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UN Human Rights Council and the Responsibility to Protect

Akihiro Ueda

I. Introduction

The aim of this paper is to illustrate roles assumed by the UN Human Rights Council in implementing the Responsibility to Protect (often referred to as “R2P”). The case of Syria (2011-present) reminds us, again, that the UN Security Council sometimes fails to take effective measures to protect populations from mass atrocious crimes.¹ Such failure might redirect us to possibilities other bodies might present, such as, to name a few, the UN General Assembly, regional organizations, and the Human Rights Council. However, the previous study on this area focused too much on the role of the UN Security Council, and too little on the role of other international organs including the Human Rights Council.²

Responding to atrocious crimes is not the Security Council’s exclusive responsibility. According to paragraph 3 of the UN General Assembly resolution 60/251, the Human Rights Council “should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon.”³ Moreover, it should also contribute “through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies.” It is clear that Human Rights Council should also play major role where R2P matters.

The main argument of this paper is two-fold. First, it clarifies the role of the UN Human Rights Council within wider framework of the R2P, or more specifically, “three pillar strategy” proposed by UN Secretary General, Ban Ki-Moon. This provides a general framework of the role of the Human Rights Council within R2P. Second, it focuses on the third pillar of the R2P framework, that is, situations where timely and decisive reaction is required, and show how Human Rights Council reacted to such situation. More precisely, the paper examines three recent cases, namely, Darfur (2007), Libya (2011), and Syria (2012), with particular emphasis on the reports of the fact-finding missions dispatched by the Human Rights Council. It indicates that the R2P concept has gradually incorporated within Human Rights Council’s mandate.

II. Human Rights Council and R2P-General Framework

The principle of R2P, initially developed by the International Commission on Intervention and State Responsibility,⁴ suggests the responsibility of every State to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. However, when “national authorities are manifestly failing to protect their populations”⁵ R2P further assumes a responsibility on the international community that may generate the taking of collective action. Such collective action may include the use of force under Chapter VII of the UN Charter. Firm support for R2P came on 15 September 2005 when the UN General Assembly Member States embraced the principle in paragraph 138-139 of the Outcome Document of the World Summit. Specifically, paragraph 139 of the Outcome Document states the responsibility of the international community in the following manner:

“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 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.”⁶

The UN Secretary General, Ban Ki-Moon, takes the provisions of paragraphs 138 and 139 of the Outcome Document as an “authoritative framework” for implementing R2P within which “[M]ember States, regional arrangements and the United Nations system and its partners can seek to give a doctrinal, policy and institutional life.”⁷ As such, he sketched a framework of R2P in his Report entitled “[I]mplementing the responsibility to protect.”⁸ This report emphasizes the need for “employing the wide array of prevention and protection instruments”⁹ including the UN Human Rights Council. In the following, the three pillar strategy is briefly outlined, and the place of the Human Rights Council within its framework is illustrated.

1. Three Pillar Strategy: A Brief Sketch

In 2009, the UN Secretary General, Ban Ki-Moon, submitted the report, and proposed

so-called “three pillar strategy” for R2P. Three pillars he proposed are: the protection responsibilities of the State (Pillar one), international assistance and capacity-building (Pillar two), and timely and decisive response (Pillar three). These pillars are summarized as follows:¹⁰

- **Pillar one** (The protection responsibilities of the State): the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement. (...) That responsibility, they affirmed, lies first and foremost with the State.
- **Pillar two** (International assistance and capacity-building): the commitment of the international community to assist States in meeting those obligations. It seeks to draw on the cooperation of Member States, regional and subregional arrangements, civil society and the private sector, as well as on the institutional strengths and comparative advantages of the United Nations system.
- **Pillar three** (Timely and decisive response): the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection.

The major contribution of this report is that it emphasizes preventative functions of R2P. While R2P is often seen as an excuse for international intervention, the pillar two states the importance and responsibility of international community in providing assistance and capacity-building. Some argue that such “narrow and deep” approach which downplays humanitarian intervention was injudicious.¹¹ However, considering the exceptional nature of military intervention, it seems justified to emphasize preventative functions of R2P framework.¹²

Few points may require preliminary explanations. First, it is important to note that the concept of genocide, war crimes, ethnic cleansing, and crimes against humanity are not always used or understood in strictly legal sense in the context of invoking R2P.¹³ According to Gareth Evans, who co-chaired the International Commission on Intervention and State Responsibility, “[F]or nearly all policymaking, political, and operational purposes, it is not necessary to distinguish between these categories [genocide, war crimes, ethnic cleansing or crimes against humanity] and give apparent crimes particular labels.”¹⁴ He stresses that such labeling may be unproductive, especially regarding to genocide, because it can give “unearned propaganda victories to those with heavy cases against them for war crimes or crimes against humanity.”¹⁵ This opens a space for Human Rights Council to contribute in implementing R2P. Since most activities of Human Rights Council, including dispatching fact-finding mission and adopting resolutions are political, rather than legal, broad definition of the atrocious crimes enables Human Rights Council to act based on the notion of R2P.

Second, it is important to note that, while the scope of the responsibility is deliberately

limited to four atrocious crimes, the number of participants which can contribute in protecting population must be wide. The report states that “the response ought to be deep, employing the wide array of prevention and protection instruments available to Member States, the United Nations system, regional and subregional organizations and their civil society partners.”¹⁶ While the Security Council plays the central role in R2P, especially in military intervention, the “the wide array of prevention and protection” means other organs are also important. In fact, as explained later in this section, the situation which involves military intervention is very limited within the whole framework of R2P.

