Al-Shabaab), and the Lord's Resistance Army (a group led by the infamous Joseph Kony and actively recruiting child soldiers). See *Crisis in the Democratic Republic of Congo*, *supra* note 166, at ¶¶ 8–11.

<sup>170</sup> Off. of the U.N. High Comm'r for Hum. Rts. (OHCHR), *Democratic Republic of the Congo, 1993–2003: Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003*, 259 (Aug. 2010), <https://perma.cc/6SEG-LB2C> [hereinafter *DRC: Mapping Human Rights Violations*].

<sup>171</sup> See, for example, *The Curse of Gold*, HUM. RTS. WATCH (June 1, 2005), <https://perma.cc/EN64-N7BT>.

Commissioner on Human Rights later determined that the “systematic and widespread attacks . . . could be characterized as crimes of genocide” and may constitute crimes against humanity or war crimes.<sup>172</sup>

Throughout the 2000s, the Congolese armed forces focused primarily on their fight against M23, a group comprised of ethnic Tutsis and backed by the Rwandan government.<sup>173</sup> This narrow focus on M23 allowed other rebel and insurgent groups to commit atrocities with impunity.<sup>174</sup> In July 2003, the Security Council attempted to stem the violence with Resolution 1493, which strengthened MONUC’s mandate by permitting “all necessary measures” to “protect civilians and humanitarian workers under imminent threat of physical violence.”<sup>175</sup> The resolution also imposed an arms embargo on rebel militias.<sup>176</sup>

Even after the deployment of MONUC in 2003, political stability remained elusive and violence continued. The ICC opened an investigation into war crimes and crimes against humanity committed in the DRC in June 2004.<sup>177</sup> In January 2006, an attack by the Lord’s Resistance Army (LRA) killed eight MONUC peacekeepers.<sup>178</sup> Four days after the attack, the Security Council adopted Resolution 1653, condemning the attack, reiterating calls for demobilization of all armed rebel groups, and invoking the DRC’s Pillar I obligation to protect its citizens by underscoring that the “government in the region have a primary responsibility to protect their populations, including from attacks by militias and armed groups.”<sup>179</sup> Resolution 1653 marked the Security Council’s support for the principle of R2P four months after its adoption at the 2005 World Summit. During the open debate preceding the adoption of Resolution 1653, the U.K., France, and four other speakers addressed the DRC’s Pillar I responsibilities under R2P, while some went further to call on the Security Council and international community to intervene to meet their R2P

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<sup>172</sup> DRC: Mapping Human Rights Violations, *supra* note 170, at 31, 463–64.

<sup>173</sup> *Crisis in the Democratic Republic of Congo*, *supra* note 166, ¶ 12; see DRC: Mapping Human Rights Violations, *supra* note 170, at ¶ 48.

<sup>174</sup> *Crisis in the Democratic Republic of Congo*, *supra* note 166, at ¶¶ 8–11.

<sup>175</sup> S.C. Res. 1493, ¶¶ 25–26 (July 28, 2013).

<sup>176</sup> *Id.* at ¶ 20. For further discussion of the U.N. Organization Mission in the Democratic Republic of the Congo’s (MONUC) operation and its escalation during the period from 1999 to 2006, see Anthony W. Gambino, *Democratic Republic of the Congo*, in *THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS*, *supra* note 24, at 360–63.

<sup>177</sup> See *Situation in the Democratic Republic of the Congo*, ICC-01/04 (June 2004), <https://perma.cc/5S5X-DV2B>.

<sup>178</sup> U.N. Secretary-General, Statement Attributable to the Secretary-General on the Democratic Republic of Congo (Jan. 23, 2006), <https://perma.cc/N57D-22P5>.

<sup>179</sup> S.C. Res. 1653, ¶ 8–10 (Jan. 27, 2006).

obligations.<sup>180</sup>

Violence spiked again to dangerous levels in 2008. As Congolese armed forces intensified military operations and the LRA retaliated, forces on both sides “killed more than 1500 civilians, raped thousands of women and girls, abducted hundreds of adults and children, and burned to the ground thousands of homes, sometimes entire villages.”<sup>181</sup> A massacre of 150 civilians killed in twenty-four hours in eastern Congo with a contingent of U.N. peacekeepers stationed less than a mile away shed renewed light on MONUC’s lack of resources and poor communication capabilities.<sup>182</sup> The extent of wartime rape and sexual abuse was also brought to light, with the U.N. reporting 15,000 acts of rape perpetrated by Congolese soldiers and rebel groups annually in both 2008 and 2009.<sup>183</sup> After a visit to the DRC in early 2010, the U.N. Special Representative on Sexual Violence in Conflict stated that the DRC had become “the rape capital of the world” as perpetrators continued to rape women and girls with impunity.<sup>184</sup> By 2008, the International Rescue Committee

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<sup>180</sup> See U.N. SCOR, 61st Sess., 5359th mtg. at 18, U.N. Doc. S/PV.5359 (Jan. 27, 2006). Mr. Burian for Slovakia, then a member of the Council, explained: “[W]e agree that the primary responsibility to protect lies with Governments. . . . However, it is the responsibility of the international community to help and protect the most vulnerable if the national authorities are not able to cope with the magnitude of the problem.” *Id.* Ms. Loj for Denmark, then a member of the Council, stated: “We should like to stress that governments in the region have the primary responsibility to protect their populations.” *Id.* at 20. The U.K., a P5 member of the Council, stated: “We urge those Governments to work together, and to work with the United Nations, to take the steps necessary to better protect their own civilians . . . The international community has an important supportive part to play.” *Id.* at 30.

See also U.N. SCOR, 61st Sess. 5359th mtg. at 2, U.N. Doc. S/PV.5359 (Resumption 1) (Jan. 27, 2006). Ms. Leahy for Canada, then a non-member of the Council, stated: “This debate is essentially an appeal to the leaders of countries to fulfil their responsibility to protect their populations.” *Id.* Mr. Lovald on behalf of Norway, then a member of the Council, stated: “The Government of Norway acknowledges the fact that the responsibility to protect all Ugandan citizens lies with the [Ugandan government]” but urged the Security Council to act, as the LRA represents a threat to regional peace and security. *Id.* at 46.

<sup>181</sup> *DR Congo: Massive Increase in Attacks on Civilians*, HUM. RTS. WATCH (July 2, 2009), <https://perma.cc/6TQS-MUD7>. LRA was actively operating by killing and abducting civilians. See *The Christmas Massacres: LRA attacks on Civilians in Northern Congo*, HUM. RTS. WATCH (Feb. 16, 2009), <https://perma.cc/W3ZM-24DT>.

<sup>182</sup> Lydia Polgreen, *A Massacre in Congo, Despite Nearby Support*, N.Y. TIMES (Dec. 11, 2008), <http://www.nytimes.com/2008/12/11/world/africa/11congo.html>.

<sup>183</sup> Neil MacFarquhar, *U.N. Officials Say 500 Were Victims of Congo Rapes*, N.Y. TIMES (Sept. 7, 2010), <http://www.nytimes.com/2010/09/08/world/africa/08nations.html>; see also *Atrocities Beyond Words: A Barbarous Campaign of Rape*, ECONOMIST (May 1, 2008), <https://perma.cc/S2NM-LB82>.

<sup>184</sup> *Tackling Sexual Violence Must Include Prevention, Ending Impunity—U.N. Official*, U.N. NEWS CENTRE (Apr. 27, 2010), <https://perma.cc/2G4V-CARW>.

reported that 5.4 million people had died since the start of the conflict in 1998, with 45,000 people continuing to die each month.<sup>185</sup>

Faced with continuing violence and an ineffective MONUC mission even as the U.N. continued to increase MONUC troop levels, the Security Council transformed MONUC into the U.N. Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) with Resolution 1925 in May 2010.<sup>186</sup> The Resolution invoked the DRC's Pillar I responsibility to protect its civilian population and engaged fully with the Security Council's Pillar II and III obligations under R2P by mandating MONUSCO to use "all necessary means" to "[e]nsure the effective protection of civilians."<sup>187</sup>

Even after MONUSCO's deployment, further reports emerged demonstrating the extent of crimes against humanity and war crimes committed by all parties in the DRC. In 2012, a U.N. panel of experts substantiated that both Rwanda and Uganda had armed rebel groups, particularly M23 rebels.<sup>188</sup> Human Rights Watch reported that Rwanda was also committing war crimes by forcibly recruiting men and children to fight for M23.<sup>189</sup> As part of its efforts to assist the Congolese armed forces in their targeted fight against M23, the Security Council imposed an arms embargo on M23 and FLDR rebels, as well as a travel ban and assets freeze on two prominent M23 leaders in January 2013.<sup>190</sup> The arms embargo was initially ineffective, as Rwanda and Uganda continued to supply rebel groups with weapons.<sup>191</sup> Facing continued sanctions violations, the U.S., the E.U., and the U.K. cut military aid to Rwanda in October 2013.<sup>192</sup>

The insufficient resources and support that had plagued MONUC continued to hinder MONUSCO's civilian protection mandate. The inefficacy of MONUSCO was most starkly highlighted in November 2012, when a small group of M23 rebels captured the city of Goma while the MONUSCO troops

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<sup>185</sup> Chris McGreal, *War in Congo Kills 45,000 People Each Month*, THE GUARDIAN (Jan. 23, 2008), <https://perma.cc/5LYL-DBMH>.

<sup>186</sup> S.C. Res. 1925, ¶ 1 (May 28, 2010).

<sup>187</sup> *Id.*, at pmb1, ¶¶ 11–12.

<sup>188</sup> Louis Charbonneau & Michelle Nichols, *Exclusive: Rwanda, Uganda Arming Congo Rebels, Providing Troops—U.N. Panel*, REUTERS (Oct. 17, 2012), <https://perma.cc/Z5YY-49Z7>.

<sup>189</sup> *DR Congo: M23 Rebels Committing War Crimes*, HUM. RTS. WATCH (Sept. 11, 2012), <https://perma.cc/X2YU-49H8>.

<sup>190</sup> *Crisis in the Democratic Republic of Congo*, *supra* note 166, at ¶ 1124.

<sup>191</sup> *Id.*

<sup>192</sup> David Smith, *U.S. Blocks Military Aid to Rwanda Over Alleged Backing of M23 Child Soldiers*, THE GUARDIAN (Oct. 4, 2013), <https://perma.cc/23N9-34PC>; Nicholas Kulish, *After Outside Pressure, Rebels in Congo Lay Down Their Arms*, N.Y. TIMES (Nov. 5, 2013), <http://www.nytimes.com/2013/11/06/world/africa/m23-rebels-democratic-republic-congo.html>.

stood by, unable to engage, because the MONSCUO mandate did not permit affirmative engagement and was limited to supporting the Congolese armed forces, which were absent in Goma.<sup>193</sup> As a result of this unacceptable loss and responding to requests from the International Conference on the Great Lakes Region (ICGLR) and the Southern African Development Community (SADC),<sup>194</sup> the Security Council unanimously authorized the first Intervention Brigade in March 2013 with Resolution 2098.<sup>195</sup> The Intervention Brigade within MONUSCO was uniquely endowed with *offensive* capabilities to help execute MONUSCO's "all necessary measures" civilian protection mandate, including "contain[ing] threats to civilians before, during and after any military intervention."<sup>196</sup> This unprecedented mandate substantially increased MONUSCO's ability to pursue its task of civilian protection and was a crucial factor in helping the Congolese armed forces to defeat the M23 rebel group by November 2013.<sup>197</sup>

Fighting in the DRC continues today, as does the perpetration of mass atrocity crimes against the civilian population.<sup>198</sup> With the effective elimination of M23, the DRC and the Congolese armed forces have turned to the remaining rebel groups to attempt to bring stability to all parts of the country.<sup>199</sup> The Security Council has extended MONUSCO's mandate several times, most recently until March 2018, reaffirming its civilian protection mandate under "all necessary measures."<sup>200</sup> Resolutions continue to demonstrate the Security Council's full engagement with its R2P responsibilities while reminding the DRC of its Pillar I responsibility to protect its civilian population. The Security Council has also employed other tools, such as continuing to impose sanctions on individuals "planning, directing or committing acts in the DRC that

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<sup>193</sup> David Lewis & Michelle Nichols, *U.N. Defends Failed Attempt to Halt Capture of Congo's Goma*, CHICAGO TRIB. (Nov. 21, 2012), <https://perma.cc/MG6Q-948R>.

<sup>194</sup> Both the International Conference on the Great Lakes Region (ICGLR) and the Southern African Development Community supported a more proactive approach by the U.N. Security Council. See S.C. Res. 2098, pmbl. (Mar. 28, 2013) ("Taking note of the special report of the Secretary-General (S/2013/119) on the DRC and the Great Lakes Region and of its recommendations contained therein, including regarding the establishment of an 'Intervention Brigade' within MONUSCO, based on the idea initially conceived by the ICGLR and supported by SADC.") (emphasis added).

<sup>195</sup> *Id.* at ¶ 9.

<sup>196</sup> *Id.* at ¶ 12(a); see also *Crisis in the Democratic Republic of Congo*, *supra* note 166, at ¶ 28.

<sup>197</sup> *DR Congo's M23 Rebel Chief Sultani Makenga 'Surrenders'*, BBC NEWS (Nov. 7, 2013), <https://perma.cc/G7NE-Q53Z>; *Crisis in the Democratic Republic of Congo*, *supra* note 166, at ¶ 27.

<sup>198</sup> INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT, A TOOLKIT ON THE RESPONSIBILITY TO PROTECT 25, <https://perma.cc/P3UW-Q9H2> (last visited Nov. 3, 2017).

<sup>199</sup> *Crisis in the Democratic Republic of Congo*, *supra* note 166, at ¶ 36.

<sup>200</sup> S.C. Res. 2348, ¶ 33 (Mar. 31, 2017).

constitute human rights violations.”<sup>201</sup>

Aspects of the Security Council’s engagement with the crisis in the DRC demonstrate the potential of R2P to protect civilians and stop mass atrocity crimes. The regionally-proposed and supported Intervention Brigade, which was unanimously deployed by the Security Council, had the offensive capabilities to pursue MONUSCO’s civilian protection mandate and effectively use force to stop atrocity crimes. The Intervention Brigade was instrumental in providing the Security Council with the rapid response capacity necessary to stop the operations of the M23 rebel group, a group that had perpetrated extensive atrocity crimes against civilian communities.

For the most part, however, Security Council engagement with the crisis in the DRC has fallen short of protecting millions of civilians from mass atrocity crimes over the past two decades. While government obstruction itself was absent in that the U.N. mission worked closely with the Congolese armed forces to protect civilians, the remaining two conditions hindered a successful implementation of R2P. First, countries in the region not only failed to cooperate with the Security Council, but were actively engaged in perpetrating mass atrocity crimes. Rwanda and Uganda both funded and provided soldiers for rebel groups operating in the DRC, thereby actively helping perpetrate those crimes. Second, the Security Council had an extremely delayed effective response to the crisis. Neither MONUC nor MONUSCO was able to effectively fulfill its civilian protection mandate, lacking capacity, resources, and staffing that continuously undermined the mission. Both U.N. missions failed to provide the Security Council with a rapid response capacity as atrocity crimes were being committed. The combination of these conditions led to the languishing of the crisis in the DRC for over two decades and a distinct failure by the Security Council to successfully implement R2P to protect millions of civilians from mass atrocity crimes.

## 2. Sudan

The protracted and ongoing humanitarian crises in Sudan’s war-torn regions of Darfur, Blue Nile, and South Kordofan have their roots in civil conflict over land resources that began in the 1970s and evolved along ethnic lines in the 1980s with the radicalization of Arab groups and marginalization of non-Arab groups. Over the course of four decades, a convergence of man-made conflict and natural phenomena created a political, economic, and social climate

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<sup>201</sup> The U.N. sanctions regime against the DRC and rebel groups was recently renewed, *see* S.C. Res. 2360, ¶ 1 (June 21, 2017). For sanctionable actions, *see* S.C. Res. 2293, ¶ 7(e) (June 23, 2016).

in Sudan that led to the humanitarian crisis in Darfur in 2003 and the crisis in Blue Nile and South Kordofan in 2005.<sup>202</sup>

*a) Darfur*

Throughout the 1970s and 1980s, extended periods of drought and increasing desertification created tensions between non-Arab farmers (including the Fur, Zaghawa, and Masalit ethnic groups) and nomadic Arab groups who grazed cattle, which eventually erupted into violence in 1987.<sup>203</sup> By the time Arab leader Omar al-Bashir rose to power through a coup in 1989,<sup>204</sup> the battle lines between Arab and non-Arab groups had been drawn—and would shape the humanitarian crises to come.<sup>205</sup> The government actively pursued policies that favored Arab groups, because al-Bashir relied on Arab networks throughout the country to remain in power.<sup>206</sup> As al-Bashir politically marginalized non-Arab groups, local conflict increased and Arab militias began attacking non-Arab villages during the late 1990s.<sup>207</sup> The government began recruiting from radical Arab groups within Sudan and neighboring Libya to further build up the Janjaweed militias so they could fight alongside the government's Sudanese Armed Forces (SAF).<sup>208</sup> In response, rebel forces composed largely of the Fur and Zaghawa ethnic groups formed the Sudanese Liberation Movement/Army<sup>209</sup> (SLM/A) and the Justice and Equality Movement (JEM). Throughout 2002 and 2003, SLM/A and JEM staged increasingly successful attacks against the SAF, placing the government in the precarious position of being unable to exert military control over parts of North, West, and South Darfur.<sup>210</sup>

In retaliation, the government began to systematically and indiscriminately attack non-Arab villages, engaging in mass atrocity crimes that reached their

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<sup>202</sup> This section will discuss Darfur, Blue Nile, and South Kordofan as mass atrocity crimes occurred during conflicts in these regions. This paper will not discuss the conflicts in the Adyei Area, Eastern Sudan, or the 2013 Khartoum protests because, while human rights violations occurred, the conflicts did not reach the level of R2P concerns.

