

## NOTES

### REFOCUSING TO REVIVE: THE RESPONSIBILITY TO PROTECT IN INTERNATIONAL ATROCITY PREVENTION

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#### TABLE OF CONTENTS

I.	INTRODUCTION .....	775
II.	RISE AND FALL OF THE RESPONSIBILITY TO PROTECT CONCEPT ....	775
	A. <i>1990s Turmoil Gives Rise to Perceived Need to Move Beyond Doctrine of Humanitarian Intervention</i> .....	775
	B. <i>Formulating the Responsibility to Protect Concept: 2001 Report of Commission</i> .....	776
	C. <i>Refining the Responsibility to Protect Concept: 2005 Report of the U.N. Secretary-General and Endorsement of the World Summit Outcome</i> .....	777
	i. <i>Embracing and Backing Away from the Responsibility to Protect: The Concept Since 2005</i> .....	779
	ii. <i>Embracing the Responsibility to Protect: 2005–2011</i> .....	780
	iii. <i>Backing Away from the Responsibility to Protect Concept: Post-2011 Libya Situation–Present</i> .....	782
II.	EVOLUTION OF THE RESPONSIBILITY TO PROTECT CONCEPT .....	783
	A. <i>Core Premises of the Concept</i> .....	783
	i. <i>Primary, Individual Duty of Each State to Protect Persons in Its Jurisdiction or Control</i> .....	784
	ii. <i>Residual, Collective Duty of States to Protect When Individual States Fail to Do So</i> .....	786
	B. <i>Measures by Which the Responsibility to Protect Concept Is to Be Discharged</i> .....	787
	i. <i>Noncoercive Measures</i> .....	788

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ii.	<i>Coercive Measures Short of the Use of Armed Force</i>	790
iii.	<i>Coercive Use of Armed Force</i> .....	791
C.	<i>Debate over the Responsibility to Protect Concept</i> .....	795
i.	<i>Reframing the Debate: 2009 Report of the Secretary-General Report on “Implementing the Responsibility to Protect”</i> .....	795
iii.	<i>From Existence to Operation: Determining the Scope of Obligations Under the Responsibility to Protect</i> .....	796
iv.	<i>Focus on Coercive Military Intervention: Stalling the Responsibility to Protect Debate</i> .....	796
IV.	REVIVING THE RESPONSIBILITY TO PROTECT CONCEPT .....	797
A.	<i>Recognizing the Current State of the Responsibility to Protect Concept</i> .....	797
B.	<i>Revisiting the Origins of the Responsibility to Protect: The 2001 Commission Report</i> .....	798
i.	<i>Remembering the Responsibility to Protect’s Purpose and Priorities</i> .....	799
ii.	<i>Distinguishing the Responsibility to Protect Concept from Humanitarian Intervention</i> .....	799
C.	<i>Redirecting the Responsibility to Protect’s Development: From a Form of “Humanitarian Intervention” to the Means for “Conflict Prevention”</i> .....	800
V.	CONCLUSION .....	802

## I. INTRODUCTION

The responsibility to protect has stalled as an influential force in the world. The responsibility to protect, commonly abbreviated as R2P, is a legal concept intended to prevent gross human rights atrocities. The concept rests on two core premises. First, that sovereign states have an inherent responsibility to protect their people. Second, that if a state is unwilling or unable to fulfill this responsibility, the international community of states has a duty to take on that individual state's responsibility when a population is suffering serious harm.<sup>1</sup> Debate focused on the scope of states' duties and their ability to intervene militarily under the responsibility to protect has made the concept ineffective at preventing or responding to serious human rights crises. To realize the R2P's goal of atrocity prevention, proponents must redirect this discourse and the development of the concept from focusing on military intervention to focusing on conflict prevention.

Part I of this Note tracks the rise and fall of the responsibility to protect concept since it was first introduced in 2001. Part II considers how the R2P concept and debate surrounding its development have evolved. Part III analyzes strategies for both reviving and improving the concept as it currently stands. This Note concludes that though the development of the responsibility to protect concept has slowed in international law, its proponents can revive the responsibility to protect concept and better achieve its goal of atrocity prevention by redirecting focus from the concept as a means of humanitarian intervention to a legal concept with force for conflict prevention.

## II. RISE AND FALL OF THE RESPONSIBILITY TO PROTECT CONCEPT

International actors including the United Nations, regional organizations, and individual states failed to prevent gross and systematic human rights violations throughout the 1990s in Somalia, Rwanda, and the Balkans.

### *A. 1990s Turmoil Gives Rise to Perceived Need to Move Beyond Doctrine of Humanitarian Intervention*

In 1999 international actors failed to stop "ethnic cleansing" in Kosovo.<sup>2</sup> The U.N. Security Council failed to authorize coercive military action in Kosovo before thousands were killed.<sup>3</sup> Despite the absence of Security Council

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<sup>1</sup> INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, RESPONSIBILITY TO PROTECT IX (2001) [hereinafter THE REPORT].

<sup>2</sup> *Flashback to Kosovo's War*, BBC (July, 10, 2006), <http://news.bbc.co.uk/2/hi/europe/5165042.stm>.

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

authorization, NATO began intervening with air strikes in March 1999.<sup>4</sup> After the air strikes, Sweden established the Independent International Commission on Kosovo to determine the legitimacy and legality of NATO's intervention.<sup>5</sup> The Kosovo Commission found NATO's actions were "legitimate, but not legal" and recognized "the need to close the gap" between the two issues of sovereignty and humanitarian intervention.<sup>6</sup>

After the Kosovo Commission announced its findings, U.N. Secretary-General Kofi Annan challenged state leaders in the 2000 Millennium Report by asking: "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how *should* we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?"<sup>7</sup>

*B. Formulating the Responsibility to Protect Concept: 2001 Report of Commission*

To answer Annan's challenge, Canadian Foreign Affairs Minister Lloyd Axworthy established the International Commission on Intervention and State Sovereignty ("Commission") in September 2000.<sup>8</sup> The Commission's mandate was to promote debates and foster international political consensus on how to develop timely reactions to massive violations of human rights and humanitarian law in the international system.<sup>9</sup> Further, the Commission was to "find new ways of reconciling the seemingly irreconcilable notions of intervention and state sovereignty."<sup>10</sup> To carry out this mandate, the Canadian government invited twelve individuals to serve as Commissioners.<sup>11</sup> The Commissioners came from around the world, representing a diverse range of regions, experiences, and viewpoints on the issues the Commission was mandated to address.<sup>12</sup>

Between November 2000 and September 2001, the Commission held five meetings with all Commissioners present, as well as eleven regional roundtables and "national consultations."<sup>13</sup> National and regional officials and

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

<sup>5</sup> Press Release, Press Briefing on the Kosovo Commission, U.N. Press Release (Oct. 23, 2000); INDEP. INT'L COMM'N ON KOS., THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSES, LESSONS LEARNED 24–25 (2000).

<sup>6</sup> INDEP. INT'L COMM'N ON KOS., *supra* note 5, at 10, 289.

<sup>7</sup> U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the Twenty-First Century*, ¶ 217, U.N. Doc. A/54/2000 (Mar. 27, 2000).

<sup>8</sup> THE REPORT, *supra* note 1, at VII, XI.

<sup>9</sup> *Id.* at 81.