Finally, the wide array approach requires consistency within organizations participating in the same venture of R2P. The report is aware of such an issue, and made clear that “[T]he more consistently, fairly and reliably such a United Nations-based response system operates, the more confidence there will be in the capacity of the United Nations to provide a credible multilateral alternative.”¹⁷ The adequate understanding of the role of the Human Rights Council requires the understanding of the UN system as a whole, especially the functions of the Security Council.

2. Human Rights Council's Activities in R2P Framework

Let us clarify the concrete activities Human Rights Council may play in each pillars respectively. The first pillar emphasizes the responsibility of each State in protecting their population from atrocious crimes. According to Ban Ki-Moon, “the responsibility to protect, first and foremost, is a matter of State responsibility, because prevention begins at home.”¹⁸ Ban also stresses that the sovereign and statehood entails the protection of population.¹⁹ Under this pillar, Human Rights Council can sharpen “its focus as a forum for considering ways to encourage States to meet their obligations relating to the responsibility to protect and to monitor, on a universal and apolitical basis, their performance in this regard.”²⁰ Ban Ki-Moon proposes to employ universal periodic review (hereafter, “UPR”) mechanism for advancing human rights.²¹ The UPR is a unique process which involves a review of the human rights records of all 192 UN Member States once every four years. It is a State-driven process which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations.²²

Because UPR is a State-driven process, it does very little if the State has no intention to fulfill their human rights obligations or no capacity to do so. The second pillar strategy focuses on the international community to help building such capacity of States. For Ban Ki-Moon, there are four ways in which the international community can assist States in protecting their population: (a) encourage States to meet their responsibilities under pillar one (para. 138); (b) help them to exercise this responsibility (para. 138); (c) help them to build their capacity to protect (para. 139); and (d) assist States “under stress before crises and conflicts break out” (para. 139).²³

On this level, the Human Rights Council may encourage States “through dialogue, education and training on human rights and humanitarian standards and norms.”²⁴ Human rights dialogue is the core of the missions of the Human Rights Council as the UN General Assembly resolution 60/251, which established the Human Rights Council, clearly stated. It stipulated that the Human Rights Council is to “contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies.”²⁵ For the Human Rights Council has no power to authorize use of force, dialogue and cooperation is virtually the only means to facilitate protection and promotion of human rights in each States.

Although not mentioned in the report, a complaint procedure of the Human Rights Council may be worth noting in this context. The paragraph 6 of the General Assembly Resolution 60/251 enjoins the Human Rights Council to maintain a “complaint procedure.” This is mostly based on the so-called “1503 procedure” created by the Economic and Social Council in 1970. The 1503 procedure was about “situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights”²⁶ in a country. Similarly, the new procedure is concerned with identifying “consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstance.”²⁷ The new complaint procedure remains confidential for the purpose of enhancing cooperation with the State concerned.

The third pillar strategy – timely and decisive response – is particularly important for the purpose of this paper. When peaceful means be inadequate, or “national authorities are manifestly failing to protect their populations,” the international community make timely and decisive response including use of force.²⁸ One would think that the Human Rights Council has no role to play at this stage because of the lack of competence in military intervention.

Nevertheless, the report refers to the role of the Human Rights Council on the third pillar. It may, according to Ban Ki-Moon, “deploy a fact-finding mission, appoint a special rapporteur to advise on the situation or refer the situation to existing special procedures.”²⁹ By dispatching such fact-finding missions or on-site missions at an early stage of the crises, it would “provide opportunities for delivering messages directly to key decision makers on behalf of the larger international community.”³⁰ The message may include, for example, that political leaders are subject to prosecution by the International Criminal Court.³¹

The special procedures mechanism, referred by the report, established initially in 1980 and assumed by the Human Rights Council in 2006, is the mechanisms to address either specific country situations or thematic issues in all parts of the world.³² Currently, there are 35 thematic³³ and 10 country³⁴ mandates. Special procedures mandate holders are selected from a list of prominent human rights experts, and engage in a number of activities including country visit and fact-finding missions. During their visits, mandate holders meet with all relevant stakeholders including government officials and NGOs, and visit places relevant to their mandate. The report on the mission is subsequently transmitted to the

Human Rights Council.

The Human Rights Council have also developed practice of dispatching fact-finding or inquiry mission to the Country, when necessary, to investigate all alleged violations of international human rights law, international humanitarian law, and international criminal law. Recently, since Darfur, most inquiry mission embraces within their mandate the responsibility to protect. This practice is examined in the next section in more detail.

In short: the Secretary General's report outlines a framework for R2P in terms of three pillars, that is: (1) the protection responsibilities of the State; (2) international assistance and capacity-building; and (3) timely and decisive response. The Human Rights Council has roles to play in each pillar. For the first pillar, the Human Rights Council may contribute by way of using the UPR mechanism – a State-driven process – for improving the human rights situations in their countries. For the second pillar, the Human Rights Council may enhance dialogue and cooperation with States – one of which mechanism is the complaint procedure which identifies consistent pattern of gross and reliably attested violations of all human rights. For the third pillar, the Human Rights Council may contribute by dispatching a fact-finding or on-site mission of inquiry, and send a clear message of the international community in terms of human rights to the political leaders.