<sup>203</sup> *The Crisis in Darfur*, ICRTOP, at § II, <https://perma.cc/P5QX-CCS7> (last visited Nov. 3, 2017); Andrew S. Natsios & Zachary Scott, *Darfur, Sudan*, in *THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME*, *supra* note 6, at 237–38.

<sup>204</sup> *The Crisis in Darfur*, *supra* note 203, at § II.

<sup>205</sup> *Id.*

<sup>206</sup> Natsios & Scott, *supra* note 203, at 239; *The Crisis in Darfur*, *supra* note 203, at § II.

<sup>207</sup> This was the Masalit-Arab War of 1996-1999. See Natsios & Scott, *supra* note 203, at 239.

<sup>208</sup> Natsios & Scott, *supra* note 203, at 240.

<sup>209</sup> The SLM/A initially started as the Darfur Liberation Front. See *id.* at 240.

<sup>210</sup> *The Crisis in Darfur*, *supra* note 203, at § IV.

height from September 2003 to April 2004.<sup>211</sup> The SAF, in conjunction with the Janjaweed militias, engaged in systematic violence against civilians including mass executions, rape and other sexual violence, child abduction, looting of herds, destruction of civilian property, and the burning of fields and villages.<sup>212</sup> Government forces carried out indiscriminate aerial bombings while the Janjaweed militias would attack from the ground, killing those that attempted to escape and burning villages after looting.<sup>213</sup> The government's policy of indiscriminate civilian attacks during this time is estimated to have led to 300,000 civilian deaths, 2.7 million IDPs, and 250,000 refugees.<sup>214</sup>

Humanitarian aid organizations and the U.S. government began reporting on the commission of mass atrocity crimes and documenting the devastating impact on civilians in mid-2003.<sup>215</sup> In August 2004, the A.U. was the first international organization to intervene, deploying a mission (AMIS) to monitor a recent ceasefire agreement.<sup>216</sup> The A.U. expressed some hostility towards a potential intervention by non-African countries and various leaders stated that

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<sup>211</sup> Natsios & Scott, *supra* note 203, at 241.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*; Bruno Stagno Ugarte, *Sudan (Darfur)*, in THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS, *supra* note 24, at 347; *see also* BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF ST. ARCHIVE Pub. No. 11182, DOCUMENTING ATROCITIES IN DARFUR (Sept. 2004), <https://perma.cc/AZJ3-CFCJ> [hereinafter DOCUMENTING ATROCITIES IN DARFUR] for testimonies from refugees of aerial attacks. Attacks on villages began with government aerial attack, followed by government soldiers and Janjaweed militiamen entering villages, with fleeing villagers targeted by aerial bombing and foot soldiers looting villages after civilians had fled. Multiple attacks over many months often occurred before the village was destroyed through burning or bombing.

<sup>214</sup> *The Crisis in Darfur*, *supra* note 203, at § IV.

<sup>215</sup> *See generally* Amnesty Int'l, *The Looming Crisis in Darfur*, AI Index AFR 54/041/2003 (June 30, 2003); *The Other War in Sudan: A Call for High Level Observer in Western Sudan Peace Process*, RELIEFWEB (Dec. 10, 2003), <https://perma.cc/5KLR-EA8E>; *Darfur in Flame: Atrocities in Western Sudan*, 16 HUM. RTS. WATCH no. 5(A) (Apr. 2004), <https://perma.cc/G27S-MP4G>; *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, HUM. RTS. WATCH (May 6, 2004), <https://perma.cc/GRN6-CZS9>. The U.S. Department of State also released information in April 2004. *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF ST. ARCHIVE, Fact Sheet, SUDAN: ETHNIC CLEANSING IN DARFUR (Apr. 27, 2004), <https://perma.cc/7UMT-32RD>; DOCUMENTING ATROCITIES IN DARFUR, *supra* note 213. Congress was briefed on the atrocities in Darfur in June 2004. *See generally* TED DAGNE, CONG. RESEARCH SERV., RS21862, SUDAN: THE CRISIS IN DARFUR (June 16, 2004).

<sup>216</sup> *See* Permanent Rep. of Nigeria to the U.N., Letter dated 27 July 2004 from the Permanent Representative of Nigeria to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2004/603 (July 27, 2004). The U.N. endorsed the mission. *See* S.C. Res. 1556, 1 (July 30, 2004). Natsios and Scott argue that international humanitarian intervention came after the bulk of the killing had already occurred and was a case of too little too late. *See* Natsios & Scott, *supra* note 203, at 254. The African Union and the League of Arab states denied that genocide or ethnic cleansing was occurring. *See id.*, at ¶ 9.

the situation in Darfur was an “African responsibility” to be dealt with by African countries,<sup>217</sup> even as AMIS faced an uncooperative Sudanese government and a severe lack of mission resources.<sup>218</sup> The League of Arab States also opposed any Western-led intervention in Sudan for similar reasons.<sup>219</sup>

Following a closed-door briefing by leading NGOs and the Deputy Permanent Representative of the Sudan regarding the deteriorating situation in Darfur,<sup>220</sup> the Security Council issued its first presidential statement regarding the humanitarian crisis in Darfur on May 25, 2004, calling on parties to protect civilians and cease hostilities.<sup>221</sup> In July 2004, the Security Council imposed an arms embargo on all non-state actors operating in Darfur, including the Janjaweed militias.<sup>222</sup> Several months later, the Security Council requested the establishment of a commission of inquiry to investigate possible acts of genocide in Darfur—marking the first time a U.N. inquiry would be established for this purpose.<sup>223</sup> The International Commission of Inquiry on Darfur released its report to the Secretary-General in January 2005.<sup>224</sup> The report concluded that while “no genocidal policy has been pursued and implemented” by the Sudanese government, evidence of “crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.”<sup>225</sup> The same month, the Sudanese government signed the Comprehensive Peace Agreement (CPA), ending the long-running civil war between the Sudanese

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<sup>217</sup> Susan E. Rice, *Why Darfur Can't be Left to Africa*, WASH. POST (Aug. 7, 2005), <https://perma.cc/69YH-SHZS>.

<sup>218</sup> See Raji Rafiu Boye, *Peacekeeping and Conflict Resolution in Darfur: A Critical Analysis of UN-AU Hybridization Mechanism*, 11 U.S.-CHINA L. REV. 1052, 1065 (2014); *AMIS II-E Performance Assessment*, HUM. RTS. WATCH (Jan. 2006), <https://perma.cc/347V-9QWC>.

<sup>219</sup> Nick Grono, *Darfur: The International Community's Failure to Protect*, INT'L CRISIS GRP. (Sept. 30, 2006), <https://perma.cc/E68V-8JNP>.

<sup>220</sup> These NGOs included Médecins Sans Frontières, International Crisis Group, and Human Rights Watch. See *Arria-Formula Meetings, 1992-2017*, SECURITY COUNCIL REPORT, <https://perma.cc/5PY2-FH35> (last visited Nov. 18, 2017).

<sup>221</sup> S.C. Pres. Statement 2004/18 (May 26, 2004).

<sup>222</sup> S.C. Res. 1556, ¶ 7 (July 30, 2004).

<sup>223</sup> Starting at the time of the release of NGO reports, NGOs and countries called for an investigation because of the increasing parallels between the situation in Darfur and the previous crisis in Rwanda and the fear of further genocide occurring.

<sup>224</sup> THE INT'L COMM'N OF INQUIRY ON DARFUR, REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL: PURSUANT TO SECURITY COUNCIL RESOLUTION 1564 OF 18 SEPTEMBER 2004 (Jan. 25, 2005), <https://perma.cc/3C9G-536X>.

<sup>225</sup> *Id.* at 4.

government and rebel groups in southern Sudan, but leaving the conflict in Darfur unresolved.<sup>226</sup>

In March 2005, the Security Council authorized a U.N. mission (UNMIS) to support the implementation of the CPA and “coordinate international efforts towards the protection of civilians,” instructing it also to work closely with AMIS “with a view towards expeditiously reinforcing the effort to foster peace in Darfur.”<sup>227</sup> However, UNMIS never deployed because of the Sudanese government’s opposition to a humanitarian mission led solely by the U.N.<sup>228</sup>

In March 2005, the Security Council also voted to refer the situation in Darfur to the ICC for investigation into acts of genocide, war crimes, and crimes against humanity.<sup>229</sup> This move demonstrated the Security Council’s commitment to pursuing accountability measures at the same time that it was supporting the peace process through UNMIS. In a letter to the Security Council, the A.U. welcomed the ICC referral and also called for a transformation of the A.U.-led AMIS to a U.N.-led mission, signaling a change in position for allowing non-African intervention.<sup>230</sup> In August 2006, the Security Council reframed UNMIS’s civilian protection mandate in terms of the recently adopted R2P doctrine by applying paragraphs 138 and 139 of the 2005 World Summit Outcome Document to Darfur—the first country-specific application of R2P.<sup>231</sup>

In May 2006, the Sudanese government and one faction of the SLM/A signed the Darfur Peace Agreement (DPA), but the agreement failed to receive the endorsement of all rebel groups, with the JEM and another faction of the SLM/A opposing it.<sup>232</sup> Conflict and violence towards civilians continued as rebel groups splintered into various factions and the Sudanese government failed to sign a comprehensive peace agreement with all rebel groups.

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<sup>226</sup> The CPA included a timetable for a referendum for various southern states, including the states that would vote for South Sudanese independence in 2011. See Section III(B)(2)(a), *infra*, discussing South Sudanese civil war and R2P concerns starting in 2013.

<sup>227</sup> S.C. Res. 1590, ¶¶ 2, 4(a)(ix), 4(d) (Mar. 24, 2005).

<sup>228</sup> Xan Rice, *Sudan Rejects U.N. Peacekeepers for Darfur*, THE GUARDIAN (July 3, 2006), <https://perma.cc/GFT7-R48Q>; see also S.C. Res. 1625, ¶ 8 (Sept. 14, 2005); S.C. Res. 1706, *supra* note 14, at ¶ 5 (looking forward to deployment of UNMIS and inviting the consent of the Sudanese government).

<sup>229</sup> S.C. Res. 1593 (Mar. 31, 2005) (resolution adopted by eleven in favor, none against, and four abstentions—U.S., China, Brazil, Algeria).

<sup>230</sup> Permanent Rep. of Congo, Letter dated 10 March 2006 from the Permanent Representative of the Congo to the United Nations addressed to the President of the Security Council, ¶¶ 1, 4(b)(ix), 5, U.N. Doc. S/2006/156 (Mar. 13, 2006).

<sup>231</sup> S.C. Res. 1706, *supra* note 14, at ¶ 1; *The Crisis in Darfur*, *supra* note 203, at § IV(iii).

<sup>232</sup> *The Crisis in Darfur*, *supra* note 203, at § IV(iii).

As the number of civilian deaths and displaced persons continued to rise, the European Parliament urged the U.N. in 2006 to “act on its responsibility to protect civilians” considering that Sudan had failed under its Pillar I responsibility of protecting its own citizens.<sup>233</sup> Calls by the European Parliament for the Security Council to take on its R2P responsibilities continued up until July 2007,<sup>234</sup> when the Security Council voted to merge UNMIS and AMIS into a joint U.N.-A.U. mission (UNAMID).<sup>235</sup> UNAMID was meant to better implement peacekeeping measures as AMIS lacked the resources to complete its mandate<sup>236</sup> and AMIS was subject to constant opposition by the Sudanese government.<sup>237</sup>

In 2009 and 2010, the ICC issued arrest warrants for al-Bashir based on three counts of genocide, five counts of crimes against humanity, and two counts of war crimes.<sup>238</sup> The Sudanese government, the League of Arab States, and the A.U. denounced the warrants issued for acts of genocide and the A.U. specifically called on the Security Council to defer proceedings under Article 16 of the 2005 Rome Statute.<sup>239</sup> While the 2005 referral to the ICC and the subsequent 2009/2010 arrest warrants sent a strong message of accountability for architects of mass atrocity crimes, to this day, the Security Council has done

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<sup>233</sup> Resolution on Darfur, ¶ 2, EUR. PARL. DOC. P6\_TA(2006)0142 (2006); Resolution on the Situation in Darfur, ¶ 3, EUR. PARL. DOC. P6\_TA(2007)0052 (2007) [hereinafter European Parliament Resolution on the Situation in Darfur].

<sup>234</sup> Resolution on the Situation in Darfur, *supra* note 233, at ¶ 1; Resolution of 12 July 2007 on the Situation in Darfur, ¶ 1, EUR. PARL. DOC. P6\_TA(2007)0342 (2007).

<sup>235</sup> S.C. Res. 1769, ¶ 6 (July 31, 2007).

<sup>236</sup> *AMIS II-E Performance Assessment*, *supra* note 218 (“The AMIS mission up to early 2005 was beset by shortcomings in deployment footprint, troop strength, support to humanitarian organizations, protection of civilians, training, staff planning, rules of engagement, priority of tasks, mobility, communications, logistics, and collaboration with CivPol.”).

<sup>237</sup> S.C. Res. 1769, *supra* note 235, at ¶ 2; *The Crisis in Darfur*, *supra* note 203, at § IV(i).

<sup>238</sup> Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-95, Warrant of Arrest, at 3 (July 12, 2010) (including genocide by killing, by causing serious bodily or mental harm, and by deliberately inflicting conditions of life calculated to bring about physical destruction); Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-1, Warrant of Arrest (Mar. 4, 2009) (arresting for counts “for genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction”).

<sup>239</sup> African Union, Decision on the Implementation of the Decisions on the International Criminal Court, Assembly of the African Union 16th Ordinary Session, ¶ 3, Doc. EX.CL/639(XVIII) (Jan. 2011) (requesting U.N. Security Council defer the proceedings in accordance with Article 16 of the Rome Statute of the ICC); *see* Rome Statute of the International Criminal Court art. 16, U.N. Doc. A/CONF.183/9 (Sept. 28, 1998) (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”); *The Crisis in Darfur*, *supra* note 203, at § IV(iv).

little to compel the international community to comply with the warrants to put an end to impunity for al-Bashir.<sup>240</sup>

In January 2011, the Sudanese Government and an umbrella organization of rebel forces known as the Liberation and Justice Movement (LJM) signed the Doha Document for Peace in Darfur (DDPD), which proposed a power-sharing arrangement.<sup>241</sup> The DDPD proved difficult to implement, however, as rebel groups continued to splinter, with some adhering to the peace agreement while others continued to fight. In April 2013, more rebel groups signed onto the DDPD, but hopes of peace in Darfur were dashed when fighting in a neighboring state<sup>242</sup> spilled over into South Darfur and threatened IDP camps, leading to a new surge of violence.<sup>243</sup> Renewed violence involved a similar pattern of atrocities as before, with government forces and militias engaging in war crimes and crimes against humanity against the non-Arab civilian population.<sup>244</sup> Amnesty International reported that the Sudanese government used chemical weapons against civilian villages throughout 2016 as part of its scorched earth campaign to decimate rebel strongholds in Darfur.<sup>245</sup> In 2016, these clashes in North Darfur further displaced 129,000 civilians, leading to a total of 2.1 million IDPs in the Darfur region.<sup>246</sup> Darfur remains one of the deadliest conflict zones in the world for peacekeepers, as more than 70 U.N. peacekeepers have been killed there since 2008.<sup>247</sup> Even as conflicts between government forces and rebel groups have decreased in recent years,<sup>248</sup> armed militias continue to attack IDPs and civilians. Fighting continues to this day as the political peace process continues to be stalled and comprehensive peace agreements remain elusive.

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<sup>240</sup> U.N. Meeting Coverage, Security Council, 7833rd mtg., Impunity Will Thrive without Break in Impasse over Darfur Situation, Chief Prosecutor of International Criminal Court Warns Security Council, SC/12623 (Dec. 13, 2016).

<sup>241</sup> *The Crisis in Darfur*, *supra* note 203, at § V.

<sup>242</sup> See Section III (B)(2)(b) for the discussion of South Kordofan.

<sup>243</sup> *The Crisis in Darfur*, *supra* note 203, at § V; *Fear among South Darfur Displaced as Rapid Support Forces Arrive*, RADIO DABANGA (Feb. 24, 2014), <http://perma.cc/5QBB-JGFS>.

<sup>244</sup> See generally HUMAN RIGHTS WATCH, "MEN WITH NO MERCY" RAPID SUPPORT FORCES ATTACKS AGAINST CIVILIANS IN DARFUR, SUDAN (Sept. 9, 2015), <https://perma.cc/DNF3-NQX6>.

<sup>245</sup> Amnesty Int'l, *Sudan: Scorched Earth, Poisoned Air: Sudanese Government Forces Ravage Javel Marra, Darfur*, AI Index AFR 54/4877/2016 (Sept. 29, 2016).

<sup>246</sup> Global Centre for the Responsibility to Protect, *Sudan*, 32 R2P MONITOR 7, 8 (Mar. 15, 2017), <https://perma.cc/2RMR-PXN7>; see also Rice, *supra* note 217.

<sup>247</sup> Global Centre for the Responsibility to Protect, *Sudan*, *supra* note 246.

<sup>248</sup> U.N. Secretary-General, *Rep. of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur*, ¶ 2, U.N. Doc. S/2017/250 (Mar. 23, 2017) (concluding that fighting between government and rebel groups has decreased, several further peace agreements with rebel factions have been signed, and fewer intercommunal clashes have occurred).

The Security Council's involvement in Darfur led to several significant "firsts": the first country-specific invocation of the R2P doctrine, the first commission established to investigate genocide, and the first ICC referral for criminal investigation into genocide, which led to the first ICC arrest warrant for a sitting head of state. From 2004 to 2006, the Security Council employed various tools to attempt to stop the mass atrocity crimes being committed against civilians under its newly emerging R2P responsibilities.