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

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

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 82–83.

representatives of civil society—from intergovernmental and nongovernmental organizations, academic institutions, and think-tanks—attended these roundtables and consultations.<sup>14</sup> The Commission’s efforts culminated a report titled *Responsibility to Protect* (“Report”), published December 2001.<sup>15</sup>

The Commission answered its mandate on state sovereignty and humanitarian intervention by introducing the legal concept, the responsibility to protect. The responsibility to protect as a concept rests on two core premises: first, that sovereign states have an inherent responsibility to protect its people; and second, that if a state is unwilling or unable to fulfill this responsibility, the international community of states has a duty to take on the individual state’s responsibility when a population is suffering serious harm.<sup>16</sup> In its Report, the Commission stated that this responsibility to protect embraced three specific responsibilities: to prevent serious harm to populations, to react to situations of serious harm, and to rebuild after harm or intervention occurs in a specific state.<sup>17</sup>

C. *Refining the Responsibility to Protect Concept: 2005 Report of the U.N. Secretary-General and Endorsement of the World Summit Outcome*

In 2005, both the U.N. Secretary-General and the U.N. General Assembly endorsed the responsibility to protect concept.<sup>18</sup> In March 2005, Secretary-General Kofi Annan published a five-year progress report titled *In Larger Freedom*, which endorsed the concept and also set the agenda for the U.N. World Summit held later that September.<sup>19</sup> In the report, Secretary-General Annan stated, “I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it.”<sup>20</sup> In Paragraph 135, the report stated:

This responsibility lies, first and foremost, with each individual State, whose primary *raison d’être* and duty is to protect its population. But if national authorities are unable or unwilling

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<sup>14</sup> *Id.* at 83.

<sup>15</sup> *Id.* at VIII.

<sup>16</sup> *Id.* at XI.

<sup>17</sup> *Id.*

<sup>18</sup> U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005); G.A. Res. A/60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005).

<sup>19</sup> U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc A/59/2005 (March, 21 2005); see generally, *In Larger Freedom Report of the Secretary-General of the United Nations for Decision by Heads of State and Government in September 2005*, UNITED NATIONS (Jan. 10, 2019), [http://www.un.org/en/events/pastevents/in\\_larger\\_freedom.shtml](http://www.un.org/en/events/pastevents/in_larger_freedom.shtml).

<sup>20</sup> U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 135, U.N. Doc A/59/2005 (Mar. 21, 2005).

to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.<sup>21</sup>

This understanding of the responsibility to protect was similar to the concept as introduced by the Commission.<sup>22</sup>

Six months later at the 2005 World Summit, the U.N. General Assembly also endorsed the responsibility to protect concept.<sup>23</sup> More than 170 Heads of State and Government gathered at the United Nations Headquarters in New York from September fourteenth to sixteenth for the World Summit, which served as the 60th session of the U.N. General Assembly.<sup>24</sup> The World Summit agenda focused on areas of development, security, human rights, and reform of the United Nations.<sup>25</sup> The General Assembly adopted a resolution at the end of the three-day meeting, which included the 2005 World Summit Outcome Document.<sup>26</sup> In paragraphs 138 and 139 of the World Summit Document, the General Assembly affirmed the responsibility to protect's core premises: that individual states and the international community have a responsibility to protect populations from atrocities including genocide, ethnic cleansing, war crimes, and crimes against humanity.<sup>27</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> See generally Mindia Vashakmadze, *Responsibility to Protect*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (3d ed.) (2012) (suggesting the Secretary-General's report embraces the 2001 Report's concept of responsibility to protect more than the High-level Panel, which embraced responsibility to protect in the context of U.N. collective military action).

<sup>23</sup> G.A. Res. 39 U.N. Doc. A/60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005).

<sup>24</sup> *The 2005 World Summit High-Level Plenary Meeting of the 60th Session of the UN General Assembly (14–16 September 2005, UN Headquarters, New York)*, UNITED NATIONS, [http://www.un.org/en/events/pastevents/worldsummit\\_2005.shtml](http://www.un.org/en/events/pastevents/worldsummit_2005.shtml) (last visited Jan. 9, 2019).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; G.A. Res. A/60/1, 2005 World Summit Outcome, ¶ 138–139 (Sept. 16, 2005).

<sup>27</sup> G.A. Res. A/60/1, 2005 World Summit Outcome, ¶ 138–139 (Sept. 16, 2005). Paragraphs 138 and 139 are cited below in full. See *infra* notes 73 and 85, respectively.

i. *Embracing and Backing Away from the Responsibility to Protect: The Concept Since 2005*

Though the responsibility to protect is not a rule of customary international law, the U.N. Human Rights Council, General Assembly, and Security Council have collectively referenced the concept over 100 times since the U.N. General Assembly adopted the concept at the 2005 World Summit.<sup>28</sup> While some U.N. resolutions have discussed thematic issues related to the responsibility to protect concept, such as the protection of civilians or the prevention of genocide, others have addressed specific situations occurring around the world.<sup>29</sup> The latter of these resolutions have addressed situations in Sudan, Libya, Côte d'Ivoire, South Sudan, Yemen, Syria, Central African Republic, Mali, the Democratic Republic of Congo, Myanmar, and Somalia.<sup>30</sup> Most of these resolutions addressed the responsibility to protect by emphasizing individual state responsibility to protect citizens or condemning state action, rather than authorizing international action against these states under the concept.<sup>31</sup> Libya—the only situation in which the U.N. Security Council explicitly employed responsibility to protect by authorizing full coercive action—as well as Sudan, the Côte d'Ivoire, the Democratic Republic of Congo, Yemen, and Syria—has been a particularly divisive topic of the responsibility to protect debate.<sup>32</sup>

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<sup>28</sup> GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, THE RESPONSIBILITY TO PROTECT: A BACKGROUND BRIEFING (2017), <https://reliefweb.int/sites/reliefweb.int/files/resources/the-responsibility-to-protect-background-briefing.pdf> (“As of September 2017 the responsibility to protect has been invoked in 64 U.N. Security Council resolutions, 10 General Assembly resolutions, and 28 Human Rights Council resolutions.”). The Global Centre for the Responsibility to Protect is a nongovernmental organization that engages in advocacy, research and partnerships with other nongovernmental organizations, government, and regional bodies with the mission of transforming the responsibility to protect “into a practical guide for action in the face of mass atrocities.” *About Us*, GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, <http://www.globalr2p.org/about/> (last visited Mar. 16, 2020).

<sup>29</sup> GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 28; U.N. Security Council Resolutions and Presidential Statements Referencing the Responsibility to Protect, GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, <https://www.globalr2p.org/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/> (last visited Mar. 4, 2020) [hereinafter *Resolutions and Presidential Statements*]; see also *Responsibility to Protect Key Documents*, UNITED NATIONS, <https://www.un.org/en/genocideprevention/key-documents.shtml> (last visited Mar. 4, 2020).

<sup>30</sup> GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 28.

<sup>31</sup> *Id.*

<sup>32</sup> Because this Note does not attempt to analyze the proper use of military force through Responsibility to Protect References, the factual background on all situations which have been or are arguably ripe for military intervention under the responsibility to protect doctrine is cursory. See Jared Genser, *The United Nations Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement*, 18 CHI. J. INT'L L. 420 (2018) (providing detailed factual summaries and

ii. *Embracing the Responsibility to Protect: 2005–2011*

The office of the U.N. Secretary-General has embraced and worked to develop the responsibility to protect concept since it was adopted by all Heads of State and Government at the World Summit in 2005.<sup>33</sup> The Secretary-General appointed a Special Adviser on the Responsibility to Protect in 2008 and combined this new office with the Office of the Special Adviser on the Prevention of Genocide.<sup>34</sup> While each office has a distinct mandate, both focus on atrocity prevention, and both Special Advisers report directly to the U.N. Secretary-General.<sup>35</sup> The main task of the Special Adviser on the Responsibility to Protect is to advance “the conceptual, political and institutional development and further refinement of the principle.”<sup>36</sup> In 2009, the office published a report entitled *Implementing the Responsibility to Protect*.<sup>37</sup> The report introduced a “three-pillar” strategy for implementing the Responsibility to Protect, which has served as a framework for debate on the responsibility to protect concept.<sup>38</sup> Since 2009, the Secretary-General has also addressed the responsibility to protect and related issues in annual reports.<sup>39</sup>

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analysis of these situations and the U.N. Security Council’s role in stemming, exacerbating or failing to act in each situation).