III. Human Rights Council and Decisive Response: Case Studies

Provided that the functions of the Human Rights Council are illustrated within the general framework of R2P, this section focuses exclusively on the third pillar - the timely and decisive response. Case studies show, however, that incorporation of R2P within Human Rights Council mandate at this level was not straight forward. I shall attempt to examine a reason behind such move. This section observes the cases of Darfur (2007), Libya (2011), and Syria (2012), focusing on the reactions made by the Human Rights Council through fact-finding missions in the context of R2P.

Immediately after the Human Rights Council was established by the General Assembly in 2007,³⁵ the R2P mandate was embraced within its mission. The High-Level Mission (hereafter, "HLM") on the situation of human rights in Darfur, established on March 2007, deliberately adopted an R2P perspective in assessing the situation of Darfur. Interestingly, however, the International Commission of Inquiry for the Libyan Arab Jamahiriya has carefully avoided using the term R2P. It seems that the Human Rights Council has deliberately shown restraint because the Security Council was already engaging in the matter under R2P through resolutions 1970 and 1973. The Independent International Commission of Inquiry on the Syrian Arab Republic, on the other hand, determined in its second report that the Syrian authority had manifestly failed to protect their population, and strongly condemned their handling. The Human Rights Council, in its 19th session where the task was to review the second report of the Mission, made an unprecedented decision in condemning the Syrian authority by determining its failure to protect its population.

Regarding the situation of Syria, the Security Council had been unsuccessful in taking any effective measures due to opposition by permanent members Russia and China.

1. Darfur (2007)

1.1 Background

While the root causes of conflict in Darfur are very complicated, the occasions which attracted the international community's attention after 2000 are relatively clear. The two rebel groups – the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) – began attacking Government police and military personnel in late 2002. This was accelerated in 2003.³⁶ The Government of Sudan, and Government-backed counterinsurgency operations, known as “Janjaweed,” primarily directed their armed response against the civilian population of Darfur, especially focusing on the tribal groups of Fur, Massalit and Zaghawa – the tribes to which most of the rebel members belong. People began fleeing from the region in early 2003. According to the HLM Report, by the end of 2004, “some 200,000 Sudanese had fled across the border to neighbouring Chad and an estimated 1.6 million were displaced within Darfur.”³⁷

The international community, through the United Nations and the African Union, began to respond to the situation of Darfur in 2004. On 18 September 2004, the Security Council adopted resolution 1564 (2004), calling for an International Commission of Inquiry on Darfur to investigate violations of international human rights and humanitarian law.³⁸ The Commission submitted the report in January 2005, establishing that the Government of Sudan and the Janjaweed were responsible for serious violations of international human rights and humanitarian law that may constitute crimes against humanity given that these violations were so widespread and systematic.³⁹

The Security Council was also actively engaging in the situation of Darfur by means of establishing a United Nations Mission in the Sudan (UNMIS),⁴⁰ imposing an arms embargo on all parties in Darfur,⁴¹ and referring the situation in Darfur to the International Criminal Court.⁴² On 31 August 2006, the Security Council adopted resolution 1706 (2006) explicitly reaffirming the elements of the responsibility to protect.⁴³ It determined that the situation in the Sudan constituted a threat to international peace and security, and decided to deploy an international peacekeeping force under Chapter VII of the Charter.

Against this backdrop, on 13 December 2006, at its fourth special session, the Human Rights Council adopted by consensus decision S-4/101 on the situation of human rights in Darfur. It expressed concern regarding the seriousness of the human rights and humanitarian situation in Darfur,⁴⁴ and decided to dispatch a HLM with the mandate to “assess the human rights situation in Darfur and the needs of the Sudan in this regard.”⁴⁵ On 26 January 2007, the President of the Human Rights Council appointed Jody Williams (Head of Mission), Bertrand Ramcharan, Mart Nutt, Makarim Wibisono, Patrice Tonda, and Sima Samar as the members of the Mission. Sima Samar is also the Special Rapporteur on the

situation of human rights in the Sudan.

1.2 Report of the Mission

The HLM submitted its report to the Human Rights Council on 9 March 2007. The significance of this Mission is that it decided to assess the situation of Darfur under the framework of R2P, something that had never been done before. Because human rights abuses in Darfur were so clearly evident, the Mission determined that “the situation did not require a human rights fact-finding mission, as such.”⁴⁶ Their intention was to give a “collective informed perspective on the human rights situation in Darfur.”⁴⁷ This collective informed perspective was informed by the Commission’s understanding that the Government of the Sudan bears the responsibility to protect.⁴⁸

The HLM assessed the situation of Darfur, the actions taken by the Government of the Sudan, the measures taken by the international community, and the needs of the people in Darfur. The Conclusion in respect to R2P of Sudan is as follows:

The Mission ... concludes that the Government of the Sudan has *manifestly failed to protect the population* of Darfur from largescale international crimes, and has itself orchestrated and participated in these crimes. As such, the solemn obligation of the international community to exercise its responsibility to protect has become evident and urgent.⁴⁹

The HLM clearly declared that the Government of the Sudan has “manifestly failed to protect the population of Darfur,” and called for the international community to exercise its responsibility to protect. This suggests that, in accordance with three pillar strategy, the international community should make a timely and decisive response, if necessary, under Chapter VII of the Charter.