However, the crisis in Darfur is largely a story of too little too late. Despite engaging in its responsibility to protect civilians through numerous avenues, the Security Council largely failed to curb the extensive humanitarian crisis in Darfur. The slow response of the Security Council was compounded by the Sudanese government's perpetration of human rights abuses against its own people and its active obstruction of humanitarian aid and peacekeeping missions. While the failure to initiate a timely response rests partially with the Security Council, the Sudanese government's active obstruction of the peacekeeping missions before and during their deployment exacerbated the humanitarian crisis. The Sudanese government resisted the deployment of peacekeeping troops and has failed to actively engage in comprehensive peace agreements with rebel groups throughout the country. The Sudanese government has repeatedly failed to protect its civilian population under Pillar I of R2P and has obstructed the international missions meant to assist in the protection of civilians under Pillars II and III. In the face of the obstruction by the Sudanese government, no P5-level country put forth the political will to push for the necessary R2P response in Sudan to protect civilians from mass atrocity crimes.

Further, the Security Council lacked rapid response capacity. With the majority of civilian mass atrocity crimes committed by government forces and Janjaweed militias occurring in 2003 and early 2004, the engagement of the Security Council in mid-2004 came too late. The deployment of peacekeeping troops was far from the rapid response that was necessary to stop the conflict, with UNMIS troops not even authorized until March 2005 or deployed until Spring 2006. Part of this delay can be attributed to the third condition: the hesitancy of African leaders and regional authorities to permit intervention by non-African countries. The A.U., the League of Arab States, and influential African leaders stated for years that the crisis in Darfur was Africa's responsibility. While the hesitancy to allow Western-led intervention was historically and politically understandable, this position was particularly detrimental on humanitarian grounds given that the A.U. mission lacked the funding and resources to carry out necessary operations to protect civilians.

While the Security Council has engaged with its R2P responsibilities through investigations, deployment of peacekeepers with a civilian protection mandate, an arms embargo, and an ICC referral, the Council response does not have the regional support nor rapid response capacity necessary to successfully

implement R2P in the face of a conflict that has dragged on for over a decade and killed hundreds of thousands of civilians in the process.

*b) Blue Nile & South Kordofan*

Following South Sudan's secession from Sudan in 2011, violence erupted between government and rebel forces in the states of Blue Nile and South Kordofan—the new southern border between Sudan and nascent South Sudan.<sup>249</sup> Tensions had escalated for various reasons: communities in these states faced political marginalization due to lack of adequate representation within the Sudanese government, social marginalization due to differences of ethnic and religious identities between Blue Nile and South Kordofan groups and others in Sudan, and economic grievances due to higher taxation of these oil-rich regions without fair compensation.<sup>250</sup> Tensions escalated further when the Sudanese government ignored the provision of the 2005 CPA that provided for a January 2011 independence vote for Blue Nile and South Kordofan states—similar to the provision that had led to the independence vote for South Sudan.

One month prior to South Sudan's formal secession in July 2011, these long-simmering tensions erupted into violence when a candidate from the Sudan People's Liberation Movement-North (SPLM-N)<sup>251</sup> stood to lose a local South Kordofan election against a pro-government opponent.<sup>252</sup> Localized violence quickly spread throughout South Kordofan and into neighboring Blue Nile by September. In response to the surge of violence between government and rebel forces, the SPLM-N, and various Darfur rebel factions joined forces to form the Sudan Revolutionary Front (SRF), an alliance committed to overthrowing the al-Bashir government.<sup>253</sup>

Reacting with disproportionate violence to the formation of the SRF, the government began carrying out indiscriminate bombing campaigns against villages that resulted in “deaths and injuries to civilians and the destruction of homes, crops, livestock and other civilian objects.”<sup>254</sup> The SAF launched particularly atrocious attacks against communities in South Kordofan's Nuba Mountain region, which the Sudanese government believed were assisting rebel

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<sup>249</sup> Both states had believed they would form part of South Sudan with the 2011 secession but were used as a bargaining chip to remain part of Sudan, much to the dismay of citizens.

<sup>250</sup> *The Crisis in Sudan*, ICRTOP, at § II, <https://perma.cc/S7J7-BU7U> (last visited Nov. 18, 2017).

<sup>251</sup> The SPLM-N is a northern affiliate of the SPLM/A, which had been the leading rebel party pushing for South Sudanese independence and is now the ruling party in South Sudan. See Section III(b)(3) for an analysis for South Sudan.

<sup>252</sup> *The Crisis in Sudan*, *supra* note 250, at § II.

<sup>253</sup> *Id.* (noting that rebel groups consolidated include SPLM-N, SLA-MM, and JEM).

<sup>254</sup> Aristide Nonosi, *Rep. of the Independent Expert on the Situation of Human Rights in the Sudan*, ¶ 58, U.N. Doc. A/HRC/33/65 (July 28, 2016); see also *The Crisis in Sudan*, *supra* note 250.

forces. Human rights organizations have reported and continue to report that these and other government attacks likely constitute war crimes and crimes against humanity as bombing campaigns are indiscriminate against civilians, sexual violence is used as a weapon of war, and communities continue to be forcibly displaced through continuous attacks and the destruction of civilian property and food sources.<sup>255</sup> Atrocity crimes perpetrated by SAF against civilians continue to be exacerbated by the ongoing denial of access for humanitarian aid organizations into the Nuba Mountains.<sup>256</sup> While the Sudanese government's restriction on U.N. missions and bodies, humanitarian aid organizations, and independent groups to the region has led to difficulty in determining the exact number of people killed and displaced, U.N. agencies estimate 400,000 IDPs in Blue Nile and South Kordofan<sup>257</sup> and 220,000 refugees in neighboring countries by the end of 2013.<sup>258</sup>

In August 2016, the Sudanese government and some rebel factions signed the African Union High Level Implementation Panel (AUHIP) Roadmap Agreement to end the conflicts in Darfur, Blue Nile, and South Kordofan.<sup>259</sup> However, the agreement was breached by both sides in January and February 2017, with violence breaking out again in South Kordofan.<sup>260</sup> In January 2017, the Janjaweed militias and other paramilitary groups were formally integrated into the SAF and brought under the command of al-Bashir through the Rapid Support Forces Act.<sup>261</sup> With the full backing of the government, the militias have been given an open mandate to stop inter-ethnic clashes and are being deployed in South Kordofan, Blue Nile, and Darfur.<sup>262</sup>

Since 2011, the SAF has committed war crimes and crimes against humanity in South Kordofan and Blue Nile through extrajudicial killings, forced displacement, widespread sexual violence, and "scorched earth" tactics aimed at

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<sup>255</sup> *Sudan: Crisis Conditions in Southern Kordofan*, HUM. RTS. WATCH (May 4, 2012), <https://perma.cc/2ZVQ-KEQG>; Amnesty Int'l, *Sudan: Five Years and Counting: Intensified Aerial Bombardment, Ground Offensive and Humanitarian Crisis in South Kordofan State*, AI Index AFR 54/4913/2016 (Sept. 29, 2016).

<sup>256</sup> *The Crisis in Sudan*, *supra* note 250.

<sup>257</sup> Anaïs Pagot & Melanie Wissing, *Sudan: Other Crises Distract Attention from Tremendous Needs of IDPs*, INTERNAL DISPLACEMENT MONITORING CTR. (July 9, 2014), <https://perma.cc/CTX2-KHXT>.

<sup>258</sup> Amnesty Int'l, *Sudan: Civilians Caught in Unending Crisis in Southern Kordofan*, AI Index AFR 54/009/2013 (Apr. 17, 2013); Amnesty Int'l, "We Had No Time to Bury Them" War Crimes in Sudan's Blue Nile State, AI Index AFR 54/011/2013, at n.5 (June 10, 2013).

<sup>259</sup> Global Centre for the Responsibility to Protect, *Sudan*, *supra* note 246, at 7.

<sup>260</sup> *Id.*

<sup>261</sup> *Sudanese Parliament Passes RSF Act Integrating Militiamen in the Army*, SUDAN TRIB. (Jan. 16, 2017), <https://perma.cc/HP3V-3H24>.

<sup>262</sup> *Sudanese President Vows to Crush Rebellion Soon*, SUDAN TRIB. (May 13, 2017), <https://perma.cc/Q757-YDMK>.

destroying food sources and civilian infrastructure.<sup>263</sup> Leading NGOs have published numerous reports detailing the war crimes and crimes against humanity committed in the South Kordofan and Blue Nile regions, invoking R2P and calling on the international community to engage with Sudan to prevent further atrocities.<sup>264</sup> The Office of the High Commissioner for Human Rights released a report on the situation of human rights in Sudan in August 2011 listing atrocities committed by the SAF, stating these likely constitute war crimes and crimes against humanity.<sup>265</sup>

While the conflict in Blue Nile and South Kordofan falls under UNAMID's mandate, UNAMID has been unable to protect civilians because of the Sudanese government's obstruction of access to those states.<sup>266</sup> UNAMID's mandate was extended in June 2017, reiterating Sudan's Pillar I primary responsibility to protect its own civilians and prevent human rights abuses as well as reaffirming UNAMID's authorization to take all necessary action to protect civilians.<sup>267</sup> In contrast with the Security Council's delayed response to Darfur, U.N. peacekeeping forces were already present when violence emerged in Blue Nile and South Kordofan in 2011 and had an R2P mandate. However, active obstruction of the U.N. mission and humanitarian aid delivery by the Sudanese government has prevented the implementation of the R2P mandate, leading to more civilian deaths and displacement in Sudan.

### 3. South Sudan

Following a popular referendum in which an overwhelming majority voted for independence, South Sudan formally seceded from Sudan on July 9, 2011,<sup>268</sup>

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<sup>263</sup> Global Centre for the Responsibility to Protect, *Sudan*, *supra* note 246, at 8. Note that SPLM-N also committed war crimes due to its indiscriminate attacks on civilian-populated areas, recruitment of children, and attacks on U.N. personnel. *See id.*

<sup>264</sup> *Invoking Responsibility to Protect in Sudan, Enough Calls for Add'l Military Support for South*, ENOUGH PROJECT (June 16, 2011), <https://perma.cc/8WBY-5394>; *Sudan: Southern Kordofan Civilians Tell of Air Strike Horror*, HUM. RTS. WATCH (Aug. 30, 2011), <https://perma.cc/SW87-NHEF>; Global Centre for the Responsibility to Protect, *Joint NGO Letter to IBSA Delegation to Syria on Human Rights Protection* (Aug. 4, 2011), <http://perma.cc/9YMM-YJX9> (referring to crimes against humanity); *Crisis Watch: Global Overview*, Int'l Crisis Grp. (Sept. 2011), <https://perma.cc/AME9-3YW4> (expressing concern about civil war in Sudan); Amnesty Int'l, *Sudan: Five Years and Counting: Intensified Aerial Bombardment, Ground Offensive and Humanitarian Crisis in South Kordofan State*, AI Index AFR 54/4913/2016 (Sept. 29, 2016).

<sup>265</sup> Off. of the U.N. High Comm'r for Hum. Rts., 13th Periodic Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Sudan (Aug. 2011), <https://perma.cc/G4S2-H65E>.

<sup>266</sup> S.C. Res. 2363, pmbL, ¶ 38 (June 29, 2017).

<sup>267</sup> *Id.* at ¶¶ 1, 37.

<sup>268</sup> Josh Kron & Jeffrey Gettleman, *South Sudanese Vote Overwhelmingly for Secession*, N.Y. TIMES (Jan. 21, 2011), <http://www.nytimes.com/2011/01/22/world/africa/22sudan.html>.

a division supported by the Security Council.<sup>269</sup> While the world hoped the birth of a new country would bring peace to the conflict-torn region, peace and stability remain elusive due to the eruption of ethnic clashes and tensions between the two major ethnic groups—the majority Dinka peoples, and the second largest ethnic group, the Nuer—that had previously united in the pursuit of South Sudanese independence. As part of the agreement of independence, Salva Kiir from the Dinka community became the first elected president of South Sudan and his party, the Sudan People's Liberation Movement/Army (SPLM/A) became the ruling party of South Sudan.<sup>270</sup> Riek Machar, the previous leader of the Sudan People's Liberation Movement/Army-In-Opposition (SPLM/A-IO) and member of the Nuer community, became the First Vice President in the government.<sup>271</sup> To help facilitate the transition to independence and ensure the protection of civilians, the Security Council quickly established the United Nations Mission in the Republic of South Sudan (UNMISS)<sup>272</sup> and authorized UNMISS to use “all necessary means” to carry out protection of civilians alongside its larger nation-building mandate.<sup>273</sup>

Despite efforts towards stability, civil war broke out in December 2013 along ethnic lines.<sup>274</sup> Ethnic tensions erupted into violence as President Kiir dismissed his entire cabinet for fear of a coup after a political power struggle split the SPLM/A into factions, igniting both intra-party conflict as well as the simmering ethnic tensions between the Dinka and Nuer communities.<sup>275</sup> As the conflict between the SPLM/A factions loyal to President Kiir and other SPLM/A factions and the SPLM/A-IO opposed to President Kiir escalated, parties engaged in severe human rights violations including the killing of civilians, the destruction of civilian property, extensive sexual violence, and recruitment of child soldiers.<sup>276</sup>

The Intergovernmental Authority on Development (IGAD), with the support of the A.U., immediately attempted to negotiate a peace agreement

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<sup>269</sup> S.C. Res. 1999 (July 13, 2011).

<sup>270</sup> *South Sudan*, ICRTOP, <https://perma.cc/67B2-JSGT> (last visited Nov. 18, 2017).

<sup>271</sup> *Id.*

<sup>272</sup> S.C. Res. 1996 (July 8, 2011).

<sup>273</sup> *Id.* at ¶¶ 3(b), 4.

<sup>274</sup> For an in-depth analysis of historical conflicts among groups in what is now South Sudan as well as a detailed account of escalating tensions leading to the December 2013 outbreak of violence, see Afr. Union Comm'n of Inquiry on S. Sudan, Final Rep. of the African Union Commission of Inquiry of South Sudan (Oct. 15, 2011), <https://perma.cc/946J-8HMH>.

<sup>275</sup> *South Sudan*, *supra* note 270.

<sup>276</sup> Global Centre for the Responsibility to Protect, *South Sudan*, 15 R2P MONITOR 1, 9 (May 15, 2014), <https://perma.cc/R63V-J5KY> [hereinafter *South Sudan*, 15 R2P MONITOR].

between the parties, but to little avail.<sup>277</sup> The Security Council renewed the UNMISS mandate, reaffirming all three pillars of R2P in May 2014.<sup>278</sup> In July 2015, the Security Council established a travel ban and froze assets for six military leaders—three from each side of the conflict—whose “targeting of civilians” “violate[d] . . . international human rights law or international humanitarian law.”<sup>279</sup> To this day, however, the Security Council has not imposed further targeted sanctions on individuals responsible for human rights violations in South Sudan.<sup>280</sup>

Under increasing pressure from the IGAD, the A.U., and the U.N., the SPLM/A and the SPLM/A-IO signed an Agreement on the Resolution of the Conflict in the Republic of South Sudan in August 2015.<sup>281</sup> However, peace was short-lived as intense fighting broke out between the two sides in Juba in July 2016, killing over 300 civilians, including two U.N. peacekeepers, and further displacing an estimated 42,000 civilians in the span of just four days.<sup>282</sup> An Independent Special Investigation into the effectiveness of UNMISS during the Juba crisis determined that UNMISS failed to protect civilians and humanitarian workers under its R2P mandate because of ineffective mission leadership, underperformance of UNMISS personnel, and lack of preparedness to carry out its mandate.<sup>283</sup> In response to the investigation’s findings, U.N. Secretary-General Ban Ki-moon fired the UNMISS commander and called for UNMISS reforms to prevent U.N. peacekeepers from abandoning their posts and to better ensure the protection of civilians and humanitarian workers.<sup>284</sup>

With violence continuing through the end of 2016, the Security Council voted to increase UNMISS troop levels through a Regional Protection Force originally proposed by the IGAD, and to prioritize UNMISS resources towards

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<sup>277</sup> *South Sudan*, *supra* note 270.

<sup>278</sup> S.C. Res. 2155, ¶¶ 3, 4 (May 27, 2014) (extending UNMISS mission and authorizing all necessary means to protect civilians).

<sup>279</sup> S.C. Res. 2206 (Mar. 3, 2015) (travel ban and asset freeze); Press Release, Security Council, Security Council Sanctions Committee Concerning South Sudan Adds Six Individuals to Its Sanctions List, U.N. Press Release SC/11958 (July 1, 2015), <https://perma.cc/7XYH-NDPG> (noting that the panel applied this to six military leaders).

<sup>280</sup> U.N. SCOR, 72d Sess., 7906th mtg., U.N. Doc. S/PV.7906 (Mar. 23, 2017).

<sup>281</sup> *South Sudan*, ICRTOP, *supra* note 270.

<sup>282</sup> *Id.*; see *South Sudan*, 15 R2P MONITOR, *supra* note 276, at 13; *South Sudan*, GLOB. CTR. FOR THE RESP. TO PROTECT, <https://perma.cc/XD36-2KCP> (last updated Sept. 15, 2017).

<sup>283</sup> *Executive Summary of the Independent Special Investigation into the Violence which Occurred in Juba in 2016 and UNMISS Response*, U.N. NEWS CTR., at 5 (Nov. 2016), <https://perma.cc/MZC7-EX5T>.

<sup>284</sup> U.N. Mission in South Sudan “Failed to Protect Civilians,” AL JAZEERA (Nov. 2, 2016), <https://perma.cc/Z6Y9-JMDZ>.

protection of civilians.<sup>285</sup> U.N. Special Adviser on the Prevention of Genocide Adama Dieng warned the international community of a possible escalation towards genocide if acts of ethnic hatred and targeting of civilians were allowed to continue.<sup>286</sup> The Security Council also considered a draft resolution on imposing an arms embargo and additional targeted sanctions on SPLM/A and SPLM/A-IO forces in December 2016; however, the resolution failed due to abstentions from China, Russia, and six other countries who claimed that the South Sudanese government was showing promising signs of engagement in the peace process.<sup>287</sup>

In March 2017, the Commission on Human Rights in South Sudan, which had been established by the Human Rights Council a year earlier,<sup>288</sup> submitted its first report on the human rights situation in South Sudan.<sup>289</sup> The Commission's report determined that government and opposition forces were targeting minority ethnic groups for killing, arbitrary arrest and detention, and severe sexual violence and sexual slavery, and that opposition forces were intentionally recruiting child soldiers.<sup>290</sup> The report concluded that these targeted tactics amounted to ethnic cleansing.<sup>291</sup> The Security Council met on March 23, 2017 to discuss the report's findings and the deteriorating situation in South Sudan, calling on the government to reinstate the August 2015 Agreement on the Resolution of the Conflict in the Republic of South Sudan<sup>292</sup> in order to restart political negotiations and permit the unrestricted access of humanitarian aid

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<sup>285</sup> S.C. Res. 2304, ¶ 14 (Aug. 12, 2016).