<sup>33</sup> *Mandate*, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/office-mandate.shtml> (last visited Mar. 4, 2020).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009).

<sup>38</sup> *Id.* at 3.

<sup>39</sup> Subsequent reports include *Early Warning, Assessment and the Responsibility to Protect* (2010); *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect* (2011); *Timely and Decisive Response* (2012); *State Responsibility and Prevention* (2013); *Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect* (2014); *A Vital and Enduring Commitment: Implementing the Responsibility to Protect* (2015); *Mobilizing Collective Action: the Next Decade of the Responsibility to Protect* (2016); *Implementing the Responsibility to Protect: Accountability for Prevention* (2017); *Responsibility to Protect: From Early Warning to Early Action* (2018); and *Responsibility to Protect: Lessons Learned for Prevention* (2019). The United Nations, Secretary-General, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/secretary-general.shtml> (last visited Mar. 17, 2020).

iii. *Applying the Responsibility to Protect: 2011 Security Council Resolutions on Libya*

In the context of the Arab Spring, Libyan activists took to the streets in February 2011 to protest against the Libyan government.<sup>40</sup> Muammar Ghaddafi had controlled the Libyan government since 1969.<sup>41</sup> Forces loyal to Ghaddafi responded with widespread, violent attacks on civilians.<sup>42</sup> On February 21, 2011, U.N. Secretary-General Ban Ki-moon called for an immediate end to any attacks on civilians by Libyan authorities.<sup>43</sup> The following day, U.N. Special Adviser on the Prevention of Genocide Francis Deng and U.N. Special Adviser on the Responsibility to Protect Edward Luck issued a joint statement, which echoed the Secretary General's call to halt all violence and reminded Libya of its responsibility to protect its populations.<sup>44</sup> U.N. High Commissioner for Human Rights Navi Pillay also called for an immediate end to human rights violations against protestors in Libya.<sup>45</sup> The Arab League, Organization of the Islamic Conference, the African Union, and the U.N. Security Council followed suit, also condemning Libyan state action.<sup>46</sup> On February 26, the U.N. Security Council unanimously adopted Resolution 1970, which recognized the "Libyan authorities' responsibility to protect its population."<sup>47</sup> The resolution permitted coercive measures, including international sanctions, against the Ghaddafi regime, but it did not authorize military intervention into Libya.<sup>48</sup>

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<sup>40</sup> *Libya Profile–Timeline*, BBC (Apr. 9, 2019), <https://www.bbc.com/news/world-africa-13755445>.

<sup>41</sup> *Id.*; *Deadly 'Day of Rage' in Libya*, AL JAZEERA (Feb. 18, 2011), <https://www.aljazeera.com/news/africa/2011/02/201121716917273192.html>.

<sup>42</sup> *Fresh Violence Rages in Libya*, AL JAZEERA (Feb. 22, 2011), <https://www.aljazeera.com/news/africa/2011/02/201122261251456133.html>.

<sup>43</sup> See Press Release, U.N. Secretary-General, *Outraged Secretary-General Calls for Immediate End to Violence in Libya*, U.N. Press Release SG/SM/13408-AFR/2119 (Feb. 22, 2011), <https://www.un.org/press/en/2011/sgsm13408.doc.htm>.

<sup>44</sup> Press Release, U.N. Secretary-General Special Advisers Francis Deng and Edward Luck, *Situation in Libya*, U.N. Press Release (Feb. 22, 2011), <https://reliefweb.int/report/libya/un-secretary-general-special-adviser-prevention-genocide-francis-deng-and-special>.

<sup>45</sup> See Statement from Navi Pillay (U.N. High Commissioner for Human Rights) to Fifteenth Special Session of Human Rights Council, *Situation of Human Rights in the Libyan Arab Jamahiriya* (Feb. 25, 2011), <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10760&LangID=E>.

<sup>46</sup> GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, *BACKGROUND BRIEFING ON THE RESPONSIBILITY TO PROTECT AFTER LIBYA & COTE D'IVOIRE*, [https://reliefweb.int/sites/reliefweb.int/files/rsources/BACKGROUND\\_BRIEFING\\_R2P\\_AFTER\\_LIBYA\\_AND\\_COTE\\_DIVOIRE.pdf](https://reliefweb.int/sites/reliefweb.int/files/rsources/BACKGROUND_BRIEFING_R2P_AFTER_LIBYA_AND_COTE_DIVOIRE.pdf) (last visited Mar. 17, 2020).

<sup>47</sup> S.C. Res. 1970, ¶ 9 (Feb. 26, 2011).

<sup>48</sup> *Id.*

After two weeks of mounting violence against civilians by government actors, the U.N. Security Council adopted a second resolution, Resolution 1973, on March 17, 2011.<sup>49</sup> Unlike the first resolution, the Security Council did not unanimously adopt the second.<sup>50</sup> Ten members of the Security Council supported the resolution while five members abstained (Brazil, China, Germany, Russia and South Africa).<sup>51</sup> Resolution 1973 authorized “all necessary measures including coercive military action but short of a ‘foreign occupation force’ to protect civilians and civilian populated areas.”<sup>52</sup> On March 19, military forces under the command of France, the United Kingdom, and the United States began intervening in Libya.<sup>53</sup>

Debate over the scope and reach of Resolution 1973 began in earnest after NATO forces took sole command of the intervention on March 24, 2011.<sup>54</sup> Critical to the responsibility to protect debate was whether the military support NATO gave to the Libyan rebels, who fought for regime change and the overthrow of Libyan Head-of-State Muammar Gaddafi,<sup>55</sup> could be considered within the scope of Resolution 1973, since the resolution authorized force only for the protection of civilians.<sup>56</sup>

iv. *Backing Away from the Responsibility to Protect Concept: Post-2011 Libya Situation—Present*<sup>57</sup>

While debate has continued on the responsibility to protect, the concept has not been used to justify international involvement in individual states since the U.N. Security Council authorized military intervention in Libya in 2011. However, the U.N. Security Council has repeatedly referenced the responsibility to protect concept in its resolutions, and the Secretary-General

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<sup>49</sup> Press Release, Security Council, Security Council Approves ‘No-Fly Zone’ over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Doc. S/Res/1973 (2011).

<sup>50</sup> GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 46.

<sup>51</sup> *Id.*

<sup>52</sup> S.C. Res. 1973, ¶¶ 4, 6, 8, U.N. Doc S/RES/1973 (Mar. 17, 2011).

<sup>53</sup> Andrew Glass, *Obama Approves Airstrikes Against Libya*, POLITICO (Mar. 19, 2019, 12:04 AM), <https://www.politico.com/story/2019/03/19/barack-obama-libya-airstrikes-1224550>.

<sup>54</sup> *Libya Civil War Fast Facts*, CNN, <https://www.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html> (last updated Apr. 17, 2019).

<sup>55</sup> *Id.*

<sup>56</sup> S.C. Res. 1973, U.N. Doc S/RES/1973 (Mar. 17, 2011).

<sup>57</sup> U.N. OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, COMPENDIUM OF PRACTICE IMPLEMENTATION OF THE RESPONSIBILITY TO PROTECT 2005–2016, [http://www.un.org/en/genocideprevention/documents/RtoP%20Compendium%20of%20Practice%20\(Provisional%20Pre-Publication%20Version\)%20FINAL%2020%20March%202017.pdf](http://www.un.org/en/genocideprevention/documents/RtoP%20Compendium%20of%20Practice%20(Provisional%20Pre-Publication%20Version)%20FINAL%2020%20March%202017.pdf).

has continued to issue annual reports on the responsibility to protect.<sup>58</sup> In doing so, these entities have contributed to the debate<sup>59</sup> and development of R2P.