The HLM also made some assessments and recommendations in terms of concrete measures the international community should take. According to the HLM, the need for effective protection was evident.⁵⁰ Such need, according to the Mission, was “emphasized by virtually everyone we met, and a consistent theme in the documentation we collected.”⁵¹ This means, for them, that there was a need for “a large, robust, broadly-mandated, well-resourced UN/AU peacekeeping/protection force deployed across the territory of Darfur.”⁵² Based on this assessment, the HLM made a recommendation to the Security Council that it “should take urgent further action to ensure the effective protection of the civilian population of Darfur, including through the deployment of the proposed UN/AU peacekeeping/protection force.”⁵³

1.3 Some Observations

In response to the report submitted by the HLM, the Human Rights Council adopted resolution 4/8 on 30 March 2007.⁵⁴ While the report of the HLM clearly stated the manifest

failure of the Government of the Sudan to protect their population, the expression adopted by the Human Rights Council did not go so far. It simply expressed its “deep concern”⁵⁵ regarding the seriousness of the ongoing violations of human rights and international humanitarian law in Darfur, “including armed attacks on the civilian population and humanitarian workers.”⁵⁶ It did not refer to the notion of the responsibility of the Government to protect, nor the responsibility of the international community.

Further observation is required for understanding the reasons behind the reluctance of the Human Rights Council in using R2P in its report. One tentative theory is that the Security Council had already taken action and, therefore, the Human Rights Council showed restraint in this regard. It should be noted that the Security Council had already taken action by sending UNMIS to the Sudan and that, as stated in the resolution, “the Government of the Sudan welcomed this decision and expressed its readiness to improve the human rights situation in Darfur.”⁵⁷

Notwithstanding the Human Rights Council’s somewhat muted expression, the report of the HLM remains important in the sense that it sets a precedent for the human rights missions of inquiry for the future. Although the following missions in Libya and Syria did not directly frame their assessment in the name of R2P, one can find its marks in their reports. The reports of the International Commission on Libya and Syria will be examined in the following sub-sections in turn.

The HLM report also substantially contributed to implementing R2P within the framework of the three pillar strategy. Although the Report by the UN Secretary General was not prepared at the time of the HLM, the expectation expressed in the report, namely to deliver messages directly to key decision makers on behalf of the larger international community, appeared to be carried out. The readiness of the government of the Sudan to improve the human rights situation may be seen as a consequence of such effort.

2. Libya (2011)

2.1 Background

In February 2011, mass demonstrations began in Libya calling for democratic reform and the toppling of the Qadhafi regime. This uprising is generally understood within the context of so-called Arab Spring, a series of similar popular uprisings in neighboring countries of Tunisia and Egypt. While the protesters of Libya claimed that these demonstrations were peaceful, the Government of Libya disputed this claim and responded by using significant force. The situation soon escalated into a civil war by late February.

Both the Human Rights Council and the Security Council reacted promptly to this issue. On 25, February 2011, the Human Rights Council called for a special session to discuss the situation of the Libyan Arab Jamahiriya. It adopted resolution S-15/1⁵⁸ which clearly referred to the concept of R2P by way of strongly calling upon “the Libyan Government to meet its responsibility to protect its population.”⁵⁹ It also decided “to

urgently dispatch an independent, international commission of inquiry.”⁶⁰ The mandate of the Commission was to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, to establish the facts and circumstances of such violations and of the crimes perpetrated and, where possible, to identify those responsible, and to make recommendations, in particular, on accountability measures, all with a view to ensuring that those individuals responsible are held accountable.⁶¹ The President of the Human Rights Council appointed M. Cherif Bassiouni as the Chairperson of the Commission, and Asma Khader and Philippe Kirsch as members of the Commission.⁶²

The following day, on 26 February 2011, the Security Council adopted resolution 1970 (2011). This resolution declared that “the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity,”⁶³ and recalled “the Libyan authority’s responsibility to protect its population.”⁶⁴ The resolution, then, acting under Chapter VII of the Charter, decided to take measures under its Article 41. The Security Council also decided to refer the situation in Libya to the Prosecutor of the International Criminal Court.⁶⁵ It set travel bans on some individuals, including Muammar Qadhafi and his family, and froze their foreign assets.⁶⁶

On 17 March 2011, about a month after resolution 1970 was adopted, the Security Council adopted the landmark resolution 1973. This resolution authorized the taking of all necessary measures in order to protect a civilian population for the first time in history. The resolution reiterated “the responsibility of Libyan authorities to protect the Libyan population”⁶⁷ and considered that “the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity.”⁶⁸ The Security Council’s authorization for the use of force was set out in the following manner. 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...

Based on this resolution, NATO officially intervened militarily in the conflict and assisted the National Transitional Council, mainly through the deployment of air power. Due to severe resistance by the Qadhafi regime and its supporters, the conflict soon became deadlocked. However, in August, Tripoli, the capital of the Libyan Arab Jamahiriya, fell and Muammar Qadhafi was captured and shot dead on 20 October 2011.

2.2 Report of the Commission

The International Commission of Inquiry to investigate all alleged violations of

international human rights law in the Libyan Arab Jamahiriya was established pursuant to Human Rights Council resolution S-15/1 and submitted two reports. The first report was submitted on 1 June 2011 at the 17th Session of the Human Rights Council;⁶⁹ and the second (and final) report was submitted on 8 March 2012 to the 19th Session of the Council.⁷⁰ Both reports, unlike the HLM report, made no specific reference to R2P.