<sup>286</sup> Press Release, Security Council, Statement to the Security Council by Adam Dieng, United Nations Special Advisor on the Prevention of Genocide, on his visit to South Sudan, U.N. Press Release (Nov. 17, 2016), <https://perma.cc/5AR3-UPHP>.

<sup>287</sup> S.C. Draft Res., U.N. Doc S/2016/1085 (Dec. 23, 2016); *South Sudanese President Launches National Dialogue for Forgiveness*, SUDAN TRIB. (Dec. 15, 2016), <https://perma.cc/QH4T-34H4>.

<sup>288</sup> G.A. Res. 31/20 (Apr. 27, 2016) (providing the U.N. Human Rights Council's resolution to establish Commission).

<sup>289</sup> Comm'n on Hum. Rts. in South Sudan, Report of the Commission on Human Rights in South Sudan, U.N. Doc. A/HRC/34/63 (Mar. 6, 2017) [hereinafter Report of the Commission on Human Rights in South Sudan].

<sup>290</sup> *Id.* at ¶¶ 25, 34–41, 42.

<sup>291</sup> *Id.*

<sup>292</sup> Agreement on the Resolution of the Conflict in the Republic of South Sudan, Intergovernmental Authority on Dev. (Aug. 17, 2016), <https://perma.cc/R6FH-6XL7>; *1.5 Years After the Peace Agreement, Famine and Atrocities Threaten South Sudan*, GLOBAL CTR. FOR THE RESP. TO PROTECT (May 3, 2017), <https://perma.cc/PQ6C-B2BM> (explaining that, arguably, the agreement exists in name only as the agreement's main elements have not been executed: "the Transitional Government of Unity exists in name only, there is no permanent ceasefire, and the Hybrid Court of South Sudan has not been established to investigate and prosecute those responsible for mass atrocities committed during the civil war.").

organizations to all communities in need.<sup>293</sup> While some Security Council members expressed support for re-opening discussions of further targeted sanctions, Russia particularly opposed it, indicating a likely veto if a targeted sanction resolution were pursued.<sup>294</sup>

As of February 2017, famine was declared in two states in South Sudan, with aid organizations estimating that 100,000 people are facing starvation and more than half a million people are on the brink of famine.<sup>295</sup> As of March 2017, South Sudan had become the largest source of displacement on the continent: 1.5 million South Sudanese refugees have fled to surrounding countries, 2 million individuals remain internally displaced, and over 200,000 people are living in UNMISS civilian protection sites for fear of ethnic killings or sexual violence.<sup>296</sup> The South Sudanese government continues to actively restrict access to humanitarian aid organizations, particularly to opposition-held areas, endangering the lives of millions of South Sudanese people in need of humanitarian relief.<sup>297</sup>

Even though the Security Council has repeatedly engaged with its R2P obligations in resolutions creating and extending UNMISS,<sup>298</sup> UNMISS has been unable to fulfill its responsibility to protect civilians. The inability of UNMISS to carry out its R2P mandate can be attributed to the mission's lack of capacity as well as the active obstruction of UNMISS by the South Sudanese government. With regard to the first point, UNMISS has been hampered by a lack of both effective leadership<sup>299</sup> and mission resources.<sup>300</sup> Even though the R2P mandate has been consistently present, the will and resources to implement the R2P

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<sup>293</sup> U.N. SCOR, 72d Sess., *supra* note 280.

<sup>294</sup> *Id.*

<sup>295</sup> *Republic of South Sudan: Current and Projected (January–July 2017) Acute Food Insecurity Situation*, INTEGRATED FOOD SECURITY PHASE CLASSIFICATION (2017), <https://perma.cc/T2B3-Y4HW>.

<sup>296</sup> Report of the Commission on Human Rights in South Sudan, *supra* note 289, at ¶¶ 20, 22; *see also South Sudan: Humanitarian Situation & Response*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFF. (Sept. 21 2016), <https://perma.cc/DA65-N842>.

<sup>297</sup> U.N. SCOR, 72d Sess., *supra* note 280; Report of the Commission on Human Rights in South Sudan, *supra* note 289, at ¶ 22.

<sup>298</sup> S.C. Res. 1996, *supra* note 272, at ¶¶ 3(b), 4 (creating and permitting UNMISS all necessary means to protect civilians). Full engagement with R2P has been reaffirmed explicitly in all subsequent resolutions extending and expanding UNMISS's mandate. *See* S.C. Res. 2155, *supra* note 278, at ¶¶ 3, 4; S.C. Res. 2304, *supra* note 285, at ¶¶ 4, 5; S.C. Res. 2057, ¶¶ 3–5 (July 5, 2012); S.C. Res. 2109, ¶ 4 (July 11, 2013); S.C. Res. 2132, ¶ 2 (Dec. 24, 2013); S.C. Res. 2187, ¶¶ 3, 4(a) (Nov. 25, 2014); S.C. Res. 2223, ¶ 4(a) (May 28, 2015); S.C. Res. 2241, ¶ 4(a) (Oct. 9, 2015); S.C. Res. 2252, ¶ 8(a) (Dec. 15, 2015); S.C. Res. 2302, ¶ 1 (July 29, 2016); S.C. Res. 2326, ¶¶ 1, 2 (Dec. 15, 2016); S.C. Res. 2327, ¶ 7(a) (Dec. 16, 2016).

<sup>299</sup> *Executive Summary of the Independent Special Investigation*, *supra* note 283.

<sup>300</sup> U.N. SCOR, 72d Sess., *supra* note 280.

mandate have fallen short. With regard to the second point, not only has the government of South Sudan blatantly disregarded its own responsibility to protect its citizens from mass atrocity crimes, but it has itself perpetrated actions amounting to ethnic cleansing. While the South Sudanese government has begun accepting UNMISS regional protection forces<sup>301</sup>—a concession which it has previously changed its mind about on multiple occasions<sup>302</sup>—the government exacerbates the humanitarian crisis by continuing to restrict the freedom of movement for UNMISS and humanitarian aid organizations, which prevents essential resources and protective forces from reaching communities in need.

While regional organizations and authorities engaged early with the conflict in South Sudan, this was to no avail as government obstruction and lack of rapid response capacity prevented successful implementation of R2P. Both the IGAD and the A.U. attempted to negotiate a peace agreement immediately following the outbreak of violence in December 2013 and IGAD specifically requested the Regional Protective Force in 2016. However, in the face of government obstruction, this was not enough. The South Sudanese government prevents UNMISS from accessing communities that require civilian protection. Similar to the case of Sudan, no P5-level state has shown political will to engage with the crisis in South Sudan to overcome the South Sudanese government's obstruction.

Further, even though UNMISS was authorized the day before South Sudanese secession to protect civilians and help with nation-building, UNMISS failed to protect civilians, most notably in July 2016 with the Juba massacre. UNMISS troops lacked resources and therefore were unable to carry out their civilian protection mandate. Taken together, the obstruction of the government and the lack of rapid response capacity have led the crisis of mass atrocity crimes in South Sudan to be an example of an unsuccessful implementation of R2P by the Security Council.

#### 4. Central African Republic

Since gaining independence from France in 1960, the Central African Republic (CAR) has experienced near-constant political instability.<sup>303</sup> In March

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<sup>301</sup> *Eight Months after Approval, New U.N. Troops Trickle into S. Sudan*, REUTERS (May 18, 2017), <https://perma.cc/E7X7-H3L5> (noting that troops were permitted eight months after U.N. Security Council approval; delay due to South Sudanese bureaucratic obstacles meant to hinder deployment of further U.N. troops).

<sup>302</sup> *South Sudan Accepts 4,000 More U.N. Peacekeepers*, AL JAZEERA (Sept. 4, 2016), <https://perma.cc/5MF7-W7NL>; *South Sudan Rejects 4,000 Additional U.N. Peacekeepers*, AL JAZEERA (Jan. 11, 2017), <https://perma.cc/6E6V-HC77>.

<sup>303</sup> *Crisis in Central African Republic*, ICRTOP, <https://perma.cc/YD6Q-BRJZ> (last visited Oct. 13, 2017).

2013, a predominantly Muslim rebel coalition known as Séléka overthrew the government—the fifth coup d'état since independence—on account of political grievances, including frustration with military disarmament and reintegration, impunity for prior crimes committed, and lack of government presence throughout the region.<sup>304</sup> In September 2013, the Office of the U.N. High Commissioner for Human Rights reported that, in the four months leading up to the March 2013 coup, both the government and Séléka forces “engaged in summary executions and extrajudicial killings, enforced disappearances, torture and looting of private and public property,” with the Séléka particularly committing crimes of sexual violence and crimes against children.<sup>305</sup> However, even after the coup, the political and security situation in the CAR remained unstable and Séléka forces perpetrated atrocities against civilian communities.

In response to the lack of accountability for human rights abuses by Séléka forces, civilians began forming “anti-Balaka” self-defense groups, though these groups quickly turned into more formal militias and began launching retaliation attacks against Séléka forces.<sup>306</sup> As tensions increased, political and social inequalities between the groups devolved into religious and ethnic violence, with Séléka forces attacking Christian communities and anti-Balaka groups retaliating against Muslim communities.<sup>307</sup> Even as the Séléka forces were officially disbanded in September 2013, ex-Séléka fighters continued to perpetrate abuses and violence against anti-Balaka groups.<sup>308</sup>

In response to the political instability, U.N. Special Adviser on the Prevention of Genocide Adama Dieng and U.N. Special Adviser on the Responsibility to Protect Jennifer Welsh issued a statement in October 2013 expressing concern over the inability of the transitional government to control forces within its territory and stating that the rising religious tensions “opened the door to the risk of atrocity crimes.”<sup>309</sup> One week later, the Security Council passed Resolution 2121, which reinforced the mandate of the U.N. field office in light of the political transition process and invoked the CAR’s Pillar I R2P obligations by “underscor[ing] the primary responsibility of the Central African

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<sup>304</sup> *Id.*

<sup>305</sup> U.N. High Comm'n for Hum. Rts., Situation of Human Rights in the Central African Republic, at 2, U.N. Doc. A/HRC/24/59 (Sept. 12, 2013).

<sup>306</sup> *Crisis in Central African Republic*, *supra* note 303, at § IV.

<sup>307</sup> HUMAN RIGHTS WATCH, “THEY CAME TO KILL”: ESCALATING ATROCITIES IN THE CENTRAL AFRICAN REPUBLIC (Dec. 18, 2013), <https://perma.cc/48Q4-F3LN>.

<sup>308</sup> *Id.*

<sup>309</sup> Press Release, United Nations, Statement by Mr. Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, and Ms. Jennifer Welsh, United Nations Special Adviser on the Responsibility to Protect, on the Situation in the Central African Republic (Oct. 1, 2013), <https://perma.cc/DS4A-KZWJ>.

authorities to protect the population.”<sup>310</sup> Rather than establish a U.N. peacekeeping mission, the resolution “look[ed] forward to the swift establishment of MISCA,” the African-led International Support Mission in the CAR.<sup>311</sup> The backing of A.U.-led MISCA was the result of some Security Council members who agreed with the A.U. that MISCA should attempt to solve the crisis in the CAR before a full U.N. mission was deployed, even though some Council members believed that a U.N.-led mission was inevitable.<sup>312</sup>

One month later, the Security Council was briefed by Special Adviser Dieng again, who stated that ex-Séléka elements and anti-Balaka militias had committed “widespread acts of sexual violence . . . against women and children; extrajudicial killing of civilians; enforced disappearances; arbitrary arrests, detention and torture; as well as the destruction and looting of property, including hospitals, schools and churches.”<sup>313</sup> Special Adviser Dieng warned that actions by both sides could “constitute crimes against humanity or war crimes.”<sup>314</sup> To the press, Special Adviser Dieng stated that the religious aspect of the conflict “will end with Christian communities, Muslim communities killing each other,” leading to the “possibility of a genocide occurring.”<sup>315</sup>

The deadliest clashes between ex-Séléka and anti-Balaka forces began in December 2013. Within the first week of December, five hundred civilians had been killed.<sup>316</sup> Anti-Balaka forces committed mass atrocity crimes, brutally killing Muslim civilians, destroying civilian property and killing animal stock.<sup>317</sup> As ex-Séléka forces were forced to retreat from certain provinces, they attacked Christian communities, killing civilians and destroying their property.<sup>318</sup> By January 2014, 935,000 CAR civilians had become IDPs—one-fifth of the CAR’s

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<sup>310</sup> S.C. Res. 2121, ¶ 6 (Oct. 10, 2013).

<sup>311</sup> *Id.* at ¶ 19.

<sup>312</sup> *Central African Republic and U.N. Office in Central Africa/Lord's Resistance Army*, WHAT'S IN BLUE, at ¶ 9 (Nov. 22, 2013), <https://perma.cc/E3MB-GJKL>.

<sup>313</sup> Adama Dieng, The Statement of Under Secretary-General/Special Adviser on the Prevention of Genocide, Mr. Adama Dieng, on the Human Rights and Humanitarian Situation in the Central African Republic, at 1 (Nov. 1, 2013), <https://perma.cc/DJ77-KLPG>.

<sup>314</sup> *Id.*

<sup>315</sup> Michelle Nichols, *U.N. Officials See Risk of Genocide in Central African Republic*, REUTERS (Nov. 1, 2013), <https://perma.cc/GTC7-5YDF>.

<sup>316</sup> HUMAN RIGHTS WATCH, “THEY CAME TO KILL,” *supra* note 307.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

entire population—and 233,000 refugees had fled to neighboring countries.<sup>319</sup>

Responding to the surge of atrocity crimes against the civilian population, the Security Council adopted Resolution 2127 on December 5, 2013.<sup>320</sup> The Resolution reminded the CAR's transitional government of its Pillar I responsibility to protect its civilian population and authorized the deployment of MISCA, as well as supplemental French forces, with a mandate to use “all necessary measures” for “the protection of civilians.”<sup>321</sup> Furthermore, the Resolution imposed an arms embargo on both parties to the conflict, raised the possibility of targeted sanctions, and requested that the Secretary-General “rapidly establish an international commission of inquiry” to investigate reports of human rights abuses.<sup>322</sup>

Over the next several weeks, more troops were authorized for deployment to assist the missions in the CAR, with the A.U. increasing its troop levels and France deploying troops in accordance with Resolution 2127.<sup>323</sup> In January 2014, the Security Council also authorized the deployment of a separate E.U. force.<sup>324</sup> Throughout this time, the A.U. and the Economic Community of Central African States (ECCAS) were coordinating the African-led missions in the CAR and their requests for international assistance were largely for monetary support, with the A.U. stating in November 2013 that “Central African challenges are Africa's challenges. Overcoming them successfully requires the mobilization of the entire continent.”<sup>325</sup>

As the Security Council was authorizing these piecemeal regional deployments, international pressure for an actual U.N. peacekeeping mission was increasing. On December 20, 2013, Human Rights Watch said that the CAR was “facing its R2P moment of truth,” and urged the Security Council to “waste no time” in authorizing a full-fledged peacekeeping mission.<sup>326</sup> In January 2014, Special Adviser Dieng again briefed the Security Council, warning the Council members that, if they delayed definitive action any longer, they would miss their chance to “mobilize appropriate resources and to reverse one of the worst

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<sup>319</sup> U.N. High Comm'r for Refugees, *Insecurity Hampers Relief Efforts as over 935,000 Remain Displaced in the Central African Republic* (Jan. 3, 2014), <https://perma.cc/2S84-QRWP>; *see also Crisis in Central African Republic*, *supra* note 303.

<sup>320</sup> S.C. Res. 2127, ¶ 28 (Dec. 5, 2013).

<sup>321</sup> *Id.* at ¶¶ 49–50, 54.

<sup>322</sup> *Id.* at ¶¶ 24, 54–60.

<sup>323</sup> *Crisis in Central African Republic*, *supra* note 303, at § 5.

<sup>324</sup> S.C. Res. 2134, ¶¶ 43, 30–42 (Jan. 28, 2014).

<sup>325</sup> U.N. SCOR, 68th Sess., 7069th mtg. at 8, U.N. Doc. S/PV.7069 (Nov. 25, 2013).

<sup>326</sup> Philippe Boloipon, *The Central African Republic Facing Its R2P Moment of Truth*, HUM. RTS. WATCH (Dec. 20, 2013), <https://perma.cc/6V3G-HD64>.

human rights and humanitarian crises of our time.”<sup>327</sup> Special Adviser Dieng called on the Security Council to act under Pillar II and III of its R2P obligations and “uphold [its] responsibility to protect Central Africans from the risk of genocide, war crimes and crimes against humanity.”<sup>328</sup>

Meanwhile, reports were emerging that “rogue” Chadian peacekeepers from MISCA had helped ex-Séléka forces to regroup by assisting their movement across parts of the CAR, circumventing check points and thereby facilitating atrocity crimes against civilians.<sup>329</sup> In February 2014, in the face of mounting evidence of war crimes and crimes against humanity, the prosecutor of the ICC announced the opening of a preliminary investigation into the situation in the CAR.<sup>330</sup>

Responding to increasing pressure and recognizing that current deployments were manifestly failing to stabilize the CAR and protect civilian populations, the Security Council finally engaged with its full R2P obligations in April 2014 by establishing the U.N. Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) with Resolution 2149.<sup>331</sup> MINUSCA was authorized to employ “all necessary means” to “protect, without prejudice to the primary responsibility of the Central African Republic authorities, the civilian population from threat of physical violence.”<sup>332</sup>

While MINUSCA’s deployment has kept violence against the civilian population well below 2013-2014 levels, the CAR continues to experience bouts of violence as fighting between ex-Séléka factions and anti-Balaka forces persists.<sup>333</sup> Further, the CAR has seen a new threat to civilian communities arise in the form of the Lord’s Resistance Army.<sup>334</sup> In light of ongoing civilian protection concerns, MINUSCA is still active in the CAR and was recently renewed until November 2017,<sup>335</sup> while the sanctions regime was renewed until

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<sup>327</sup> Adama Dieng, The Statement of Under Secretary-General/Special Adviser on the Prevention of Genocide Mr. Adama Dieng on the Human Rights and Humanitarian Dimensions of the Crisis in the Central African Republic, at 4 (Jan. 22, 2014), <https://perma.cc/P6EW-FPC5>.