While the Libyan intervention stoked debate on the successes and failures of the responsibility to protect in action, the Syrian crisis has demonstrated the consequences of inaction. The building crisis in Syria erupted shortly after the Security Council authorized action in Libya in 2011.<sup>60</sup> While the Security Council emphasized in five resolutions between February 2014 and December 2016 that the Syrian regime had a responsibility to protect all people within its borders, the Security Council never authorized coercive military action, as it did in Libya.<sup>61</sup> The Syrian crisis developed into a civil war and one of the largest humanitarian crises in recent history, which continues to this day.<sup>62</sup>

### III. EVOLUTION OF THE RESPONSIBILITY TO PROTECT CONCEPT

The Commission first presented the responsibility to protect concept in the 2001 Commission Report.<sup>63</sup> Despite varying support for enforcing or acting on the concept since it was introduced, the core premises of the concept have remained largely unchallenged since 2001.

#### A. Core Premises of the Concept

The responsibility to protect rests on two core premises regarding state sovereignty. First, an individual state's responsibility to protect its population is implied in state sovereignty.<sup>64</sup> Second, the international community has a responsibility to protect a population when a state is unwilling or unable to do

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<sup>58</sup> U.N. Secretary-General, *A Vital and Enduring Commitment: Implementing the Responsibility to Protect*, U.N. Doc. A/69/981-S/2015/500 (July 13, 2015).

<sup>59</sup> Gareth Evans, *Gareth Evans on 'Responsibility to Protect' After Libya*, WORLD TODAY (Oct. 5, 2012), <https://www.gevans.org/opeds/oped132.html>.

<sup>60</sup> *Syria Profile—Timeline*, BBC (Jan. 14, 2019), <https://www.bbc.com/news/world-middle-east-14703995>.

<sup>61</sup> See S.C. Res. 2139 (Feb. 22, 2014) (demanding Syria protect civilians and stressing “the primary responsibility to protect its population lies with the Syrian authorities”); S.C. Res. 2165 (July 14, 2014) (“Reaffirming the primary responsibility of the Syrian authorities to protect the population in Syria.”); S.C. Res. 2254 (Dec. 15, 2015) (demanding once again that all parties to the Syrian conflict protect civilians and stressing “the primary responsibility to protect its population lies with the Syrian authorities”); S.C. Res. 2258 (Dec. 22, 2015) (reaffirming Syria’s responsibility to protect); S.C. Res. 2332 (Dec. 21, 2016) (reaffirming Syria’s responsibility to protect and “reiterating that parties to armed conflict must take all feasible steps to protect civilians”).

<sup>62</sup> *Syria Profile—Timeline*, *supra* note 60.

<sup>63</sup> THE REPORT, *supra* note 1, at VIII.

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

so.<sup>65</sup> The Commission introduced these two premises in its 2001 report, stating:

1. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
2. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.<sup>66</sup>

To support the core premises, the Commission relied on theories of international law regarding state sovereignty, the U.N. Charter, human rights and humanitarian law, as well as the developing practices of states, regional organizations, and the U.N. Security Council regarding intervention and state sovereignty.<sup>67</sup> Since 2001, the U.N. Secretary-General and the U.N. General Assembly have affirmed the two core premises of the responsibility to protect.<sup>68</sup>

*i. Primary, Individual Duty of Each State to Protect Persons in Its Jurisdiction or Control*

At its core, the responsibility to protect concept rests on a global consensus that states, as sovereign powers, owe certain obligations to their peoples. The Commission held that as international human rights developed, this concept of state responsibility crystalized not just through state and intergovernmental practice, but also through human rights and humanitarian international covenants and treaties.<sup>69</sup> Thus, according to the Commission, the obligations of sovereignty developed to

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> “The foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in: obligations inherent in the concept of sovereignty; the responsibility of the Security Council, under Article 24 of the U.N. Charter, for the maintenance of international peace and security; specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law; the developing practice of states, regional organizations and the Security Council itself.” *Id.* at XI.

<sup>68</sup> U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 135, U.N. Doc A/59/2005 (Mar. 21, 2005); G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 138–39 (Sept. 16, 2005).

<sup>69</sup> THE REPORT, *supra* note 1, at XI.

require that states not only refrain from harming their peoples, but also actively ensure individuals' rights are upheld.<sup>70</sup>

The U.N. General Assembly has recognized and affirmed this core premise of the responsibility to protect in two resolutions.<sup>71</sup> These resolutions demonstrated that consensus exists in the international community regarding the legal norm that states, as sovereign powers, owe certain obligations to their peoples, including the obligation to protect them from atrocities.<sup>72</sup>

Paragraph 138 of the 2005 World Summit Outcome Document states in full:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.<sup>73</sup>

In paragraph 138 of the 2005 World Summit Outcome Document, the U.N. General Assembly recognized a core, foundational premise of the responsibility to protect concept—that states are required to protect populations from atrocities, including genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>74</sup> The General Assembly narrowed the potential scope of the responsibility to protect concept, but in doing so it identified four concrete situations that all states should prevent and react to.<sup>75</sup>

By passing a General Assembly resolution that embraced the responsibility to protect at the 2005 World Summit, world leaders propelled the concept forward; a responsibility to protect from four specific atrocity crimes became common ground for the General Assembly and world

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

<sup>71</sup> G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005); G.A. Res. 63/308, The Responsibility to Protect (Oct. 7, 2009).

<sup>72</sup> G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005); G.A. Res. 63/308, The Responsibility to Protect (Oct. 7, 2009) (recalling the 2005 World Summit Outcome and deciding “to continue its consideration of the responsibility to protect”).

<sup>73</sup> G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 138 (Sept. 16, 2005); G.A. Res. 63/308, The Responsibility to Protect (Oct. 7, 2009).

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

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

leaders to stand on when discussing the concept. Though the World Summit Outcome was progress for the responsibility to protect, the resolution did not make the concept or its discharge legally binding on U.N. member states.

ii. *Residual, Collective Duty of States to Protect When Individual States Fail to Do So*

Because sovereign states, which all have the inherent duty to protect their populations, form an international community of states through the United Nations, this community also has a collective, residual responsibility to protect the global population.<sup>76</sup> The residual responsibility is “activated when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect or is itself the actual perpetrator of crimes or atrocities.”<sup>77</sup> Moreover, this responsibility requires the international community of states to protect people living outside a particular state who are directly threatened by actions taking place inside the state.<sup>78</sup> As a result, in certain circumstances the broader community of states must take action to support populations that are in jeopardy or under serious threat.<sup>79</sup>

In its 2001 Report, the Commission asserted “that intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.”<sup>80</sup> According to the Commission, multiple concepts support this premise, including intergovernmental organizational actions,<sup>81</sup> natural law principles, international human rights and humanitarian treaty law,<sup>82</sup> state practice, evolving customary international law, established norms, and emerging principles.<sup>83</sup>

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<sup>76</sup> THE REPORT, *supra* note 1, at ¶ 2.31 (recognizing “the state whose people are directly affected has the default responsibility to protect” but the broader community of states has the residual responsibility).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at ¶ 2.25.

<sup>81</sup> *Id.* (particularly the U.N. Security Council’s actions in Somalia, the Economic Community of West African States’ interventions in Liberia and Sierra Leone, and NATO’s intervention in Kosovo).