The first report found violations of international human rights law by the Government of Libya, especially in relation to the excessive use of force against demonstrators,⁷¹ arbitrary detentions and enforced disappearances,⁷² torture and other forms of ill-treatment,⁷³ denial of access to medical treatment,⁷⁴ denial of freedom of expression,⁷⁵ attacks on civilians, civilian objects, protected persons and objects,⁷⁶ prohibited weapons,⁷⁷ use of mercenaries,⁷⁸ abuse of migrant workers,⁷⁹ sexual violence,⁸⁰ and failure to protect the rights of children in armed conflict.⁸¹

The first report calls on the Libyan Government, among others, “to immediately cease acts of violence against civilians in violation of applicable international humanitarian law and international human rights law.”⁸² It also made recommendation to the National Transitional Council, among others, “to ensure immediately the implementation of applicable international humanitarian law and international human rights law.”⁸³

The second report of the International Commission of Inquiry found human rights violations, mostly on the Qadhafi side in the conflict, including the excessive use of force,⁸⁴ unlawful killing,⁸⁵ arbitrary detentions and enforced disappearances,⁸⁶ torture and other forms of ill-treatment,⁸⁷ targeting of communities,⁸⁸ sexual violence,⁸⁹ and attacks on civilians, civilian objects, protected persons and objects. The Commission made 20 recommendations to the interim Government of Libya. It recommended, for example, to “investigate all violations of international human rights law and international humanitarian law set out in this report.”⁹⁰

2.3 Some Observations

The 17th general session of the Human Rights Council was held in June 2011 and the first report of the International Commission of Inquiry was considered. The resolution adopted by the Human Rights Council at the session mentioned R2P only very briefly. The resolution calls on “the Government of Libya (...) to immediately cease all violations of human rights, to meet its responsibility to protect its populations, to release all those arbitrarily detained and to ensure unimpeded humanitarian access without discrimination.”⁹¹ The second report was submitted to the 19th session of the Human Rights Council on 8 March 2012. Since the Qadhafi regime had already been toppled by this time, it was expected that any subsequent resolution on Libya would not include R2P.

Given what might appear as reluctance both from the International Commission and the Human Rights Council in referring to R2P with regard to Libya, two questions arise: first, to what degree did the International Commission report support the concept of R2P?; second, how might we understand what appears some reticence on the part of the Human

Rights Council with regard to firmly supporting R2P in its resolution?

One might argue that the reports of the Commission actually do refer to R2P, albeit in a somewhat indirect manner. For example, in the report of the Commission R2P is implied in the demand to cease “intentional or indiscriminate attacks on civilians or attacks having a disproportionate impact on civilians.”⁹² This argument is difficult to sustain however. The prohibition on the attacks against civilian populations in the context of armed conflict is specifically covered under existing rules of humanitarian law, namely Articles 13(1) and 13(2) of the Additional Protocol II to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflict. Through annual thematic debates, the Security Council has focused on elaborating the agenda on the Protection of Civilians (or “PoC”), and has carefully distinguished this from R2P. As Jenner Welsh rightly explained, “while the PoC and RtoP overlap, they are not the same: the PoC is in one sense narrower, in that it only refers to situations of armed conflict; but it is also broader in that the rights of civilians in armed conflict extend beyond protection from mass atrocities.”⁹³ Moreover, it is important to stress the fact that the Commission report did not refer to “responsibility” in the sense of R2P. While the first report concluded that the Libyan authority violated international humanitarian law by attacking civilian populations, and affirmed the legal responsibility of the Government, it did not mention a shift of such responsibility to the international community. These two categories of responsibilities must be distinguished: the former is legal, while the latter is political.

The reasons behind the reluctance of the Human Rights Council evident in the resolution adopted must be cross-examined with the case of Syria. For now, however, it is important to stress that the central player on the matter of Libya was the Security Council.⁹⁴ The Security Council successfully adopted resolution 1973 which authorized NATO’s military intervention under R2P, and there was therefore no need for the Human Rights Council to engage heavily in the matter. It seems appropriate therefore that the Council showed restraint in implementing its original role of monitoring, protecting, and promoting human rights in the country.

3. Syria (2012-Present)

3.1 Background

In February 2011, inspired by the series of uprisings in Tunisia, Egypt, and Libya, protests broke out in the Syrian Arab Republic around issues of democracy and human rights. The Syrian authority began wide-scale military operations on 25 April in Dar’a which soon spread to different locations within the country. The Office of the High Commissioner for Human Rights estimated that at least 3,500 civilians had been killed by the Government forces since March 2011.⁹⁵

The Syrian Arab Armed Forces, responsible for defending the national territory, is composed of around 300,000 soldiers. The group called Shabbiha, composed of an

estimated 10,000 civilians and armed by the Government, are, according to the Commission of Inquiry on Syria, “widely used to crush anti-Government demonstrations alongside national security forces.”⁹⁶ Numerous defectors have organized themselves into the “Free Syrian Army”, which has claimed responsibility for attacks against the Government. The Commission, however, say that there is “no reliable information on the size, structure, capability and operations of this body.”⁹⁷

In April, the President of the Syrian Arab Republic, Bashar al-Assad, announced several steps towards political and legal reform. Such reforms include the lifting of the state of emergency, the granting of general amnesties, and new regulations on the right of citizens to participate in peaceful demonstrations.⁹⁸ On 2 June, the President announced the establishment of the National Dialogue Commission as a part of transitional process towards multiparty democracy.⁹⁹