<sup>328</sup> *Id.*

<sup>329</sup> *Central African Republic: Seleka Fighters Regroup in North*, HUM. RTS. WATCH (Feb. 5, 2014), <https://perma.cc/Y526-B3BN>.

<sup>330</sup> Lizzie Dearden, *Central African Republic: International Criminal Court Starts War Crimes Investigation*, INDEPENDENT (Feb. 8, 2014), <https://perma.cc/6QV8-68XW>.

<sup>331</sup> S.C. Res. 2149, ¶ 18 (Apr. 10, 2014).

<sup>332</sup> *Id.* at ¶¶ 29, 30(a).

<sup>333</sup> U.N. Secretary-General, *Report of the Secretary-General on the Situation in the Central African Republic*, U.N. Doc. S/2016/824 (Sept. 29, 2016).

<sup>334</sup> *Central Africa (Lord’s Resistance Army)*, GLOBAL CTR. FOR THE RESP. TO PROTECT, <https://perma.cc/UBV8-XPAH> (last updated June 28, 2016).

<sup>335</sup> S.C. Res. 2301, ¶ 23 (Jul. 26, 2016).

January 2018.<sup>336</sup>

While the actions of the Security Council have somewhat helped to stabilize and support the transition process in the CAR since the full engagement of MINUSCA, the crisis in the CAR nonetheless represents an unsuccessful implementation of R2P by the Security Council. Similar to the case of the DRC, though the government of CAR was not obstructing U.N. activities, cooperation with regional authorities was lacking and the response time was significantly delayed. Here, the coordination between regional authorities and the Security Council was lacking in that the Security Council was overly deferential to regional organizations like the A.U. and the ECCAS. Instead of engaging on a deeper level with the conflict, the Security Council spent too much time allowing underfunded and understaffed missions attempt to stabilize the crisis in the CAR. As the international body charged with implementing R2P, the Security Council should have played a more active role in assisting the A.U. with coordinating resources for an R2P response. Further, neighboring states in the region did not contribute to a political solution either; in fact, Chadian peacekeepers' support for ex-Séléka forces actually facilitated violence and human rights abuses against civilian populations, thereby exacerbating the problems.

The Security Council's deferred reaction also meant that there was no rapid response capacity. While MISCA and supplemental French and E.U. troops were deployed relatively early, they were not enough to protect civilians from mass atrocity crimes. MINUSCA itself was deployed well after the surge of violence that threatened the civilian population. Ultimately, the Security Council's implementation of R2P in the situation in the CAR was unsuccessful as it was too deferential to the leadership of regional authorities, which deference delayed an effective response mechanism and failed to protect civilians from mass atrocity crimes.

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The four case studies in this Section demonstrate that the Security Council's implementation of R2P is generally unsuccessful when fewer than all three conditions are met.

First, active government obstruction by the state perpetrating atrocity crimes seriously hinders political action. Obstruction by the Sudanese and South Sudanese governments hindered the deployment of U.N. missions and led to A.U. missions that largely lacked resources to effectively carry out their mandate to be the only presence in both countries as mass atrocity crimes were occurring. Further, in none of these cases were there P5 member states that provided the

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<sup>336</sup> S.C. Res. 2339, ¶¶ 1, 5, 12 (Jan. 27, 2017).

political will to overcome government obstruction in order to launch a more effective R2P response.

Second, cooperation between regional organizations and countries and the Security Council was lacking in the cases of Sudan, the CAR, and the DRC. In Sudan and the CAR, regional organizations like the A.U., the League of Arab States, ECOWAS, and ECCAS were working to solve the local crises. While regional organizations are essential to successfully implementing R2P, as the R2P successes in Subsection A demonstrate, here, the cooperation and communication between the organizations and the Security Council fell short. In the case of Sudan, the A.U. and the League of Arab States were particularly averse to Western- or U.N.-led intervention, which meant that the resources available to a potential U.N.-led mission were unavailable to the humanitarian crises. The statement of African leaders that Sudan was an “African responsibility” was mirrored in the crisis in the CAR years later, when the A.U. representative told the Security Council that the CAR presented an “African challenge” to be met by engaging the whole continent of Africa—not the whole international community. Deference to regional leadership in the context of R2P delayed the reaction of the Security Council, whose role is to take a more active leadership position in the case of an R2P crisis.

Additionally, in the cases of the DRC and the CAR, regional countries and neighboring states actively undermined political stability and helped facilitate and perpetrate atrocities against civilian populations. The DRC, Rwanda and Uganda provided support and sent armed forces to support rebel groups, thereby perpetrating and financing the commission of mass atrocity crimes. In the CAR, rather than assisting with political stability, Chadian peacekeepers facilitated the movement of ex-Séléka fighters to regroup, thereby also facilitating the commission of further mass atrocity crimes. Both the aversion by regional organizations and the active undermining by regional states in the crises in Sudan, the CAR, and the DRC, contributed to the unsuccessful implementation of R2P by the Security Council.

Third, all four cases demonstrate a lack of rapid response capacity. In all four crises, U.N. missions were deployed either too late or with too few resources to effectively carry out their civilian protection mandate. While the response to the R2P crisis in the DRC was severely delayed, the authorization of the Intervention Brigade demonstrates the potential of the Security Council’s R2P engagement. The Brigade engaged under two conditions—regional and Security Council cooperation as well as rapid response capacity—and was successful in defeating the rebel group that had been perpetrating mass atrocity crimes against civilian communities. The Brigade encapsulated the conditions that helped make the three cases in Subsection A successful implementations of R2P.

Looking through the lens of the three conditions—government obstruction, cooperation between regional authorities and the Security Council, and rapid response capacity—the Security Council failed to implement its R2P mandate in response to the crises in the DRC, Sudan, South Sudan, and the CAR. Each case was missing at least two of these crucial conditions. Just as the successful implementations in Subsection A demonstrate that all three conditions are necessary for proper implementation of R2P, a missing condition means that the Security Council cannot properly implement R2P in order to protect civilians from mass atrocity crimes.

### C. Unsuccessful Implementation of R2P Resulting From U.N. Security Council Actual or Threatened Veto

A fourth condition has also prevented the Security Council from successfully implementing its R2P mandate: the P5 veto. As all substantive resolutions presented to the Security Council may be subject to a veto by any of the P5, the use of the veto regarding an R2P-related resolution is always a possibility. The four cases in this Section demonstrate that the Security Council veto, or the mere threat of the veto, can stall R2P response from the beginning or even after initial steps have been taken by the Security Council to implement its R2P mandate. This condition is separate from the three discussed in Subsections A and B because its presence stops Security Council action fully and completely.

#### 1. Yemen

Spurred on by the Arab Spring revolutions underway in nearby Tunisia and Egypt, Yemenis took to the streets in mid-January 2011 to protest the rule of President Ali Abdullah Saleh, who had been in power for over thirty years.<sup>337</sup> As protests spread throughout southern Yemeni cities, President Saleh deployed security forces that clashed with protesters, leaving hundreds dead.<sup>338</sup> In May 2011, leaders of the opposition and members of Saleh's General People's Congress party agreed to a peace transition process, facilitated by the Gulf Cooperation Council (GCC), that would allow Saleh a "dignified exit," but Saleh refused to sign the agreement and continued to fight protesters and opposition forces.<sup>339</sup> In September 2011, the Secretary-General issued a statement

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<sup>337</sup> Nada Bakri & J. David Goodman, *Thousands in Yemen Protest against the Government*, N.Y. TIMES (Jan. 27, 2011), <http://www.nytimes.com/2011/01/28/world/middleeast/28yemen.html>.

<sup>338</sup> *Arab Uprising: Country by Country - Yemen*, BBC NEWS (Dec. 16, 2013), <https://perma.cc/R283-NTK7>.

<sup>339</sup> Ernesto Londono & Greg Miller, *Yemen's Saleh Refuses to Sign Deal to Quit*, WASH. POST (May 23, 2011), <https://perma.cc/RJP9-G5A7>.

condemning the “excessive use of force by government security forces against unarmed protestors” while calling on government forces “to protect civilians and uphold their obligations under applicable international law.”<sup>340</sup>

The Security Council welcomed the Secretary-General’s statement in Resolution 2014, adopted in October 2011 (its first resolution on the situation in Yemen).<sup>341</sup> The resolution condemned the human rights violations committed by Yemeni government forces and other third parties and reminded the Yemeni government of its Pillar I obligation—its “primary responsibility to protect its population.”<sup>342</sup> Recognizing that a political resolution to the conflict would be the surest way to prevent further civilian casualties, Resolution 2014 also backed the GCC initiative for the peaceful transition of political power in Yemen.<sup>343</sup>

In November 2011, Saleh finally signed the GCC initiative, effectively transferring power from himself to his deputy, Abdo Rabbo Mansour Hadi—a development that the Security Council commended as a step towards implementing the “peaceful transition of power” envisioned by Resolution 2014.<sup>344</sup> Under the GCC initiative, mass protests gave way to smaller demonstrations as President Hadi convened a National Dialogue Conference and began the constitution-drafting process. Throughout this time, the Security Council received regular briefings from the Special Adviser<sup>345</sup> and expressed its continued support for a political resolution of the situation through the GCC, condemning violence meant to derail the peace process.<sup>346</sup>

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<sup>340</sup> U.N. Secretary-General, *Statement Attributable to the Spokesperson for the Secretary-General on Yemen* (Sept. 19, 2011), <https://perma.cc/YPV7-86FF>.

<sup>341</sup> S.C. Res. 2014, pmb. (Oct. 21, 2011).

<sup>342</sup> *Id.*

<sup>343</sup> *See* Agreement on the Implementation Mechanism for the Transition Process in Yemen in Accordance with the Initiative of the Gulf Cooperation Council (GCC) (Dec. 5, 2011), <https://perma.cc/75E3-Y2Y5>.

<sup>344</sup> Press Release, Security Council, Security Council Press Statement on Situation in Yemen, U.N. Press Release SC/10460 (Nov. 28, 2011), <https://perma.cc/4AX6-WV6P>.

<sup>345</sup> The U.N. Security Council received briefings from Special Adviser Jamal Benomar regarding the situation in Yemen. *See Yemen Briefings, 2012-2014*, SECURITY COUNCIL REP., <https://perma.cc/3RAA-K83J> (last visited Nov. 18, 2017).

<sup>346</sup> Press Release, Security Council, Security Council Press Statement on Terrorist Attack in Yemen, U.N. Press Release SC/10460 (Sept. 13, 2012) (condemning terrorist attacks); Press Release, Security Council, Security Council Press Statement on Friends in Yemen, U.N. Press Release SC/10778 (Sept. 28, 2012) (commending implementation of agreement); Press Release, Security Council, Security Council Statement Welcomes 18 March Launch of Yemen’s National Dialogue, Expresses Concern at Reports of Interference in Country’s Transition, U.N. Press Release SC/10919 (Feb. 13, 2013) (welcoming the National Dialogue Conference); Press Release, Security Council, Security Council Press Statement on Yemen, U.N. Press Release SC/10969 (Apr. 15, 2013) (welcoming reorganization of the military); Press Release, Security Council, Security Council Press Statement on Yemen, U.N. Press Release SC/11195 (Nov. 27, 2013) (encouraging NDC);

After a period of relative calm and following the establishment of a transition government in line with the GCC initiative, tensions again escalated into violence in 2014. The Houthis, an armed rebel group representing Yemen's Shia minority, took advantage of the fledgling state of the transition government and began a military campaign against President Hadi's forces.<sup>347</sup> Houthi forces were joined by army units that had defected as well as other forces loyal to Saleh, forming an ad-hoc opposition coalition that became known as the Popular Committees.<sup>348</sup> In response, the Security Council adopted Resolution 2140 in February 2014, which again expressed continued support for the political transition process while also establishing a regime of targeted sanctions, in the form of asset freezes and travel bans, against individuals determined to be obstructing the political transition process or violating international human rights or humanitarian law.<sup>349</sup>

By September 2014, the Popular Committees controlled over half of Yemen's governorates, including the capital city of Sanaa.<sup>350</sup> In Sanaa, Houthi leadership dissolved the parliament and took over the remaining government institutions, drawing the condemnation of the Security Council and ultimately forcing Hadi to flee the country in March 2015.<sup>351</sup> Further violence stemmed from a southern separatist movement, which was frustrated by its exclusion from the GCC initiative political process.<sup>352</sup> Other third-party terrorist groups, including Al-Qaeda in the Arabian Peninsula (AQAP) and the Islamic State of Iraq and the Levant (ISIL), also operated in parts of Yemen and sought to capitalize on the instability created by the power transition.

Before being pushed into exile in March 2015, Hadi had requested the military support of the Gulf States in countering the Houthis and bolstering his government. When Hadi was forced out of Sanaa, a Saudi Arabia-led coalition<sup>353</sup> answered his request for support by undertaking military airstrikes against the

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Press Release, Security Council, Security Council Press Statement on Attack against Defense Ministry of Yemen, U.N. Press Release SC/11202 (Dec. 5, 2013) (condemning terrorist attacks.).

<sup>347</sup> *Yemen Crisis: Who is Fighting Whom?*, BBC NEWS (Mar. 28, 2017), <https://perma.cc/CV2C-HA8K>.

<sup>348</sup> *Yemen: the Forgotten War*, AMNESTY INT'L (Mar. 2015), <https://perma.cc/3DBU-23FG>.

<sup>349</sup> S.C. Res. 2140, ¶¶ 15–20 (Feb. 26, 2014).

<sup>350</sup> *Yemen Crisis: Who is Fighting Whom?*, *supra* note 347.

<sup>351</sup> S.C. Res. 2201 (Feb. 15, 2015); *see also Yemen Crisis: President Hadi Flees as Houthi Rebels Advance*, BBC NEWS (Mar. 25, 2015), <https://perma.cc/M68L-CMLG>.

<sup>352</sup> *Yemen Crisis: Who is Fighting Whom?*, *supra* note 347.

<sup>353</sup> *Id.* (noting that coalition forces included Saudi Arabia, U.A.E., Bahrain, Kuwait, Qatar, Egypt, Jordan, Morocco, Senegal, and Sudan. The U.S., U.K., and France provided logistical and intelligence support).

Popular Committees.<sup>354</sup> By this point, the parties to conflict in Yemen had solidified into two distinct sides: forces loyal to Hadi supported by the Saudi-led coalition and forces loyal to Saleh supported by the Houthis (who, themselves, were allegedly backed by Iran).<sup>355</sup> Far from having a civilian protection mandate, the Saudi-led coalition had the intention of decisively ending the civil conflict in Yemen in favor of Hadi. In fact, the intervention by coalition forces increased fighting throughout Yemen and led to mass civilian casualties due to its indiscriminate bombing campaigns and active blockade of humanitarian assistance.<sup>356</sup>

The protracted violence between coalition forces and the Popular Committees soon led to international human rights and humanitarian law violations being committed by both sides. In April 2015, the Security Council adopted Resolution 2216, which urged a peaceful political solution to the conflict, called on the Houthis to withdraw forces from seized areas and surrender all arms, and formally established an arms embargo on Houthi forces and forces loyal to former President Saleh.<sup>357</sup> The resolution explicitly reaffirmed “consistent with international humanitarian law, the need for all parties to ensure the safety of civilians.”<sup>358</sup>

Nonetheless, Amnesty International reported in August 2015 that civilians continued to be severely impacted as fighting had spread throughout twenty of Yemen’s twenty-two governorates and both sides engaged in indiscriminate airstrikes and ground attacks against civilians and civilian objects—thereby violating international humanitarian law—while restricting humanitarian aid access to communities that required basic assistance.<sup>359</sup> A January 2016 report by a U.N.-appointed panel of experts investigating the Saudi-led bombing campaign further determined that coalition forces engaged in “widespread and systematic” attacks on civilians in violation of international humanitarian law, including “airstrikes targeting civilians and civilian objects . . . [like] medical facilities;

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<sup>354</sup> Dan Roberts & Kareem Shaheen, *Saudi Arabia Launches Yemen Air Strikes as Alliance Builds against Houthi Rebels*, THE GUARDIAN (Mar. 26, 2015), <https://perma.cc/7WQU-69EZ>.

<sup>355</sup> Human Rights Council, *Situation of Human Rights in Yemen: Report for the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/33/38 (Aug. 4, 2016).

<sup>356</sup> Julian Borger, *Saudi-Led Naval Blockade Leaves 20M Yemenis Facing Humanitarian Disaster*, THE GUARDIAN (June 5, 2015), <https://perma.cc/24NX-HEY2>.

<sup>357</sup> S.C. Res 2216, pmbl., ¶¶ 1, 14 (Apr. 14, 2015).

<sup>358</sup> *Id.* at ¶ 9.