<sup>82</sup> *Id.* (specifically, the human rights provisions of the U.N. Charter, the Universal Declaration of Human Rights, the Genocide Convention, the Geneva Conventions and Additional Protocols on international humanitarian law, the Rome Statute of the International Criminal Court).

<sup>83</sup> *Id.* at ¶¶ 2.25–2.27.

The General Assembly affirmed the second core premise of the responsibility to protect in the 2005 World Summit Outcome Document.<sup>84</sup> Paragraph 139 of the Outcome Document states:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, 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 from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.<sup>85</sup>

The General Assembly affirmed the responsibility of individual states in paragraph 138 of the World Summit Outcome and acknowledged a collective responsibility for the “international community” to protect all populations in paragraph 139.<sup>86</sup>

*B. Measures by Which the Responsibility to Protect Concept Is to Be Discharged*

In its 2001 Report, the Commission framed a state’s legal responsibility to protect as a composition of three “elements.” The three “elements” of the responsibility to protect were summarized as specific “responsibilities”:

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<sup>84</sup> G.A. Res. 39 U.N. Doc. A/60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005).

<sup>85</sup> *Id.*

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

- A. The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
- B. The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
- C. The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.<sup>87</sup>

By accepting the individual responsibilities to prevent, react, and rebuild, states would fulfill the legal responsibility to protect. The Commission outlined measures for how states, either individually or collectively, could discharge the responsibilities of each “element.” These included noncoercive measures, coercive measures short of the use of force, and coercive measures that include use of armed force. Though neither the U.N. General Assembly nor the U.N. Secretary-General adopted the Commission’s framework, discussing the overarching responsibility to protect in terms of three duties—to prevent, to react, to rebuild—has continued.

*i. Noncoercive Measures*

The 2001 Commission said that for states to discharge their responsibility to protect fully, individual states and the international community of states must first employ non-coercive prevention measures.<sup>88</sup> According to the Commission, non-coercive measures include both root cause prevention efforts and direct prevention efforts.<sup>89</sup> Ideally, states would discharge the duty to prevent through a well-designed prevention policy.<sup>90</sup> According to the Commission, such a policy would contain both root cause and direct cause prevention efforts.<sup>91</sup>

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<sup>87</sup> THE REPORT, *supra* note 1, at XI.

<sup>88</sup> *Id.*

<sup>89</sup> The Report noted that “[a]n extensive analysis of the modalities of conflict prevention is not the focus of this Commission . . . [b]ut in the context of the Responsibility to Protect, improving conflict prevention at every level—conceptually, strategically and operationally—is urgent and essential.” *Id.* at ¶ 3.9.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at ¶ 3.18.

The Commission found support for a “comprehensive and long-term approach to conflict prevention” in Article 55 of the U.N. Charter, which addresses international economic and social cooperation.<sup>92</sup> The Report expanded on the concept of peace and security to include “solutions to international economic, social, health and related problems; international, cultural and educational cooperation; and universal respect for human rights.”<sup>93</sup> The Commission noted the existence of a “growing and widespread recognition that armed conflicts cannot be understood without reference to such ‘root’ causes as poverty, political repression, and uneven distribution of resources.”<sup>94</sup> The Report acknowledged that root cause prevention is multi-faceted and provided examples of possible political, economic, legal, and military efforts that state, intergovernmental, and nongovernmental actors could employ.<sup>95</sup>

Like root cause prevention, direct prevention efforts outlined by the Commission address the same causal areas—political, economic, legal, and military—but employ different instruments to prevent a crisis from building.<sup>96</sup> Direct prevention measures include “straightforward assistance, positive inducements or, in the more difficult cases, the negative form of threatened ‘punishments.’”<sup>97</sup> Depending on the specific situation and effectiveness of the non-coercive, direct prevention measures, the Commission recognized that a state may have to adopt coercive measures short of military force to keep a situation from escalating. Similarly, once a state has determined it is too late for prevention efforts to be effective, it must continue to discharge its responsibility to protect by reacting to the situation with coercive measures.

The U.N. General Assembly and Heads of State embraced the Commission’s position that the responsibility to protect requires states to prevent atrocity crimes through non-coercive measures in the 2005 World Summit Outcome.<sup>98</sup> In paragraph 138, the General Assembly accepted that each individual state has the responsibility to prevent the incitement and occurrence of atrocity crimes.<sup>99</sup> It also stated the “international community” should “encourage and help States exercise this responsibility and support the United Nations

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<sup>92</sup> *Id.*; see also U.N. Charter art. 55.

<sup>93</sup> THE REPORT, *supra* note 1, at ¶ 3.18.

<sup>94</sup> *Id.* at ¶ 3.19.

<sup>95</sup> According to the Report, root cause prevention may mean “addressing *political* needs and deficiencies . . . tackling *economic* deprivation and the lack of economic opportunities . . . strengthening *legal* protections and institutions” and also “embarking upon needed sectoral reforms to the *military* and other state security services” through long-term support and reforms. *Id.* at ¶¶ 3.23–3.24 (emphasis added).

<sup>96</sup> *Id.* at ¶¶ 3.23–3.25.

<sup>97</sup> *Id.* at ¶ 3.25; see *id.* at ¶¶ 3.26–3.32 (providing numerous examples of political and diplomatic, economic, legal, and military direct prevention measures State and intergovernmental actors could employ).

<sup>98</sup> G.A. Res. 39 U.N. Doc. A/60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005).

<sup>99</sup> *Id.* at ¶ 138.

in establishing an early warning capability.”<sup>100</sup> In paragraph 139, the General Assembly identified its role in accepting the responsibility to prevent atrocities.<sup>101</sup> According to the World Summit Outcome, the General Assembly intended to commit, “as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”<sup>102</sup> The General Assembly also expanded on the responsibility of the “international community,” stating that this responsibility required international actors “to use appropriate diplomatic, humanitarian and other peaceful means” through the United Nations in order to prevent atrocity crimes.<sup>103</sup>

*ii. Coercive Measures Short of the Use of Armed Force*

According to the 2001 Commission, both the responsibility to prevent and the responsibility to react to atrocity crimes implicate the use of coercive measures.<sup>104</sup> In its Report, the Commission stated that states first and foremost have the obligation to resolve or contain situations within their domains through non-coercive, preventative measures.<sup>105</sup> When preventative measures fail to curb or resolve a specific situation, states still have the obligation to react and redress that situation through coercive measures.<sup>106</sup> Only when a state is unwilling or unable to redress the situation does the international collective of states have a responsibility to react by protecting that state’s population.<sup>107</sup> The Commissioners emphasized that “in the case of reaction just as with prevention, less intrusive and coercive measures should always be considered before more coercive and intrusive ones are applied.”<sup>108</sup>

The Commission Report held that to discharge responsibility to protect obligations properly, international actors should begin by carefully examining and then employing non-military coercive measures.<sup>109</sup> The Commission preferred tailored sanctions. Unlike military interventions, which directly interfere with a domestic authority’s ability to operate in its own territory, political, economic, or military sanctions primarily affect a domestic authority’s ability

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

<sup>101</sup> *Id.* at ¶ 139.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> THE REPORT, *supra* note 1, at ¶¶ 3.33, 4.1. (“The ‘responsibility to protect’ implies above all else a responsibility to react to situations of compelling need for human protection.”).

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

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

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at ¶ 4.1.