On 3 August, the Security Council issued a Statement by the President, expressing its grave concern at the deteriorating situation in Syria, and condemning the widespread violations of human rights.¹⁰⁰ On 4 October, a proposed draft resolution of the Security Council on the situation of Syria failed to be adopted due to vetoes put down by Russia and China.¹⁰¹ The draft resolution recalled “the Syrian Government’s primary responsibility to protect its population”¹⁰² and “strongly condemns the continued grave and systematic human rights violations and the use of force against civilians by the Syrian authorities.”¹⁰³ The draft resolution also referred to Article 41 of the UN Charter, or economic sanctions, should the resolution not be implemented within 30 days.¹⁰⁴

On 22 August, the Human Rights Council convened a Special Session to discuss the issue of Syria. They adopted Human Rights Council resolution S-17/1 which “called upon the Syrian authorities to immediately put an end to all human rights violations, to protect the population and to fully comply with their obligations under international human rights law.”¹⁰⁵ In addition, the resolution decided to dispatch urgently an independent international Commission of Inquiry.¹⁰⁶ The President of the Human Rights Council appointed Paulo Pinheiro (Chairperson), Yakin Erturk and Karen Koning AbuZayd as members of the Commission. The mandate of the Commission was to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.¹⁰⁷

3.2 Report of the Commission

The independent International Commission of Inquiry on the Syrian Arab Republic submitted reports to the Human rights Council twice; the first on 23 November 2011 and the second on 28 February 2012. While the first report was silent in terms of R2P, the second report took a brave step by determining the manifest failure of the Government of Syria to

protect its population.

For the first report, based on the mandate, the Commission found violations of international human rights law mainly by the Government of Syria, including excessive use of force and extrajudicial execution,¹⁰⁸ arbitrary detentions,¹⁰⁹ enforced disappearances,¹¹⁰ torture and other forms of ill-treatment,¹¹¹ sexual violence,¹¹² violations of children's rights,¹¹³ displacement and restriction of movement,¹¹⁴ and violations of economic and social rights.¹¹⁵ The Commission was, however, "unable to verify the level of the intensity of combat between Syrian armed forces and other armed groups."¹¹⁶ The Commission, therefore, did not apply international humanitarian law to the events in Syria.

Despite the fact that international humanitarian law was not applied in the events of Syria, the Commission stressed that crimes against humanity may still occur. The Commission was thus "gravely concerned that crimes against humanity of murder, torture, (...) and other inhumane acts of a similar character have occurred in different locations in the country since March 2011."¹¹⁷

While the first report of the Commission showed concern that crimes against humanity have occurred and may still be occurring, it did not refer to R2P in the report. However, the second report of the Commission went further, determining that the Government of Syria has manifestly failed in its responsibility to protect its people.¹¹⁸ The second report determined the failure of the R2P as follows:

The Government has manifestly failed in its responsibility to protect the population; its forces have committed widespread, systematic and gross human rights violations, amounting to crimes against humanity, with the apparent knowledge and consent of the highest levels of the State. Anti-Government armed groups have also committed abuses, although not comparable in scale and organization with those carried out by the State.¹¹⁹

Interestingly, however, the Commission did not request the Security Council to intervene militarily in Syria. According to the Commission "the only possible solution to end the violence is an inclusive dialogue leading to a negotiated settlement that effectively ensures the human rights of all people in the country."¹²⁰ Therefore, the Commission recommended calling for "an urgent, inclusive political dialogue, bringing together Government, opposition and anti-Government actors to negotiate an end to the violence, to ensure respect for human rights and to address the legitimate demands of the Syrian people."¹²¹

3.3 Some Observations

During the 19th session of the Human Rights Council, held between 27 February and 23 March 2012, a resolution on the situation of Syria was adopted.¹²² The resolution strongly condemned the Syrian authority, referring to R2P in the following manner:

The Human Rights Council,...

*Deploing also the escalation of violence that has led to a grave and ongoing human rights crisis and increased human suffering, and the fact that the Syrian authorities have manifestly failed in their responsibility to protect the Syrian population,...*¹²³

The Human Rights Council had never adopted such an expression in previous resolutions. Even when the HLM of Darfur concluded the manifest failure of the Sudan to protect its population, R2P was only briefly mentioned in the adopted resolution. The question to be answered therefore is, what made the Human Rights Council make such an expression?

The answer may largely lie with the failings of the Security Council to take any action regarding Syria. After the Security Council adopted the Presidential Statement of 3 August 2011, it attempted to adopt a resolution on 4 October 2011. Russia and China clearly rejected the resolution proposed. According to Russia, the draft resolution is based on the philosophy of confrontation,¹²⁴ and it “cannot agree with this unilateral, accusatory bent against Damascus.”¹²⁵ Moreover, for Russia, the so-called “Unified Protector” model, the military intervention authorized in Libya, “should be excluded from global practices once and for all.”¹²⁶ In other words, Russia claims that Security Council resolution 1973 which would have authorized the use of force for protecting populations does not allow for regime change, and, because of what Russia saw as manipulation within the resolution to this end, the use of force, even for creating no-fly zones, cannot be accepted. Basically, for the same reason, a more diluted version of the draft resolution was also vetoed, leaving the Security Council in deadlock.

Considering the fact that the Security Council failed to take any effective measures in response to the situation in Syria, it seems appropriate (even demanded) that the Human Rights Council takes over from the Security Council in protecting population of Syria from mass atrocious crimes. The Human Rights Council resolution on the situation of Syria, adopted in late February (2012), must be understood within this context.¹²⁷ Of course, it does not mean that the Human Rights Council could authorize military intervention. It has no such power. It seems apt to remind ourselves again that the function of the Human Rights Council, where timely and decisive reaction is required, is to “deliver messages directly to key decision makers on behalf of the larger international community.”¹²⁸ The impact of the Human Rights Council resolution is therefore limited. Nevertheless, the case of Syria demonstrates that the Human Rights Council is trying to fill the gap left by failings within the Security Council by implementing R2P within its mandate.