<sup>359</sup> Amnesty Int’l, *Yemen: “Nowhere Safe for Civilians”: Airstrikes and Ground Attacks in Yemen*, AI Index MDE 31/2291/2015 (Aug. 8, 2015); *Yemen: Relentless Airstrikes That Have Left Hundreds of Civilians Dead Must be Investigated*, AMNESTY INT’L (Apr. 24, 2015), <https://perma.cc/L29T-8MUS>; *Yemen: Mounting Evidence of High Civilian Toll of Saudi-Led Airstrikes*, AMNESTY INT’L (May 8, 2015), <https://perma.cc/3BA4-Z6JH>.

schools; mosques; markets, factories, and food storage warehouses; and other essential civilian infrastructure.<sup>360</sup> Human Rights Watch further condemned the recruitment of child soldiers, restrictions on humanitarian access, arbitrary detention, torture, and forced disappearance.<sup>361</sup>

As fighting continued to rage throughout Yemen, the Office of the U.N. High Commissioner for Human Rights released its own report in August 2016 stating that both parties to the conflict had committed violations of international human rights and humanitarian law, including indiscriminate attacks on civilians and civilian areas, recruitment of child soldiers, forced displacement, and sexual violence.<sup>362</sup> The following month, members of the Human Rights Council sought to build on the report's findings by establishing an independent international commission of inquiry into the situation in Yemen, but the measure failed to gain the necessary votes.<sup>363</sup>

Despite mounting reports of shocking and indiscriminate attacks against civilians, the U.S. and U.K. support the Saudi-led coalition's efforts, and many of the weapons used against civilians by coalition forces in Yemen can be traced back to U.S. and U.K. sales.<sup>364</sup> Given that two P5 members are thus aligned with the forces responsible for so much of the civilian toll, it is unsurprising that the Security Council's only action to implement R2P in Yemen since 2015 has been to renew pre-existing sanctions.<sup>365</sup>

A sustained ceasefire and political stability remain elusive to this day. The latest U.N.-led peace talks concluded in August 2016 without an agreement.<sup>366</sup> While the Security Council continues to release statements calling on all parties in Yemen to lay down arms and pursue a political solution to end the conflict,<sup>367</sup> Hadi and his forces state that, unless Security Council Resolution 2216 is fully enforced—with Houthi rebels withdrawing from Yemeni areas and surrendering

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<sup>360</sup> Ewen MacAskill, *U.N. Report into Saudi-Led Strikes in Yemen Raises Questions over UK Role*, *GUARDIAN* (Jan. 27, 2016), <https://perma.cc/556W-7XJA>.

<sup>361</sup> HUMAN RIGHTS WATCH, *WORLD REPORT 2017: YEMEN* 675–82 (2017).

<sup>362</sup> Human Rights Council, *Situation of Human Rights in Yemen*, *supra* note 355.

<sup>363</sup> *Yemen*, GLOBAL CTR. FOR THE RESP. TO PROTECT, <https://perma.cc/Y8LA-CP9W> (last updated Oct. 15, 2017).

<sup>364</sup> *Yemen: Multibillion-Dollar Arms Sales by USA and UK Reveal Shameful Contradiction with Aid Efforts*, AMNESTY INT'L (Mar. 23, 2017), <https://perma.cc/VJ2F-YJAV>.

<sup>365</sup> *Yemen*, *supra* note 363.

<sup>366</sup> *Chronology of Events: Yemen*, SECURITY COUNCIL REP., <https://perma.cc/D594-5AFA> (last updated Oct. 6, 2017).

<sup>367</sup> Meeting Coverage, Security Council, Security Council Issues Presidential Statement Calling on Parties in Yemen to Engage Constructively in Good-Faith Effort for Conflict Resolution, U.N. Meeting Coverage SC/12873 (June 15, 2017).

all arms unconditionally—the political process cannot continue.<sup>368</sup>

In January 2017, the U.N. Office for the Coordination of Humanitarian Affairs reported that 10,000 civilians had been killed and 40,000 wounded during the two-year conflict.<sup>369</sup> As of July 2017, 17 million people in Yemen were food insecure and 2.9 million were internally displaced.<sup>370</sup> Protracted conflict has also caused a cholera epidemic to spread throughout Yemen, killing more than 1,700 people in the span of less than three months, as medical infrastructure was targeted in bombing campaigns and humanitarian assistance remains limited.<sup>371</sup>

While the Security Council invoked R2P relatively early on—reminding Yemen of its Pillar I obligations to protect civilians in Resolution 2014 and imposing targeted sanctions on human rights abusers—the Security Council has failed to fully engage with R2P in Yemen. In subsequent resolutions, the Security Council has framed the conflict in Yemen as strictly a civil war, rather than a situation in which mass atrocity crimes are being committed against civilians. Though the Security Council repeatedly called on all warring parties in Yemen to observe international human rights and humanitarian laws, it has not explicitly invoked R2P's Pillar II or Pillar III, likely since any further action to implement R2P would be blocked by the P5 countries involved in the Saudi-led intervention. Further, the Saudi-led intervention is itself not an R2P intervention as it was deployed without the formal authorization of the Security Council and without a mandate to protect civilians—and has, in fact, led to more civilian deaths and injuries. Overall, the Security Council veto, as well as the framing of the conflict as a civil war, has created a crisis in which mass atrocity crimes continue to be committed and further R2P implementation seems unlikely.

## 2. Syria

In March 2011, fifteen kids in the Syrian town of Dara'a were thrown in jail for writing the words, “[t]he people want the regime to fall,” on a wall.<sup>372</sup> Local protests erupted in response and soon spread across the country, becoming an outlet for a broader range of grievances against Syria's authoritarian regime.<sup>373</sup> From the outset, Syrian President Bashar al-Assad responded with brutality,

<sup>368</sup> *Yemen Crisis: Who is Fighting Whom?*, *supra* note 347.

<sup>369</sup> Ahmed Al-Haj, *Top U.N. Official: 10,000 Civilians Killed in Yemen Conflict*, AP NEWS (Jan. 16, 2017), <https://perma.cc/6Z8Y-3RYV>.

<sup>370</sup> *Yemen*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFF., <https://perma.cc/2X2V-C44V> (last visited Oct. 14, 2017).

<sup>371</sup> See U.N. Off. for the Coordination of Humanitarian Aff., *Yemen*, 25 HUMANITARIAN BULLETIN (July 16, 2017), <https://perma.cc/XL8R-STQZ>.

<sup>372</sup> Rania Abouzeid, *Syria's Revolt: How Graffiti Stirred an Uprising*, TIME (Mar. 22, 2011), <http://content.time.com/time/world/article/0,8599,2060788,00.html>.

<sup>373</sup> *Id.*

directing his security forces to open fire on protesters and even sending tanks into towns and villages.<sup>374</sup> Signaling the regime's intention to continue this shocking violence against its own civilians, it soon imposed a total media blackout, preventing international journalists from entering the country and detaining local journalists who covered the protests.<sup>375</sup>

By summer 2011, the relative silence of the international community had empowered the Syrian regime to brazenly employ violence to maintain its rule. When the regime felt it was losing control of the city of Hama—a scene of many of the largest protests—in July 2011, it responded by unleashing cannon fire and machine guns on unarmed residents.<sup>376</sup> On August 3, 2011, after nearly five months of the Syrian regime's relentless attacks on its own population, the Security Council issued its first formal statement condemning the use of force against civilians.<sup>377</sup>

As Syrian civilians and military defectors began forming armed opposition groups in an attempt to counter the regime's attacks,<sup>378</sup> the government's violent repression of the civilian population only escalated.<sup>379</sup> While the Security Council met to consider a draft resolution that would have condemned the Syrian government's abuses and raised the specter of future sanctions, the measure was ultimately vetoed by China and Russia, who judged inaction to be in their best interest given their economic and political relationships with the al-Assad regime.<sup>380, 381</sup> Acting with the decisiveness that the Security Council had lacked, the League of Arab States moved to suspend Syria in November 2011 and

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<sup>374</sup> Katherine Marsh, *Syrian Regime Launches Crackdown by Shooting 15 Activists Dead*, THE GUARDIAN (Mar. 23, 2011), <https://perma.cc/XH5Y-WD3N>; see also Katherine Marsh et al., *Syria's Crackdown on Protesters Becomes Dramatically More Brutal*, THE GUARDIAN (Apr. 25, 2011), <https://perma.cc/7BVW-5NAL>.

<sup>375</sup> *Attacks on the Press in 2011: Syria*, COMM. TO PROTECT JOURNALISTS, <https://perma.cc/8Y6Y-WDAA> (last visited Nov. 14, 2017).

<sup>376</sup> Editorial, *Syria's Ramadan Massacre*, WASH. POST (Aug. 1, 2011), <https://perma.cc/9HYU-4R3R>.

<sup>377</sup> S.C. Pres. Statement 2011/16 (Aug. 3, 2011).

<sup>378</sup> Jeffrey White, *Asad's Armed Opposition: The Free Syrian Army*, THE WASH. INST. FOR NEAR EAST POL'Y (Nov. 30, 2011), <https://perma.cc/P7TZ-WMMK>.

<sup>379</sup> UN: *Syria Escalates Repression After Security Council Statement*, HUM. RTS. WATCH (Aug. 9, 2011), <https://perma.cc/945U-JQTQ>.

<sup>380</sup> Meeting Coverage, Security Council, Security Council Fails to Adopt Draft Resolution Condemning Syria's Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China, U.N. Meeting Coverage SC/10403 (Oct. 4, 2011).

<sup>381</sup> Richard Gowan & Paulo Sérgio Pinheiro, *Syria*, in THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS 434, 434–53 (Jared Genser & Bruno Stagno Ugarte eds., 2014).

announced that it would impose economic and political sanctions in response to the government's failure to put an end to the violence.<sup>382</sup>

The same month, a commission of inquiry established by the Human Rights Council during the early stages of the crisis released its first report, detailing “patterns of summary execution, arbitrary arrest, enforced disappearance, [and] torture” by government forces, and suggesting that these abuses “may amount to crimes against humanity.”<sup>383</sup> In December 2011, U.N. High Commissioner for Human Rights Navi Pillay personally briefed the Security Council, stressing that crimes against humanity were likely being committed and urging the Security Council to refer the situation in Syria to the ICC.<sup>384</sup> If the members of the Security Council had had any doubt as to whether the violence in Syria met the threshold of R2P action, such doubt was no longer possible.

In light of these calls to action, the Security Council again met to consider a draft resolution on Syria in February 2012, as al-Assad's forces were mercilessly shelling civilian residences in the city of Homs.<sup>385</sup> The proposed measure, which would have echoed the overwhelming international calls for al-Assad to step down, was again blocked by Russia and China—an outcome met with fury by the other permanent members of the Council.<sup>386</sup> The Executive Director of the Global Centre for the Responsibility to Protect stated after the vote that the Security Council had been reduced to “a mere spectator of crimes against humanity in Syria.”<sup>387</sup>

While the Security Council's internal divisions relegated it to the sidelines, former U.N. Secretary-General Kofi Annan attempted to fill the leadership void as Joint Special Envoy of the United Nations and the League of Arab States on the Syrian Crisis.<sup>388</sup> When Annan proposed a six-point plan to end the crisis, the

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<sup>382</sup> David Batty & Jack Shenker, *Syria Suspended from Arab League*, THE GUARDIAN (Nov. 12, 2011), <https://perma.cc/7HQY-WZCM>.

<sup>383</sup> Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶¶ 100–10, U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23, 2011).

<sup>384</sup> *Syria Should Be Referred to ICC, UN's Navi Pillay Says*, BBC NEWS (Dec. 13, 2011), <https://perma.cc/B3QJ-V85V>.

<sup>385</sup> Ben Quinn, *Syria: More Than 200 Dead After 'Massacre' in Homs*, THE GUARDIAN (Feb. 3, 2012), <https://perma.cc/W897-J8R7>.

<sup>386</sup> Paul Harris et al., *Syria Resolution Vetoed by Russia and China at United Nations*, THE GUARDIAN (Feb. 4, 2012), <https://perma.cc/PS55-ENH2>.

<sup>387</sup> Simon Adams, *Using Coercive Nuance Against Assad*, N.Y. TIMES (Mar. 30, 2012), <https://perma.cc/8ZJS-PAKB>.

<sup>388</sup> Press Release, U.N. Secretary-General, Kofi Annan Appointed Joint Special Envoy of United Nations, League of Arab States on Syrian Crisis, U.N. Press Release SG/SM/14124 (Feb. 23, 2012), <https://perma.cc/4FTN-MQCQ>.

Security Council endorsed the plan and encouraged the Syrian government to abide by it.<sup>389</sup> However, the Council did remarkably little to actually enforce the plan. On April 14, 2012, the Security Council passed Resolution 2042—its first resolution on the crisis in Syria—authorizing the preliminary deployment of thirty unarmed military observers to monitor the ceasefire component of the Special Envoy’s plan.<sup>390</sup> While the Security Council increased the number of military observers from 30 to 300 a week later, establishing the U.N. Stabilization Mission in Syria (UNSMIS),<sup>391</sup> the effort remained thoroughly insufficient. The Security Council quietly admitted defeat and disbanded UNSMIS in July 2012.<sup>392</sup> Annan, frustrated by the “finger-pointing and name-calling in the Security Council” and lamenting the resulting lack of “serious, purposeful and united international pressure,” resigned as Special Envoy the following month.<sup>393</sup>

Without the threat of coercive action by the Security Council, the Syrian regime continued its strategy of collective punishment, deploying the full extent of its air power against civilians in rebel-held areas.<sup>394</sup> In November 2012, the National Coalition for Syrian Revolutionary and Opposition Forces emerged as the unified front for the opposition groups, excluding Islamist militias, and soon gained the recognition of the U.S., U.K., France, Turkey, Spain, the League of Arab States, and the Gulf states as the legitimate representative of the Syrian people.<sup>395</sup> Despite this recognition, the rebel groups were also guilty of committing atrocities against civilians, as the U.N. Commission of Inquiry had evidenced in its August 2012 report.<sup>396</sup>

By the end of 2012, the fighting in Syria had evolved into a full-scale civil war, and casualties were steadily increasing.<sup>397</sup> Amid concerns that the Syrian regime had begun using banned chemical weapons against civilians, a U.N.

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<sup>389</sup> S.C. Pres. Statement 2012/6 (Mar. 21, 2012).

<sup>390</sup> S.C. Res. 2042, ¶ 7 (Apr. 14, 2012).

<sup>391</sup> S.C. Res. 2043, ¶ 5 (Apr. 21, 2012).

<sup>392</sup> S.C. Res. 2059 (July 20, 2012).

<sup>393</sup> Rick Gladstone, *Resigning as Envoy to Syria, Annan Casts Wide Blame*, N.Y. TIMES (Aug. 2, 2012), <http://www.nytimes.com/2012/08/03/world/middleeast/annan-resigns-as-syria-peace-envoy.html>.

<sup>394</sup> Simon Adams, *Failure to Protect: Syria and the U.N. Security Council*, GLOB. CTR. FOR THE RESP. TO PROTECT, 5 OCCASIONAL PAPER SER., at 6 (Mar. 14, 2015), <https://perma.cc/ZQF4-8WTH>.

<sup>395</sup> *A Backgrounder on the National Coalition of Syrian Revolutionary and Opposition Forces*, CARNEGIE MIDDLE EAST CTR. (Jan. 11, 2013), <http://carnegie-mec.org/diwan/50628>.

<sup>396</sup> Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, Rep. of the Ind. Int’l Comm’n of Inquiry on the Syrian Arab Republic, ¶ 134, U.N. Doc. A/HRC/21/50 (Aug. 16, 2012).

<sup>397</sup> Adams, *supra* note 394, at 6.

investigative team was dispatched in August 2013.<sup>398</sup> Just days after the team arrived, al-Assad launched the deadliest chemical weapon attack yet, using Sarin gas to kill hundreds of civilians in Ghouta—including many children.<sup>399</sup> The audacity of the attack shocked the international community and prompted a Security Council emergency briefing later that same evening, but Russia and China reportedly blocked a formal resolution at that time.<sup>400</sup> After a U.N. team of experts definitively confirmed the use of Sarin gas in September 2013, the Security Council responded with a unanimous resolution requiring the verification and destruction of Syria's chemical weapons stockpiles, in accordance with a deal reached by the U.S. and Russia, and promising to impose coercive Chapter VII measures in the case of noncompliance.<sup>401</sup>

While the destruction of these stockpiles—albeit a partial destruction<sup>402</sup>—was an important step, the Syrian regime continued using more traditional heavy weapons against civilians and blocking the delivery of desperately-needed humanitarian aid to civilian areas.<sup>403</sup> On February 22, 2014, the Security Council passed a resolution demanding that Syrian authorities allow humanitarian access and threatening to take unspecified “further steps” in the case of noncompliance.<sup>404</sup> This marked the first resolution in which the Security Council explicitly acknowledged the Syrian government's “primary responsibility to protect its population” under R2P.<sup>405</sup> When al-Asaad continued to abrogate that responsibility and deny humanitarian aid for the Syrian people, the Security Council adopted a new resolution authorizing cross-border humanitarian access without the consent of the state.<sup>406</sup> This measure, renewed in December 2014,<sup>407</sup> did allow for marginally more aid to reach the people of Syria, but the demand for aid far outpaced its delivery as the crisis continued unabated.<sup>408</sup>

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<sup>398</sup> UN *Chemical Weapons Inspectors Arrive in Syria*, AL JAZEERA AM. (Aug. 18, 2013), <https://perma.cc/NC9E-Q234>.

<sup>399</sup> HUMAN RIGHTS WATCH, *ATTACKS ON GHOUTA: ANALYSIS OF ALLEGED USE OF CHEMICAL WEAPONS IN SYRIA* (Sept. 10, 2013).

<sup>400</sup> U.N., *U.S. Call for Urgent Probe of Syria Chemical Attack Claim*, CNN (Aug. 22, 2013), <https://perma.cc/CQ48-HPWC>.

<sup>401</sup> S.C. Res. 2118, pmb., ¶¶ 3, 21 (Sept. 27, 2013).

<sup>402</sup> Krishnadev Calamur, *How is Syria Still Using Chemical Weapons?*, THE ATLANTIC (Apr. 4, 2017), <https://perma.cc/7HP7-VWY9>.

<sup>403</sup> John Kerry, *Assad's War of Starvation*, FOREIGN POL'Y (Oct. 25, 2013), <https://perma.cc/B26D-Q4NL>.

<sup>404</sup> S.C. Res. 2139, ¶ 17 (Feb. 22, 2014).

<sup>405</sup> *Id.* at ¶ 9.

<sup>406</sup> S.C. Res. 2165, ¶¶ 2–3 (July 14, 2014).