<sup>109</sup> *Id.* at ¶¶ 4.3–4.5.

to interact with those outside its borders.<sup>110</sup> Regardless of the specific measure, the Commission emphasized that sanctions and all other coercive measures short of military force “must be used with extreme care to avoid doing more harm than good—especially to the civilian population.”<sup>111</sup>

In 2005, the U.N. General Assembly broadly embraced the Commission’s position that the responsibility to protect requires states and the “international community” to employ coercive measures short of military force when discharging their obligations under responsibility to protect.<sup>112</sup> In paragraph 139 of the World Summit Outcome the General Assembly affirmed that “the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.”<sup>113</sup>

Since 2005, the U.N. Security Council has referred to the responsibility to protect concept in more than eighty of its resolutions.<sup>114</sup> The Security Council consistently used the concept in resolutions to “reaffirm,” “reiterate,” and “recall” that the responsibility to protect civilian populations in crisis situations lies with individual states.<sup>115</sup> Besides publicly condemning state action in its resolutions, the Security Council has not imposed coercive measures short of military force under the theory of the responsibility to protect.<sup>116</sup>

### *iii. Coercive Use of Armed Force*

The Commission asserted in its 2001 Report that full discharge of the responsibility to protect concept could require military action in “extreme and exceptional cases.”<sup>117</sup> The Commission did emphasize, however, that “[m]ost internal political or civil disagreements, even conflicts, within states do not require coercive intervention by external powers.”<sup>118</sup> The Commission concluded from its year of research that the international community of states and civil society generally agreed that circumstances which warrant intervention must be “cases of violence which so genuinely ‘shock the conscience of mankind,’” or those which “present such a clear and present danger to

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<sup>110</sup> *Id.* at ¶4.4.

<sup>111</sup> *Id.* at ¶ 4.5 (noting sanctions, especially blanket economic ones, can be “blunt and indiscriminate” if not targeted and appropriately monitored).

<sup>112</sup> G.A. Res. 39 U.N. Doc. A/60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005).

<sup>113</sup> *Id.*

<sup>114</sup> *Resolutions and Presidential Statements*, *supra* note 29.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> THE REPORT, *supra* note 1, at ¶ 4.10.

<sup>118</sup> *Id.* at ¶ 4.11.

international security,” that they demand military intervention.<sup>119</sup> The Commission identified two categories of circumstances that justify intervention:

- large scale<sup>120</sup> loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.<sup>121</sup>

The Commission included in its list of threats or occurrences that could qualify for intervention situations caused by a state, as well as those that occur where a state has failed or collapsed.<sup>122</sup> The Commission Report clarified that situations that warrant intervention encompass both “abuses occurring wholly within state borders, with no immediate cross-border consequences, and those with wider repercussions.”<sup>123</sup> The Report also stated that not only the actual occurrence of an “extreme and exceptional” situation but also the threat of such an occurrence could justify intervention.<sup>124</sup>

The Commission identified the U.N. Security Council as the best governing body to determine cases for intervention.<sup>125</sup> The Commission believed the Security Council would be particularly valuable when disagreement on whether or not to intervene arises on sovereignty grounds, as well as when deciding how to mobilize resources effectively.<sup>126</sup> In reflecting this view, the Commission suggested that “as a matter of practice that all proposals for military intervention be formally brought before” the Security Council.<sup>127</sup> The Commission Report presented two standards for preferred military authorization through the Security Council:

<sup>119</sup> *Id.* at ¶ 4.13.

<sup>120</sup> The Report “make[s] no attempt quantify ‘large scale’” because the Commission doubted determining whether a threat is “large scale” would cause much disagreement in practice. *Id.* at ¶ 4.21. Even so, the Commission did recognize there may be some marginal cases where opinions differ, perhaps in situations “where a number of small scale incidents may build into large scale atrocity.” *Id.*

<sup>121</sup> *Id.* at ¶ 4.19.

<sup>122</sup> *Id.* at ¶ 4.22 (reasoning that when deciding whether a situation justifies intervention, “it makes no basic moral difference whether it is state or non-state actors who are putting people at risk”).

<sup>123</sup> *Id.* at ¶ 4.23 (“This reflects our confidence that, in extreme conscience-shocking cases of the kind with which we are concerned, the element of threat to international peace and security . . . will be usually found to exist.”).

<sup>124</sup> *Id.* at ¶ 4.21 (“Without this possibility of anticipatory action, the international community would be placed in the morally untenable position of being required to wait until genocide begins, before being able to take action to stop it.”).

<sup>125</sup> THE REPORT, *supra* note 1, at ¶ 6.14.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at ¶ 6.15.

Security Council authorization must in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention must formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter; and

The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing; it should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention.<sup>128</sup>

Though the Commission Report expressly held that the Security Council should be the first and primary source of military authorization, the Commission suggested that the Security Council should not be the last when it fails to deal with a proposal for military intervention.<sup>129</sup> The Commission considered alternative means of discharging the responsibility to protect concept through either the General Assembly under the “Uniting for Peace” procedures or through regional organizations, citing their authority under Chapter VIII of the U.N. Charter.<sup>130</sup>

Like the Commission, the U.N. General Assembly also recognized that discharging the responsibility to protect could require coercive use of military force after peaceful measures fail.<sup>131</sup> The responsibility to protect concept, as embraced by the General Assembly in the 2005 World Summit Outcome can require military intervention “should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>132</sup> According to the General Assembly, only the Security Council can authorize the discharge of the international community’s responsibility to protect through “timely and decisive” coercive military action.<sup>133</sup> The World Summit Outcome stated that any collective military action must be taken 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.”<sup>134</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at ¶ 6.28.

<sup>130</sup> *Id.* at ¶¶ 6.29–6.35.

<sup>131</sup> G.A. Res. 39 U.N. Doc. A/60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005).

<sup>132</sup> *Id.* at ¶ 139.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

The U.N. Security Council has discharged the responsibility to protect concept through coercive military force one time since the General Assembly affirmed the Security Council had authority to do so.<sup>135</sup> The U.N. Security Council adopted Resolution 1973, on March 17, 2011, after two weeks of mounting violence against Libyan civilians, carried out by Libyan authorities.<sup>136</sup> The Security Council specifically referred to the responsibility to protect in the introduction of Resolution 1973.<sup>137</sup>

Resolution 1973 authorized all necessary measures including coercive military action but short of a “foreign occupation force” to protect civilians and civilian populated areas.<sup>138</sup> The Security Council authorized military intervention, a no-fly zone, an arms embargo, a ban on Libyan flights, and an asset freeze.<sup>139</sup> Paragraph 4 of the resolution stated that the Security Council:

Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and requests the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council . . . .<sup>140</sup>

On March 19, 2011, forces under the command of France, the United Kingdom, and the United States began a military intervention in Libya.<sup>141</sup> NATO forces took sole command of military action on March 24.<sup>142</sup> The U.N.

<sup>135</sup> S.C. Res. 1973 (Mar. 17, 2011).

<sup>136</sup> Press Release, Security Council, Security Council Approved ‘No-Fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011); S.C. Res. 1973 (Mar. 17, 2011).

<sup>137</sup> S.C. Res. 1973 (Mar. 17, 2011) (recognizing it was “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>138</sup> *Id.* at ¶¶ 4, 6, 8.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at ¶ 4.

<sup>141</sup> *Libya Civil War Fast Facts*, *supra* note 54.

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

Security Council has not used the responsibility to protect concept to authorize coercive, military force since the Libya situation in 2011.<sup>143</sup>

*C. Debate over the Responsibility to Protect Concept*

After both the U.N. Secretary-General and U.N. General Assembly endorsed the premise that sovereignty implies responsibility in 2005, debate largely shifted from whether the responsibility to protect concept had status as international law to the scope and measures by which states could discharge their duties to protect.

*i. Reframing the Debate: 2009 Report of the Secretary-General Report on “Implementing the Responsibility to Protect”*

In 2009, the U.N. Secretary-General reframed the responsibility to protect to reflect the concept as embraced by the General Assembly.<sup>144</sup> In his report *Implementing the Responsibility to Protect*, the Secretary-General reintroduced the responsibility to protect as a concept resting on three “pillars.”<sup>145</sup> These pillars were:

Pillar one: Every state has the responsibility to protect its populations from the four mass atrocities.