IV. Conclusion

Given the fact that the literature on R2P has placed a disproportionate emphasis on the role

of the Security Council, the aim of this paper was to provide an overview of the functions of the UN Human Rights Council in implementing R2P within the “three pillar strategy” framework, and explore its practice under pillar three, or in situations where timely and decisive reaction is required – *inter alia*, Darfur, Libya, and Syria.

It illustrated functions of the Human Rights Council within the framework of the “three pillar strategy” proposed by the UN Secretary General, Ban Ki-Moon. In each pillar – (1) the protection responsibilities of the State; (2) international assistance and capacity-building; and (3) timely and decisive response – the Human Rights Council has a role to play. For the first pillar, the Human Rights Council may contribute through the UPR mechanism – a State-driven process for improving the human rights situations in their respective countries. For the second pillar, the Human Rights Council may enhance dialogue and cooperation between States – such as via the complaint procedure which identifies consistent patterns of gross and reliably attested violations of all human rights. For the third pillar, the Human Rights Council may contribute by dispatching a fact-finding or on-site mission of inquiry, and send a clear message of the international community in terms of human rights.

Against this backdrop of the R2P framework, the paper also explored the Human Rights Council’s practice under the third pillar – timely and decisive response – by considering cases of Darfur, Libya, and Syria. It argued that mutual assistance between the Human Rights Council and the Security Council may be demonstrated. The Human Rights Council remained relatively silent in terms of R2P in the case of Libya where effective measures by the Security Council were taken. However, the Human Rights Council has engaged actively in condemning the Government of Syria in the name of R2P where the Security Council was, and remains, virtually dysfunctional.

NB. The views expressed in this paper are author’s personal views, and do not reflect Japanese government’s official view.

Notes

¹ The Security Council failed to adopt draft resolutions 612 (2011) and 77 (2012) consecutively due to the opposition by Russia and China.

² There are some exceptions. See, for instance, Tadashi Imai, “A thought on the functions of the UN Human Rights Council in coping with mass human rights violations” *Human Rights International No. 22* (2011).

³ UN Doc., A/RES/60/251, para. 3.

⁴ The report of the Commission is available here:

<http://responsibilitytoprotect.org/ICISS%20Report.pdf> (last visited, 29 April 2012)

⁵ UN Doc., A/RES/60/1(2005), para. 139.

⁶ *Ibid.*

⁷ UN Doc., Ban Ki-Moon, Report of the Secretary General, Implementing the responsibility to protect. (A/63/677) 12 January 2009, para. 2.

⁸ Ibid.

⁹ Ibid., para. 10(c)

¹⁰ Ibid., para. 11.

¹¹ See Thomas Weiss, “R2P Alive and Well after Libya” *Ethics & International Affairs* Vol 25 No. 3 (2011)

¹² See Alex J. Bellamy, “Libya and the Responsibility to Protect: The Exception and the Norm” *Ethics & International Affairs* Vol 25 No. 3 (2011)

¹³ Genocide, war crimes, and crimes against humanity are well defined in the Rome Statute of the International Criminal Court. See < <http://www.icc-cpi.int/Menus/ICC/>> (last visited: 29 April 2012)

¹⁴ Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*. (Washington, D.C.: Brookings Institution Press, 2008), p. 13.

¹⁵ Ibid.

¹⁶ Ban Ki-Moon, Implementing the responsibility to protect, para. 10(c)

¹⁷ Ibid., para. 66.

¹⁸ Ibid., para. 14.

¹⁹ Ibid., para. 14.

²⁰ Ibid., para. 16.

²¹ Ibid., para. 16.

²² For more detail, see, for example, Markus Schmidt, “United Nations”, Daniel Moeckli, Sangeeta Shah, & Sandesh Sivakumara ed. *International Human Rights Law* (Oxford: Oxford University Press, 2010)

²³ Ban Ki-Moon, Implementing Responsibility to Protect, para. 28.

²⁴ Ibid. para. 33.

²⁵ UN Doc., A/RES/60/251(2007)., para. 5(f).

²⁶ UN Doc., the Economic and Social Council Resolution 1503 (XLVII) (1970).

²⁷ UN Doc., the Human Rights Council Resolution 5/1, para. 85.

²⁸ Ban Ki-Moon, Implementing Responsibility to Protect, para. 49.

²⁹ Ibid., para. 52.

³⁰ Ibid., para. 53.

³¹ Ibid., para. 53.

³² See the Human Rights Council website

<http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (last visited: 29 April 2012).

³³ Themes include: adequate housing; African descent, arbitrary detention; sales of children; cultural rights; education; healthy and sustainable environment; enforced or involuntary disappearances; extrajudicial, summary or arbitrary executions; extreme poverty and human rights; food; foreign debt; freedom of peaceful assembly and of association; freedom of opinion and expression; freedom of religion or belief; health; human rights defenders; independence of judges and lawyers; indigenous peoples; internally displaced persons; mercenaries; migrants; minority issues; guarantees on non-recurrence; racism; slavery; solidarity; terrorism; torture; substances and waste; trafficking in persons; the issue of human rights and transnational corporations and other business enterprises; water; women in law and in practice; and violence against women.