<sup>407</sup> S.C. Res. 2191 (Dec. 17, 2014).

<sup>408</sup> U.N. SCOR, 70th Sess., 7369th mtg., 3, U.N. Doc. S/PV.7369 (Jan. 28, 2015).

In the years that followed, the Bashar al-Assad regime continued to defy international humanitarian law and flout whatever resolutions the Security Council managed to pass, confident that the support of veto-wielding permanent members Russia and China would shield it from serious punishment. That the regime has proven correct in this regard marks the most serious failure of the Security Council to date. While the Security Council had, in 2013, promised to impose Chapter VII measures in the case of future chemical weapon use, recent chemical weapons attacks have failed to produce this response.<sup>409</sup> Despite the ongoing targeting of civilians and the obstruction of humanitarian aid, coercive measures such as sanctions or an ICC referral continue to be blocked by Russia and China.<sup>410</sup> U.N. High Commissioner for Human Rights Zeid Ra'ad Al Hussein expressed his disappointment in the Security Council's failure in this regard, stating that "the persistent failure of the Security Council to refer the situation in Syria to the International Criminal Court is an example of the most shameful form of realpolitik."<sup>411</sup>

Moreover, the lack of unified action on Syria has allowed it to become a proxy war, with individual nations picking sides and undertaking unilateral actions that have further devastated the civilian population. The most recent report of the U.N. Commission of Inquiry accused Russia of complicity in the war crimes being committed by the Syrian government, highlighting the improbability of a unified Security Council response to the continuing crisis.<sup>412</sup>

As of July 2017, the Syrian Observatory for Human Rights had documented roughly 475,000 deaths since the start of the violence, including nearly 100,000 civilian casualties.<sup>413</sup> UNHCR reports that 13.5 million people in Syria are currently in need of humanitarian assistance, with 4.53 million of those people in inaccessible areas.<sup>414</sup> Under the watch of the Security Council, the crisis has caused more than 5 million people to flee the country as refugees, and has

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<sup>409</sup> Meeting Coverage, Security Council, Security Council Fails to Adopt Resolution Condemning Chemical Weapons Use in Syria, Following Veto by Russian Federation, U.N. Meeting Coverage SC/12791 (Apr. 12, 2017), <https://perma.cc/H2V5-38VV>.

<sup>410</sup> *UN Security Council: Ensure Justice for Syria Atrocities*, HUM. RTS. WATCH (Aug. 30, 2016), <https://perma.cc/3WC9-TM7P>.

<sup>411</sup> "Monstrous Disregard" for Civilians, Says UN Rights Chief, As Hospitals Bombed in Syria, U.N. NEWS CTR. (Apr. 29, 2016), <https://perma.cc/8BPF-XCWG>.

<sup>412</sup> *UN: Both Sides Committed War Crimes in Syria's Aleppo*, AL JAZEERA (Mar. 1, 2017), <https://perma.cc/83FC-KQKE>.

<sup>413</sup> *About 475 Thousand Persons Were Killed in 76 Months of the Syrian Revolution and More than 14 Million Were Wounded and Displaced*, SYRIAN OBSERVATORY FOR HUM. RTS. (July 16, 2017), <http://www.syriahr.com/en/?p=70012>.

<sup>414</sup> *Syria Emergency*, U.N. HIGH COMMISSIONER FOR REFUGEES, <https://perma.cc/3RPD-MVRN> (last visited Oct. 14, 2017).

left a further 6.3 million people internally displaced—the largest number of people displaced by any conflict in the world.<sup>415</sup>

### 3. Myanmar (Burma)

The Burmese people have suffered through a litany of human rights abuses since a military coup d'état in 1962 ended democratic rule in Myanmar. International calls for action by U.N. officials and human rights advocates have intensified to the threshold of R2P invocation in response to abuses by the military junta, including: its violent crackdown on peaceful demonstrators in the 2007 Saffron Revolution, its hapless response to Cyclone Nargis in 2008, and, most recently, its persecution of the minority Muslim Rohingya community.<sup>416</sup> Between 1996 and 2007, military forces destroyed or displaced 3,600 villages and perpetrated crimes against humanity as a means to instill fear in the civilian population.<sup>417</sup> The military has also consistently killed civilians to repress political activity and peaceful demonstrations, implementing a “shoot on sight” policy in the ethnic minority areas of eastern Myanmar.<sup>418</sup> The U.N. Special Rapporteur on Myanmar has labeled the state’s failure to stem this violence as a “wilful [sic] abrogation of its responsibility under international humanitarian law.”<sup>419</sup>

In recent years, violence against minority ethnic groups has drawn international attention. Particularly, longstanding tensions between Buddhists in Rakhine State and Rohingya Muslims have erupted into a series of violent attacks since 2012, killing hundreds of civilians and displacing tens of thousands.<sup>420</sup> Most recently on October 9, 2016, a series of attacks on Myanmar border police left nine police officers dead.<sup>421</sup> Declaring a state of emergency, the government authorized police security forces to pursue “security clearing operations” throughout Rakhine State, which has led to an “unprecedented”

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<sup>415</sup> *Id.*; Rick Gladstone, *Displaced Population Hit Record in '16*, U.N. *Says*, N.Y. TIMES (June 19, 2017), <https://www.nytimes.com/2017/06/19/world/middleeast/displaced-people-united-nations-global-trends.html>.

<sup>416</sup> *The Crisis in Burma*, ICRTOP, <https://perma.cc/LC24-97T5> (last visited Oct. 14, 2017).

<sup>417</sup> Paul Sergio Pinheiro & Meghan Barron, *Burma (Myanmar)*, in THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME 272, 274 (Jared Genser & Irwin Cotler eds., 2011).

<sup>418</sup> *Id.* at 273–74.

<sup>419</sup> Paulo Sergio Pinheiro (Special Rapporteur on the Situation of Human Rights in Myanmar), *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of Human Rights in Myanmar*, 106, U.N. Doc. E/CN.4/2006/34 (Feb. 7, 2006).

<sup>420</sup> Global Centre for the Responsibility to Protect, *Myanmar*, 35 R2P MONITOR, at 7 (Sept. 15, 2017).

<sup>421</sup> *Id.*

level of violence by the government against the Rohingya people.<sup>422</sup> In February 2017, OHCHR expressed concern that the clearing operations are a systematic and widespread government policy of ethnic cleansing.<sup>423</sup> Crimes committed by government forces include: “extrajudicial executions or other killings, including by random shooting; enforced disappearance and arbitrary detention; rape, including gang rape, and other forms of sexual violence; physical assault including beatings; torture, cruel, inhuman or degrading treatment or punishment; looting and occupation of property; destruction of property; and ethnic and religious discrimination and persecution.”<sup>424</sup> As of May 2017, UNHCR estimates a total of 420,000 Rohingya refugees in surrounding countries (43,000 of whom fled to Bangladesh immediately after the October 2016 attacks) as well as 120,000 internally displaced.<sup>425</sup>

U.N. Special Adviser on the Prevention of Genocide Adama Dieng stated reported crimes “could amount to crimes against humanity.”<sup>426</sup> The U.N. Special Rapporteur on the Situation of Human Rights in Myanmar Yanghee Lee echoed these concerns.<sup>427</sup> The Human Rights Council has called for an independent factfinding mission into these allegations of human rights violence and abuses by government forces, particularly focused on Rakhine State.<sup>428</sup> The Myanmar government has stated it would not accept a U.N. mission.<sup>429</sup> Without credible engagement by the Security Council, systematic persecution threatens the survival of ethnic groups in Myanmar, particularly the Rohingya community.

The Security Council has not invoked R2P regarding Myanmar, going back to when the country’s situation was placed on its permanent agenda in 2006. Apart from a presidential statement that deplored the violence enacted upon

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<sup>422</sup> Off. of the High Comm’r of Hum. Rts. Mission to Bangl., Flash Report: Interviews with Rohingyas Fleeing from Myanmar Since 9 October 2016, at 42 (Feb. 3, 2017), <https://perma.cc/UZ73-WB62>.

<sup>423</sup> *Id.*

<sup>424</sup> *Id.* at 40.

<sup>425</sup> Vivian Tan, *Over 168,000 Rohingya Likely Fled Myanmar Since 2012—UNHCR Report*, U.N. HIGH COMM’R FOR REFUGEES (May 3, 2017), <https://perma.cc/CH3A-GH6K>.

<sup>426</sup> Press Release, United Nations, Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide Following OHCHR’s Report on the Situation in Northern Rakhine State, Myanmar, U.N. Press Release (Feb. 6, 2017), <https://perma.cc/B5GN-NKHP>.

<sup>427</sup> Yanghee Lee (Special Rapporteur on the Situation of Human Rights in Myanmar), *Rep. of the Special Rapporteur on the Situation of Human Rights in Myanmar*, U.N. Doc. A/HRC/34/67 (Mar. 1, 2017).

<sup>428</sup> Human Rights Council Res. 34/22, ¶ 11, U.N. Doc. A/HRC/RES/34/22 (Mar. 24, 2017).

<sup>429</sup> Global Centre for the Responsibility to Protect, *South Sudan*, 33 R2P MONITOR, at 9 (May 15, 2017), <https://perma.cc/JYS2-F32P>.

demonstrators during the Saffron Revolution,<sup>430</sup> the Security Council has not substantively engaged on the application of R2P to Myanmar. Russia and China rejected a 2007 draft resolution, which had called on the Myanmar government to cease military attacks against civilians and would have established a basis for invoking R2P.<sup>431</sup> The draft resolution expressed, “deep concern at large-scale human rights violations in Myanmar, as cited in the report of the Special Rapporteur of 21 September 2006, including violence against unarmed civilians by the Myanmar military, unlawful killings, torture, [and] rape . . . .”<sup>432</sup> Though U.N. High Commissioner Zeid Ra’ad and U.N. Special Adviser on the Prevention of Genocide Dieng have alluded to R2P in their February 2017 statements,<sup>433</sup> there has not been an invocation of the doctrine by the Security Council because of Russia and China’s continued insistence that Myanmar’s internal conflict does not threaten international peace and security. With the U.K. requesting the Security Council be seized of the situation in Myanmar<sup>434</sup> as well as the recent reports of atrocities by the U.N. High Commissioner on Human Rights and Special Advisers, the Security Council is under pressure to consider the situation in Rakhine State. But any implementation of R2P by the Security Council has remained stalled under threat of a Chinese and Russian veto.

#### 4. Democratic People’s Republic of Korea (North Korea)

Since Kim Il-sung consolidated the Democratic People’s Republic of Korea (DPRK) under the control of the Korean Worker’s Party in the aftermath of the Korean War, the state has exerted almost total control over its citizens. Dissent against the regime’s rule is punishable by death or indefinite detention in a forced labor camp.<sup>435</sup> Over the past 30 years, more than 400,000 people are estimated to have died in the DPRK’s modern-day gulag system, which continues to imprison over 200,000 people in near-starvation conditions. Prisoners in political prison camps are subject to brutal conditions of gross human rights violations, including: forced labor; torture and solitary

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<sup>430</sup> S.C. Pres. Statement 2007/37 (Oct. 11, 2007).

<sup>431</sup> S.C. Draft Res., ¶ 3, U.N. Doc. S/2007/14 (Jan. 12, 2007).

<sup>432</sup> *Id.* at pmb1.

<sup>433</sup> Tomás Ojea Quintana (Special Rapporteur on the Situation of Human Rights in Myanmar), *Rep. on the Situation of Human Rights in Myanmar*, ¶ 68, U.N. Doc. A/65/368 (Sept. 15, 2010).

<sup>434</sup> Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland, Letter dated 1 February 2016 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/113 (Feb. 4, 2016).

<sup>435</sup> U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab, Democratic People’s Republic of Korea 2016 Human Rights Report, at 4 (2016).

confinement; food rations below subsistence levels; severe lack of sanitation; witnessing or being subject to public executions, rape, or forced abortions; and lack of adequate medical care leading to death or the spread of diseases.<sup>436</sup> Under the Three Generation Rule, three generations of family members of the accused must be imprisoned as traitors.<sup>437</sup> While the number of prisoners has decreased in recent years, human rights organizations note that this is possibly the result of the number of deaths from such brutal conditions rather than a change in government prison policies.<sup>438</sup>

Further, the government's practice of assigning food rations based on loyalty to the regime and its prioritization of military spending, compounded by natural disasters that have destroyed crop growth, have led to the deaths of at least one million people since the 1990s and continue to endanger the lives of some eighteen million people.<sup>439</sup> Food relief provided by countries and international relief organizations rarely reaches those communities most affected by famine and is often allocated to those most loyal to the regime.<sup>440</sup> In 2016, an estimated one-fourth of all children in the DPRK were stunted due to "chronic malnutrition" and two-thirds of the population were food insecure.<sup>441</sup> Only sixteen percent of households had adequate food consumption.<sup>442</sup>

The movement to classify the human rights atrocities in the DPRK under R2P was led initially by civil society groups and now by various U.N. bodies. In 2006, former Czech Republic President Václav Havel, former Norwegian Prime Minister Kjell Magne Bondevik, and Nobel Peace Prize Laureate Elie Wiesel commissioned the first report that comprehensively reviewed human rights

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<sup>436</sup> *Id.*

<sup>437</sup> Shin Dong-hyok, *Life in North Korea's Gulag*, WALL ST. J. (Nov. 30, 2007), <https://www.wsj.com/articles/SB119637269611208428>.

<sup>438</sup> U.S. Dep't of State, *supra* note 435, at 6.

<sup>439</sup> DLA PIPER ET AL., FAILURE TO PROTECT: A CALL FOR THE UN SECURITY COUNCIL TO ACT IN NORTH KOREA, 12–30 (Oct. 30, 2006), <https://perma.cc/NC47-8ZPK>. The author of this Article, Jared Genser, led the pro bono team producing this report commissioned by former Czech Republic President Vaclav Havel, Nobel Peace Prize Laureate Elie Wiesel, and former Norwegian Prime Minister Kjell Magne Bondevik. See White Paper on North Korea Human Rights, KINU (2016); U.N. IN DPR KOREA, DPR KOREA NEEDS AND PRIORITIES (Mar. 2017), <https://perma.cc/F7ZW-YRJ5>; Tomás Ojea Quintana (Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea), *Rep. of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea*, 10, U.N. Doc. A/HRC/34/66 (Feb. 22, 2017).

<sup>440</sup> DLA PIPER ET AL., FAILURE TO PROTECT: THE ONGOING CHALLENGE OF NORTH KOREA, 5–6 (2008), <https://perma.cc/VF8G-27VP>. The author of this Article, Jared Genser, led the pro bono team producing this report as well.

<sup>441</sup> *Democratic People's Republic of Korea*, WORLD FOOD PROGRAMME, at 1, <https://perma.cc/NPJ2-EDKG> (last visited Oct. 15, 2017); U.N. IN DPR KOREA, *supra* note 439.

<sup>442</sup> *Democratic People's Republic of Korea*, *supra* note 441.

violations in the DPRK to both apply the responsibility to protect and to conclude that North Korea was committing crimes against humanity.<sup>443</sup> In March 2013, the Human Rights Council created a commission of inquiry on human rights in the DPRK, which first directed the attention of the U.N. to the “systematic, widespread and gross human rights violations [that] have been and are being committed by the Democratic People’s Republic of Korea.”<sup>444</sup> In its Washington hearing, the COI heard specific testimony advocating for the application of the responsibility to protect to the situation in the DPRK.<sup>445</sup> The COI’s 2014 report stressed that “the gravity, scale, and nature of these violations reveal a State that does not have any parallel in the contemporary world.”<sup>446</sup> The report explicitly referenced R2P and called on the international community to “accept its responsibility to protect the people of the [DPRK] from crimes against humanity.”<sup>447</sup> The DPRK condemned the report as part of an “anti-[DPRK] ‘human rights’ racket” at the U.N.<sup>448</sup>

In response to the Commission’s 2014 report, the Security Council convened a special session to discuss the DPRK’s human rights issues and voted to place the issue on its permanent agenda—a procedural decision that is not subject to the veto.<sup>449</sup> However, despite the Commission’s unambiguous invocation of R2P and initial signs of momentum, the Security Council has

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<sup>443</sup> FAILURE TO PROTECT: A CALL FOR THE UN SECURITY COUNCIL TO ACT IN NORTH KOREA, *supra* note 439; FAILURE TO PROTECT: THE ONGOING CHALLENGE OF NORTH KOREA, *supra* note 440.

<sup>444</sup> The author, Jared Genser, served as pro bono counsel to the International Coalition to Stop Crimes Against Humanity in North Korea, which played a leading role in advocating for the establishment of the U.N. Commission of Inquiry. *See, for example, The International Coalition to Stop Crimes Against Humanity in North Korea Urges Human Rights Council to Create Inquiry into Mass Atrocity Crimes*, INT’L COAL. TO STOP CRIMES AGAINST HUMANITY IN N. KOR. (Jan. 22, 2013), <https://perma.cc/4T8V-T9B2>; Human Rights Council Res. 22/13, U.N. Doc. A/HRC/RES/22/13 (Apr. 9, 2013); Comm’n of Inquiry on Hum. Rts. in the Democratic People’s Republic of Korea, Rep. of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, ¶ 24, U.N. Doc. A/HRC/25/63 (Feb. 7, 2014) [hereinafter COI Report].

<sup>445</sup> Jared Genser, Former Counsel to the International Coalition to Stop Crimes Against Humanity in North Korea, Testimony at the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (Oct. 31, 2013), <https://perma.cc/WL2X-EJFZ>.

<sup>446</sup> COI Report, *supra* note 444, at ¶ 80.

<sup>447</sup> *Id.* at ¶ 86.

<sup>448</sup> Permanent Rep. of the Democratic People’s Republic of Korea, Identical letters dated 2 February 2015 from the Permanent Representative of the Democratic People’s Republic of Korea to the United Nations addressed to the Secretary-General and the President of the General Assembly, at 3, U.N. Doc. A/69/753-S/2015/84 (Feb. 2, 2015).