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

Pillar three: If a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action in a timely and decisive manner and in accordance with the U.N. Charter.<sup>146</sup>

Similar to the first core premise of the 2001 Commission’s Report and paragraph 138 of the 2005 World Summit Outcome Document, Pillar one addressed the responsibility of individual states to protect their populations.<sup>147</sup> Pillar one also affirmed the first core premise of the responsibility to protect

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<sup>143</sup> *Resolutions and Presidential Statements*, *supra* note 29.

<sup>144</sup> U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*; THE REPORT, *supra* note 1, at XI; G.A. Res. 39 U.N. Doc. A/60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005).

concept: that individual states have a responsibility to protect their peoples. Pillars two and three of the U.N. Secretary-General's framework for the responsibility to protect supported the U.N. General Assembly's understanding of collective responsibility, as embraced in the World Summit Outcome.<sup>148</sup> Pillars two and three also embraced the second core premise of the responsibility to protect concept, identified in both the 2001 Commission Report and 2005 World Summit Outcome: that the international community of states has a residual responsibility to protect a state's population when it is unwilling or unable to do so.<sup>149</sup>

*ii. From Existence to Operation: Determining the Scope of Obligations Under the Responsibility to Protect*

The 2005 General Assembly resolution solidified the norm that states have a collective responsibility to protect the global population. While both formal and informal discussions since 2005 have affirmed the existence of the responsibility to protect concept, its application is not as simple as its declaration. Though the core premises of the responsibility to protect were affirmed on a global stage at the World Summit by the United Nations and world leaders,<sup>150</sup> how to discharge the responsibility that the core premises support has required its own debate.

*iii. Focus on Coercive Military Intervention: Stalling the Responsibility to Protect Debate*

Discourse on the responsibility to protect concept has largely focused on the issue of military force. The discharge of responsibility to protect obligations through coercive military force is represented by the third pillar of the United Nations "three-pillar" framework.<sup>151</sup> The third pillar holds that "if a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action in a timely and decisive manner and in accordance with the U.N. Charter."<sup>152</sup> Since the Security Council cited the responsibility to

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<sup>148</sup> U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009); THE REPORT, *supra* note 1, at XI; G.A. Res. 39 U.N. Doc. A/60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005).

<sup>149</sup> U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009); THE REPORT, *supra* note 1, at XI; G.A. Res. 39 U.N. Doc. A/60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005).

<sup>150</sup> G.A. Res. 39 U.N. Doc. A/60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005).

<sup>151</sup> U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009).

<sup>152</sup> *Id.*

protect when authorizing military force during the Libyan situation in 2011, the focus on coercive military action and debate over whether the concept is any different than traditional intervention by states or inter-governmental organizations for humanitarian purposes has intensified.

Moreover, critics and opponents alike have analyzed the situations in which the Security Council did not discharge the responsibility to protect duty through coercive military force—such as Syria—and the sole situation in which it did in 2011 in Libya. Even many of those who accepted that the responsibility to protect is distinct from humanitarian intervention have continued to focus on the discharge of the concept's obligations through military force.<sup>153</sup> Articles and books have debated time and time again whether the responsibility to protect could ever succeed in preventing or responding to atrocities while the permanent members of the Security Council had veto power. Though the responsibility to protect rests on three separate pillars, debate has disproportionately focused on the third.

#### IV. REVIVING THE RESPONSIBILITY TO PROTECT CONCEPT

While the possibility of military intervention into a sovereign state's territory necessarily requires debate and understanding among all international actors, hyper-focusing on one measure for discharging R2P obligations will forever stunt the concept's development. Proponents of the responsibility to protect must return to the original purpose of the doctrine and shift focus from military intervention to investing in prevention at national, regional, and international levels.

##### *A. Recognizing the Current State of the Responsibility to Protect Concept*

The responsibility to protect remains a concept of international law, but it has slowed in its development. The U.N. General Assembly embraced the concept in 2005.<sup>154</sup> In 2009, the General Assembly reaffirmed this original commitment, but it has been considering<sup>155</sup> the concept and the obligations R2P imposes on individual states and the United Nations since then. While formal and informal debates and reports continue,<sup>156</sup> the principle's

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<sup>153</sup> See, e.g., DAN KUWALI, *THE RESPONSIBILITY TO PROTECT: IMPLEMENTATION OF ARTICLE 4(H) INTERVENTION* 36 (2011) (recognizing R2P as a concept while still asserting that intervention is “the most realistic means to stop ongoing mass atrocities” in Africa).

<sup>154</sup> G.A. Res. 39 U.N. Doc. A/60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005).

<sup>155</sup> G.A. Res. 63/308, Responsibility to Protect (Oct. 7, 2009).

<sup>156</sup> See *List of Annual Debates/Dialogues*, U.N. GEN. ASSEMBLY AT OFFICE FOR THE RESPONSIBILITY TO PROTECT, <http://www.un.org/en/genocideprevention/general-assembly.html> (last visited Jan. 13, 2019).

development as a legal doctrine has been minimal since the Security Council distanced itself from the concept after invoking it to authorize military intervention in Libya.<sup>157</sup>

The issue of coercive use of military force in discharging the duties of the responsibility to protect has made the concept ineffective in its current state. Since 2011, the Security Council has continued to remind states they have a responsibility to protect the populations who are suffering at the hands of state authorities, but it has not relied on the concept for authorizing significant coercive measures. Words, debates, reports, and resolutions on the concept have continued, but action by states to discharge the concept has stalled.

Further, R2P's growth as a legal norm before the Security Council discharged it during the Libyan intervention compared to its growth afterwards demonstrates that its development into a force for atrocity prevention has slowed. The Libyan intervention occurred approximately eight years ago, and no legal developments suggest that the concept's use for atrocity prevention in international law has evolved.<sup>158</sup> Rather, the aftermath of the Libyan situation contributed to a stall in the development of the responsibility to protect as a tool for prevention, and it also encouraged an explosion of discourse on the role of military and humanitarian intervention in the concept.<sup>159</sup>

Supporters of the concept who want to see R2P effect change first must recognize that while the concept is a doctrine on prevention in theory, in reality the concept is caught in the debate of humanitarian intervention. Second, proponents must also commit to refocusing the debate and future development of R2P on prevention. The continued occurrence of the world failing to prevent or stem human rights crises, such as in Syria,<sup>160</sup> has only renewed focus on resolving issues of when, whether, and how the international community of states, through the United Nations, can stop these situations.

### *B. Revisiting the Origins of the Responsibility to Protect: The 2001 Commission Report*

A review of the original text of the responsibility to protect concept while considering its development over the past eighteen years, supports the argument that today's focus on military intervention is disproportionate to the role of intervention in the context of the whole concept.

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<sup>157</sup> S.C. Res. 1973 (Mar. 17, 2011).

<sup>158</sup> Referring to the lack of legal developments beyond the 2005 World Summit Outcome. G.A. Res. 39 U.N. Doc. A/60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005).

<sup>159</sup> David Rieft, *R2P, R.I.P.* N.Y. TIMES (Nov. 7, 2011), <https://www.nytimes.com/2011/11/08/opinion/r2p-rip.html>.

<sup>160</sup> *Syria Profile–Timeline*, *supra* note 60.

*i. Remembering the Responsibility to Protect's Purpose and Priorities*

In 2001, the Commission was tasked with answering then Secretary-General Kofi Annan's challenge of how to stop atrocities from occurring around the world. The Commission's response was, in short, prevention.<sup>161</sup> The Commission identified the two priorities of the responsibility to protect concept as:

Prevention is the single most important dimension of responsibility to protect: prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it.

The exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied.<sup>162</sup>

The Commission Report emphasized that the responsibility to protect concept, at its core, is focused on preventing atrocities.<sup>163</sup> While the Commission Report addressed the challenges of designing an effective prevention system through detailed suggestions for operationalizing the responsibility to protect concept at the United Nations, the Commission's attention towards coercive military force does not mean the concept is a repackaged version of traditional humanitarian intervention.<sup>164</sup>

*ii. Distinguishing the Responsibility to Protect Concept from Humanitarian Intervention*

In a 2012 interview on the status of the responsibility to protect after the Libyan intervention, Gareth Evans, a Co-Chair of the Commission, emphasized that the responsibility to protect concept was not "just old 'humanitarian intervention' in a new guise."<sup>165</sup> Evans distinguished the two concepts by explaining that "[the responsibility to protect] is primarily about prevention, whereas humanitarian intervention is only about reaction. [The responsibility] to protect is about a continuum of responses by a whole range of actors, not just those able and willing to apply military force."<sup>166</sup> The Commission's

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<sup>161</sup> THE REPORT, *supra* note 1.

<sup>162</sup> *Id.* at XI.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at ¶¶ 7.1–7.3.

<sup>165</sup> Evans, *supra* note 59 (responding "[a]bsolutely not!" to the suggestion).

<sup>166</sup> *Id.*

Report emphasized that the concept justifies military intervention only after prevention fails, and even then, only after non-military coercive measures fail too.<sup>167</sup> “The responsibility to react—with military coercion—can only be justified when the responsibility to prevent has been fully discharged.”<sup>168</sup> The Commission’s conception of R2P did not require international actors to attempt every prevention option, but “there must be reasonable grounds for believing that, in all the circumstances, if the measure had been attempted it would not have succeeded.”<sup>169</sup>

Though Libya, as the only situation in which the Security Council authorized military action under responsibility to protect,<sup>170</sup> demands discussion, those engaged in debate must analyze the specific intervention in Libya, as well as the general doctrine of humanitarian intervention, in its proper place within the larger framework of the concept. The Commission split both state and collective responsibility into three separate duties: first to prevent, second to react, and third to rebuild.<sup>171</sup> By refocusing the debate on the first duty of prevention, proponents can develop the concept in a manner that optimizes its potential for systemic change. In purposefully centering the discourse on the duty of prevention, opponents must engage with the responsibility to protect as a prevention concept before they can focus on its relation to military intervention.

*C. Redirecting the Responsibility to Protect’s Development: From a Form of “Humanitarian Intervention” to the Means for “Conflict Prevention”*

To revive and improve the concept, all of civil society and states need not only refer to the responsibility to protect in the case of reaction measures, but also the case of long-term prevention measures. By pushing the concept to the individual causes of different actors, proponents of the responsibility to protect can begin building political will and support for the responsibility to protect in civil society. To revive the concept, it is critical that the general population—rather than just those in the world of international law and diplomacy—understand the concept is properly discharged when there is no crisis or need to consider intervention. While changes in dialogue or in framing the responsibility to protect debate may seem trivial compared to enacting a resolution for military intervention, the originators of the concept recognized

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<sup>167</sup> While military intervention is included in the principle, the Responsibility to Protect is “very much concerned with alternatives to military action, including all forms of preventive measures, and coercive interventions measures—sanctions and criminal prosecutions—falling short of military intervention.” THE REPORT, *supra* note 1, at ¶ 1.8.

<sup>168</sup> *Id.* at ¶ 4.37.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at ¶ 1.

<sup>171</sup> THE REPORT, *supra* note 1.

the power of words.<sup>172</sup> Rather than continue to frame the concepts of atrocity prevention and state responsibility as intervention, the Commission developed a new term to open the debate and bring more parties to the discussion table.<sup>173</sup> So too must proponents of the responsibility to protect today. As Gareth Evans, Co-Chair of the Commission, stated:

The whole point of [the responsibility to protect] doctrine, in the minds of those of us who conceived it, was above all to change the way that the world's policymakers, and those who influence them, thought and acted in response to emerging, imminent and actually occurring mass atrocity crimes. It was to generate a reflex international response that genocide, other crimes against humanity and major war crimes happening behind sovereign state walls were everybody's business, not nobody's.<sup>174</sup>

To generate the political will and institutional capacity necessary for making the responsibility to protect effective in international law, the conversation must shift not only to prevention but also to why collective prevention matters for the world.<sup>175</sup>

A focus on prevention requires states and their populations to look forward rather than to react to the current situation. To implement the responsibility to protect requires enormous political will and understanding of how to best implement existing preventative options—not only at the international level but also the domestic level.<sup>176</sup> The 2001 Commission Report asserted that governmental and intergovernmental organizations do not lack the basic data required for early warning; rather, they lack timely analysis and translation into prevention policy efforts.<sup>177</sup> The Commission Report also suggested that early warning for deadly conflict was usually after-the-fact and unstructured, and more official resources devoted to early warning and analysis were

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<sup>172</sup> *Id.* at ¶ 2.4.

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

<sup>174</sup> *Case Summary of Uses of the Responsibility to Protect*, GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, <http://www.globalresponsibilitytoprotect.org/media/files/case-summary-final-e-version.pdf> (last visited Nov. 22, 2018).

<sup>175</sup> The Commission pointed to globalization and the ripple effect one state's domestic affairs can have on neighboring, regional, and international states in the 21st century. THE REPORT, *supra* note 1, at ¶ 3.3 (“[C]onflict prevention is not merely a national or local affair.”).

<sup>176</sup> *Id.* at ¶ 3.2 (treating all citizens fairly, promoting social and economic development, protecting human rights, and ensuring accountability and good governance at the national level provides the foundation and means for conflict prevention).

<sup>177</sup> *Id.* at ¶ 3.10 (“[L]ack of early warning is an excuse rather than an explanation, and the problem is not lack of warning but of timely response.”).

needed.<sup>178</sup> Since the Commission published its Report in 2001, the U.N. Secretary-General appointed a Special Adviser for the Responsibility to Protect; her office focuses on developing prevention tactics.<sup>179</sup> As the Commission Report noted, the responsibility to protect relies not only on states to play their role, but on civil society at all levels: whether local, state, regional or international.<sup>180</sup> To mobilize the responsibility to protect, all must play a role in shifting the current culture from that of reaction to a “culture of prevention.”<sup>181</sup>

#### V. CONCLUSION

The responsibility to protect as a legal concept that can effect change in the world has stalled. To realize R2P's goal of atrocity prevention, proponents of the concept must change the discourse and direction of the concept. To revive and improve the concept, proponents must also recognize the stagnant state it currently occupies in international law; revisit the core principles of the concept in order to refocus the debate; and redirect efforts across state and civil society to develop the principle, not as a concept of international humanitarian intervention, but as a concept of conflict prevention. Though the development of the concept has slowed in international law, by redirecting focus from the concept as a means of humanitarian intervention to a legal concept with force for conflict prevention, proponents can revive the responsibility to protect and better achieve its goal of atrocity prevention.

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<sup>178</sup> *Id.* at ¶¶ 3.10–3.11 (citing the need for the U.N. to develop its early warning capabilities and the crucial need for regional actors to become more involved).

<sup>179</sup> *Id.* at ¶¶ 3.30–3.40.

<sup>180</sup> *Id.* at ¶¶ 3.42–3.43 (stating all must “be ready to act in the cause of prevention and not just in the aftermath of disaster”).

<sup>181</sup> *Mandate*, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/office-mandate.shtml> (last visited Jan. 10, 2019).