<sup>449</sup> *Crisis in North Korea*, INT’L COAL. FOR THE RESP. TO PROTECT, at § VII, <https://perma.cc/Y4GV-EYDW> (last visited Oct. 15, 2017); Roberta Cohen, *Human Rights and Humanitarian Planning for Crisis in North Korea*, BROOKINGS INSTT. (Fall/Winter 2015), <https://perma.cc/RH75-VPLT>.

neglected to meaningfully engage with its responsibility to uphold R2P in the DPRK.<sup>450</sup> The Security Council declined to refer the DPRK to the ICC (one of the Commission's central recommendations) and has not pursued any resolution directly criticizing the DPRK's human rights violations due in large part to the likelihood of a veto from China or Russia, if not from both.<sup>451</sup> China attempted to block the Security Council from holding its second meeting on human rights in the DPRK in 2015, marking the first time a procedural vote has been held on an item already on the Security Council's agenda.<sup>452</sup> The meeting was held despite China's protests, with the U.N. Under-Secretary-General for Political Affairs stating that, "the international community has a collective responsibility to protect the population of the DPRK."<sup>453</sup> However, no substantive resolutions resulted from the meeting.

In the absence of meaningful Security Council action, various other U.N. bodies have sought to address human rights violations in the DPRK and have called on the international community to act. In a 2014 resolution, the Human Rights Council called for the creation of a field office for monitoring and documenting abuses in the DPRK, which was established in Seoul in June 2015 and now helps provide updated reports regarding the human rights situation.<sup>454</sup> In the most recent report of the U.N. Special Rapporteur on the Situation of Human Rights in the DPRK—a position created by the Human Rights Council—the Rapporteur identified the extensive political prisoner system and the food security crises as two central issues in a long list of human rights violations.<sup>455</sup> The Rapporteur, in conjunction with two independently appointed experts, also recommended a dual-pronged approach for holding the DPRK regime accountable for its crimes against humanity.<sup>456</sup> The Secretary-General issued his own report on the human rights violations in the DPRK in October 2016, echoing earlier reports of extensive violations and calling on the regime to engage with human rights organizations and the U.N. to stem human rights

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<sup>450</sup> Kjell Magne Bondevik & Kristen Adams, *Democratic People's Republic of Korea*, in *THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME* 367 (Jared Genser & Irwin Cotler eds., 2011).

<sup>451</sup> Cohen, *supra* note 449, at 8.

<sup>452</sup> Michelle Nichols, *China, Russia Fail to Stop U.N. Meeting on Rights in North Korea.*, REUTERS (Dec. 10, 2015), <https://perma.cc/MV69-FT8N>.

<sup>453</sup> *Id.*

<sup>454</sup> Human Rights Council Res. 25/25, ¶ 10 U.N. Doc. A/HRC/RES/25/25 (Apr. 9, 2014).

<sup>455</sup> Tomás Ojea Quintana, Special Rapporteur on the Situation of Hum. Rts. in the Democratic People's Republic of Korea, *supra* note 439, at ¶¶ 20–27.

<sup>456</sup> Group of Indep. Experts on Accountability, Rep. of the Group of Independent Experts on Accountability, ¶ 18, U.N. Doc. A/HRC/34/66/Add.1 (Feb. 24, 2017) (annexed to report of the February 2017 report by the Special Rapporteur).

abuses.<sup>457</sup> Finally, the General Assembly—free of the Security Council’s debilitating veto yet unable to wield the necessary power to implement the R2P doctrine—has regularly passed resolutions condemning the DPRK’s human rights violations, most recently in December 2016.<sup>458</sup>

Various Security Council members continue to push for the Council to engage on the human rights violations of the DPRK regime, but the continued threat of a veto from Russia and China has precluded substantive engagement. In November 2016, however, the Security Council did manage to pass Resolution 2321, which for the first time included a provision calling on the DPRK to ensure the “welfare and inherent dignity of people in the DPRK” and linking this directly to the DPRK’s detrimental pursuit of nuclear weapons and ballistic missiles.<sup>459</sup> The following month, the Council convened to discuss the human rights situation in the DPRK and nine countries, including the U.S. and the U.K., voted to keep human rights issues in the DPRK as an agenda item.<sup>460</sup> Predictably, China and Russia (along with three other members) objected to maintaining the issue on the Security Council’s permanent agenda, stating that the primary responsibility of the Security Council is the maintenance of international peace and security rather than being, as China said, “a forum for discussing human rights issues,” which is “of no benefit whatsoever.”<sup>461</sup> While the Security Council kept the human rights discussion on its agenda, there has been no further substantive R2P engagement.

Even as human rights advocates have demanded stronger Security Council action in the form of a Chapter VII resolution calling on the DPRK to release all political prisoners, demanded open access to all parts of the country for humanitarian aid organizations, and referred allegations of crimes against humanity to the International Criminal Court,<sup>462</sup> the Security Council has so far failed to meaningfully engage with the systematic and widespread human rights violations in DPRK. While largely overlooked by many scholars and human rights advocates engaged with R2P,<sup>463</sup> the severity of atrocities and human rights violations—reportedly ten out of the eleven egregious acts that the Rome Statute

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<sup>457</sup> U.N. Secretary-General, *Situation of Human Rights in the Democratic People’s Republic of Korea*, ¶ 76, U.N. Doc. A/71/439 (Oct. 7, 2016).

<sup>458</sup> G.A. Res. 71/202, ¶ 1 (Dec. 19, 2016).

<sup>459</sup> S.C. Res. 2321, ¶ 45 (Nov. 30, 2013).

<sup>460</sup> U.N. SCOR, 71st Sess., 7830 mtg., 3, U.N. Doc. S/PV.7830 (Dec. 9, 2016).

<sup>461</sup> *Id.* at 2.

<sup>462</sup> Jared Genser, *Will the Security Council Now Act on North Korea?*, DIPLOMAT (Dec. 23, 2014), <https://perma.cc/JME2-HNJ4>.

<sup>463</sup> Alex Bellamy, *A Chronic Protection Problem: the DPRK and the Responsibility to Protect*, 91 INT’L AFF. 221, 225–44 (2015).

of the ICC defines as crimes against humanity have been committed by the DPRK against its citizens<sup>464</sup>—requires the Security Council to engage with the R2P doctrine in order to end mass atrocity crimes in the DPRK.

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These four case studies demonstrate the overruling power of the Security Council veto in preventing the implementation of the Council's R2P mandate. In the case of Yemen, while the Security Council invoked Yemen's Pillar I R2P responsibility, there has been no further action to implement R2P, because the U.S. and U.K. continue to assist the Saudi-led intervention, which is arguably helping perpetrate mass atrocity crimes against Yemeni civilians. In the cases of Syria, Myanmar, and the DPRK, the Security Council has been stalled because of the veto or threatened veto of Russia and China. Even if other factors like government obstruction, cooperation between regional organizations and the Security Council, and rapid response capacity may be missing in these cases, these conditions are secondary to the fourth factor of the veto, which has effectively stopped all Security Council action. As meaningful engagement with the Security Council's R2P mandate in these crisis situations remains gridlocked, governments continue to perpetrate and enable mass atrocity crimes against civilian populations.

#### IV. RECOMMENDATIONS FOR IMPROVING THE U.N. SECURITY COUNCIL'S IMPLEMENTATION OF R2P

The preceding historical analysis of the Security Council's country-specific implementation of R2P demonstrates the complexities and singularities that set each situation apart, but it also allows for the emergence of a set of factors that, when taken together, consistently have determined whether the Security Council will succeed or fail in its responsibility to implement R2P. What follows are recommendations for achieving better outcomes along those key factors, with the overarching goal of improving future Security Council implementation of R2P.

##### A. Political Will

In any situation that requires the involvement of the Security Council to effectively protect a population from mass atrocities, the government in question's willingness to accept the aid of the Security Council can either lower the bar for Council engagement or dramatically raise it. In situations where the government is willing to accept Security Council involvement, the barriers to

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<sup>464</sup> COI Report, *supra* note 444, at ¶ 76.

engagement and thus the political will required of the Council members to engage are manageable. However, in situations where the government is unwilling to accept Security Council involvement, the bar for engagement becomes much higher and must be overcome with much greater political will from the Council members, usually requiring the strong support of an influential P5 member.

In Côte d'Ivoire and in Mali, the legitimate governments welcomed Security Council involvement, allowing the Council to engage with its R2P responsibility with relative ease and, ultimately, with success. In Libya, while the government did not welcome Security Council action, the extraordinary political will of the U.S., the U.K., and France to engage with their R2P responsibilities through the Security Council overcame the increased barriers to engagement. Conversely, the Security Council's engagement fell short in Sudan and South Sudan, where the government's resistance to Council action was not overcome by a P5 member's strong will to engage.

While the political will of the Security Council members to engage with the Council's R2P responsibility will always be subject to concerns of national self-interest to some degree, elevating the profile of abuses taking place in a country can occasionally shift the balance of political will in favor of engagement. Civil society groups' and U.N. human rights bodies' work to highlight ongoing abuses helps Security Council members understand the urgency of acting in a particular situation while also creating public pressure on Council members to act, with both of those mechanisms tending to increase the overall political will to engage. In the interest of positively influencing the political will of Security Council member states to engage with their R2P responsibilities, the international community should increase its support for civil society groups and U.N. human rights bodies that alert the Council to abuses and hold the Council accountable for its response. Given this crucial role with regard to R2P, it is unacceptable that just 3.5 percent of the U.N. general budget goes towards the organization's human rights bodies,<sup>465</sup> and members of the international community should seek to correct this.

## B. Cooperation with Regional Organizations

Given the global scope of the U.N.'s work and the vast demands on the organization, regional organizations can play an important role in responding to R2P situations. When regional organizations are substantially involved in such situations, those organizations' attitudes towards Security Council involvement

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<sup>465</sup> OHCHR's *Funding and Budget*, OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., <https://perma.cc/K4KG-MY3M> (last visited Oct. 15, 2017).

can profoundly shape the Council's own response—for better or worse. When regional organizations welcome Security Council engagement and defer to the Council to coordinate the international response, the Council is better able to engage with its R2P responsibility and more likely to be successful in responding to the situation. When regional organizations discourage or reject Security Council engagement, the Council is more likely to defer a response and abandon its coordination role—actions which can have devastating effects if regional organizations ultimately fail to resolve the situation.

Effective cooperation with ECOWAS in the case of Côte d'Ivoire, with the GCC and the League of Arab States in the case of Libya, and with the A.U. and ECOWAS in the case of Mali—cooperation characterized by regional organizations' acceptance of Security Council involvement, the Council's receptiveness to the requests of regional organizations, and the Council's central coordination role—enabled the Security Council to engage with its R2P responsibility in a timely and decisive manner in those cases. Conversely, the A.U.'s hostility towards Security Council involvement and leadership in the cases of Darfur and the CAR delayed meaningful Council engagement under R2P and handicapped the Council's eventual response. The actions of regional powers Rwanda and Uganda undermined Security Council R2P efforts in the DRC and precluded both a strong regional response and regional coordination with the Council.

To have a coordinated response from the Security Council and regional actors in future R2P situations, the Council needs to focus on the actions of regional organizations, support the work of regional organizations, and also rise to its role of coordinating a coherent international R2P response. To enhance this capability, the U.N. should undertake capacity-building efforts with key regional organizations and build joint response mechanisms with those organizations to establish a greater degree of trust and better coordinate future responses to emerging R2P crises.<sup>466</sup>

### C. Rapid Response Capacity

Once the Security Council makes the decision to engage with its R2P responsibility, the international community's ability to respond rapidly to the situation on the ground is of crucial importance. Because U.N. missions take an

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<sup>466</sup> See, for example, Ms. Gueguen, First Political Counsellor at the French Permanent Mission to the United Nations, Speech to the Security Council on Cooperation Between the United Nations and Regional and Subregional Organizations in Maintaining International Peace and Security (Nov. 18, 2016), <https://perma.cc/BW8J-2F9K>.

average of six months to deploy,<sup>467</sup> even the immediate authorization of a U.N. mission may not allow for a sufficiently timely response to a rapidly escalating R2P situation. Some of the factors that can enable a rapid response include: the presence of a previously established and well-equipped U.N. mission, the willingness and ability of relevant regional organizations to quickly deploy their own resources, and the willingness and ability of outside countries to quickly deploy their own resources. The presence of at least one of those factors can increase the chances that the Security Council response will effectively prevent mass atrocities.

In the cases of Libya and Mali, outside countries were willing and able to respond rapidly, saving the lives of countless civilians. In the case of Libya, the U.S., U.K., and France declared their intention to act the day after the Security Council adopted a resolution authorizing them to do so, and had deployed the necessary forces within a week. Likewise, in the case of Mali, France responded the day after receiving Security Council authorization. In the case of Côte d'Ivoire, a rapid response was enabled by the existence of a previously established mission on the ground, in addition to short-term borrowing of forces and equipment from a well-equipped mission in nearby Liberia. Conversely, outside countries were not especially willing to marshal their own resources to respond rapidly to situations in the DRC, Sudan, and the CAR, and previously established U.N. and regional missions in those countries were under-equipped and unable to respond rapidly as the situations on the ground deteriorated.

Because the conditions necessary for a country-led or region-led rapid response may not always be present and the existence of a previously established and well-equipped U.N. mission cannot be assumed, there is a real need for the U.N. to develop a rapid response capacity. The most feasible and sustainable way in which to do this may well be for the U.N. to contract private military and security companies to serve as a standing rapid-reaction force on a short-term basis.<sup>468</sup> The Security Council members should give this and other arrangements for a rapid-reaction force serious consideration in order to enable a timely response to future R2P situations.

#### D. The Veto

While the aforementioned factors weigh heavily on the likelihood of successful Security Council engagement on the basis of R2P, the most significant

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<sup>467</sup> High-Level Independent Panel on Peace Operation, *Uniting Our Strengths for Peace: Politics, Partnership and People*, ¶ 188 (June 16, 2015), <https://perma.cc/TJZ3-C7X4>.

<sup>468</sup> See generally Jared Genser & Clare Garvie, *Contracting for Stability: The Potential Use of Private Military Contractors as a United Nations Rapid-Reaction Force*, 16 *CHI. J. INT'L L.* 439 (2016).

factor of all lies in the institutional architecture of the Security Council itself. According to the U.N. Charter, the permanent five members of the Security Council—China, France, Russia, the U.K., and the U.S.—have the power to block any Council resolution to which they do not concur.<sup>469</sup> That this power has repeatedly been invoked to block Security Council efforts to halt mass atrocity crimes is unacceptable. In Yemen, Syria, Myanmar, and the DPRK, the use or threatened use of the veto by one or more permanent members of the Security Council has resulted in the continuation of mass atrocity crimes and tremendous loss of life.

Many observers have noted that, “the use or abuse of the veto is responsible for some of the [U.N. Security] Council’s most conspicuous failures, when it does not intervene in time, or with sufficient force, to protect the victims of genocide and other comparable crimes.”<sup>470</sup> Some of those observers have also proposed potential solutions to this problem, with the France/Mexico Initiative and the ACT Code of Conduct emerging as the two most widely supported proposals.<sup>471</sup> As of June 2017, 93 U.N. member states had signed onto the France/Mexico Initiative calling for the voluntary restraint of the veto in mass atrocity situations and 111 member states had signed onto the ACT Code of Conduct calling upon all Security Council members to refrain from voting against efforts to prevent or halt mass atrocities and requiring transparency from vetoing states on their reasons for employing the veto.<sup>472</sup> The Security Council should seriously consider the adoption of either the ACT Code of Conduct or the France/Mexico Initiative to restrain the use of the veto in mass atrocity situations and rise to meet its R2P responsibility, and the U.N. Secretary-General and broader international community should demand that the Council do so.

## V. CONCLUSION

Much has happened since the initial discussions of R2P in 2001 and the formal adoption of R2P into the U.N. system in 2005. The doctrine of R2P grew out of the failure of the international community to respond to governments committing widespread and systematic atrocity crimes against their own people in Rwanda, Bosnia, and Kosovo during the 1990s. The development and adoption of R2P was meant to codify existing responsibilities under international

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<sup>469</sup> U.N. Charter art. 43, ¶ 3.

<sup>470</sup> *Strengthening the United Nations: Statement by the Elders*, THE ELDERS (Feb. 7, 2015), <https://perma.cc/6ZUL-ZHEV>.

<sup>471</sup> *UN Security Council Code of Conduct*, GLOB. CTR. FOR THE RESP. TO PROTECT (Sept. 15, 2017), <https://perma.cc/QK6F-CTAM>.

<sup>472</sup> *Id.*

law and provide a better mechanism to prevent similar atrocity crimes in the future.

Since its adoption, the Security Council has acted on its R2P mandate at various times, both successfully and unsuccessfully. R2P implementations were successful when the government did not obstruct international efforts to assist with the prevention of mass atrocity crimes (or when such obstruction was overcome by a powerful country's desire to engage to protect civilians), cooperation existed between regional organizations and the Security Council, and the Council had the capacity to respond rapidly to the developing or imminent crisis. In all unsuccessful implementations, at least two of these conditions were notably absent. Further, a fourth and overriding condition—the use of the veto by a Security Council P5 member—has prevented the Security Council from successfully implementing R2P in certain cases regardless of the other conditions.

Examining both the successful and unsuccessful cases of R2P implementation allows for important takeaways that can inform the Security Council's actions in future invocations of R2P. As Section III notes, international institutions can be strengthened to encourage and support the existence of the three necessary conditions while internal institutional commitments by Security Council members can ensure that the veto does not obstruct collective action in the face of future mass atrocity crimes.

While the Security Council's inaction regarding the crisis in Syria stands front and center in recent memory, a more comprehensive analysis of Security Council implementation of R2P reveals that there is more to R2P than this notable failure might suggest. As is evident in the preceding analysis of Security Council implementation of R2P since its codification in 2005, certain conditions must be present to allow for successful implementation, and there is much that can be done to foster the presence of those conditions. It is now up to the international community to strengthen the institutions and mechanisms that will allow the Security Council to respond in a timely and decisive manner to future mass atrocity crimes and more consistently uphold its responsibility to protect.