³⁴ Countries include: Cambodia; Cote d’Ivoire; Democratic People’s Republic of Korea; Haiti; the Islamic Republic of Iran; Myanmar; Somalia; Sudan; and the Syrian Arab Republic. Also included are the Palestinian territories occupied since 1967

³⁵ UN Doc., General Assembly Resolution 60/251 (2007)

³⁶ UN Doc., A/HRC/4/80 (2007), the Report of the High-Level Mission, para. 27.

- ³⁷ The Report of the High-Level Mission, para. 34.
- ³⁸ UN Doc., Security Council res. 1564 (2004).
- ³⁹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005.
- ⁴⁰ UN Doc., Security Council resolution. 1590 (2005), 24 March 2005.
- ⁴¹ UN Doc., Security Council resolution. 1591 (2005), 29 March 2005.
- ⁴² UN Doc., Security Council resolution. 1593 (2005), 31 March 2005.
- ⁴³ UN Doc., Security Council resolution. 1706 (2006), 31 August 2006.
- ⁴⁴ UN Doc., Human Rights Council resolution S-4/101 (2006), para. 1.
- ⁴⁵ Ibid., para. 4.
- ⁴⁶ The Report of the High-Level Mission, para. 3.
- ⁴⁷ Ibid.,
- ⁴⁸ Ibid.
- ⁴⁹ Ibid., para. 76. (*italics by the author*)
- ⁵⁰ Ibid., para. 70.
- ⁵¹ Ibid.
- ⁵² Ibid.
- ⁵³ Ibid., para. 77(i)
- ⁵⁴ UN Doc., A/HRC/4/8 (2007), Follow-up to decision S-4/101 of 13 December 2006 adopted by the Human Rights Council at its fourth special session entitled “Situation of human rights in Darfur”.
- ⁵⁵ Ibid., para. 3.
- ⁵⁶ Ibid., para. 3.
- ⁵⁷ Ibid.
- ⁵⁸ UN Doc., A/HRC/RES/S-15/1 (2011), “Situation of human rights in the Libyan Arab Jamahiriya.”
- ⁵⁹ Ibid., para. 2.
- ⁶⁰ Ibid., para. 11.
- ⁶¹ UN Doc., A/HRC/RES/S-15/1, para. 11.
- ⁶² UN Doc., A/HRC/17/44 (2011), Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, para. 2.
- ⁶³ UN Doc., S/RES/1970 (2011).
- ⁶⁴ Ibid.
- ⁶⁵ Ibid., para. 4.
- ⁶⁶ Ibid., para. 17.
- ⁶⁷ UN Doc., S/RES/1973 (2011)
- ⁶⁸ Ibid.
- ⁶⁹ UN Doc., A/HRC/18/44 (2011), Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya.
- ⁷⁰ UN Doc., A/HRC/19/68 (2012), Report of the International Commission of Inquiry on Libya.
- ⁷¹ Ibid., para. 82-99.
- ⁷² Ibid., para. 100-120
- ⁷³ Ibid., para. 121-129.
- ⁷⁴ Ibid., para. 130-139.
- ⁷⁵ Ibid., para. 140-154.
- ⁷⁶ Ibid., para. 155-180.
- ⁷⁷ Ibid., para. 181-189

- ⁷⁸ Ibid., para. 190-201
⁷⁹ Ibid., para. 202-210
⁸⁰ Ibid., para. 211-219.
⁸¹ Ibid., para. 220-227.
⁸² Ibid., para. 268.
⁸³ Ibid.
⁸⁴ UN Doc., A/HRC/19/68 (2012), Report of the International Commission of Inquiry on Libya
⁸⁵ Ibid., para. 15-22.
⁸⁶ Ibid., para. 23-37.
⁸⁷ Ibid., para. 38-43.
⁸⁸ Ibid., para. 44-53.
⁸⁹ Ibid., para. 54-64.
⁹⁰ Ibid., para. 127.
⁹¹ UN Doc., A/HRC/17/L.3 (2011) (*italic by author*)
⁹² A/HRC/17/44, para. 162
⁹³ Jennifer Welsh, “Civilian Protection in Libya”, p. 257.
⁹⁴ There is a debate about whether the regime change was permitted under the Security Council resolution 1973. For more detail, see “Roundtable: Libya, RtoP, and Humanitarian Intervention” *Ethics & International Affairs*, vol. 25, no. 3 (2011)
⁹⁵ UN Doc., A/HRC/S-17/2Add.1, para. 28
⁹⁶ Ibid., para. 20.
⁹⁷ Ibid., para. 29.
⁹⁸ Ibid., para. 31.
⁹⁹ Ibid., para. 32.
¹⁰⁰ UN Doc., S/PRST/2011/16 (2011)
¹⁰¹ UN Doc., S/2011/612 (2011)
¹⁰² Ibid.
¹⁰³ Ibid.
¹⁰⁴ Ibid, para. 11.
¹⁰⁵ UN Doc., A/HRC/S-17/2 (2011), para. 4.
¹⁰⁶ Ibid., para. 13.
¹⁰⁷ UN Doc., A/HRC/S-17/.2/Add.1, para. 4.
¹⁰⁸ Ibid., para. 41-51.
¹⁰⁹ Ibid., para. 52-58.
¹¹⁰ Ibid., para. 59-60.
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¹¹³ Ibid., para. 69-74.
¹¹⁴ Ibid., para. 75-79.
¹¹⁵ Ibid., para. 80-83.
¹¹⁶ Ibid., para. 99.
¹¹⁷ Ibid., para. 108.
¹¹⁸ UN Doc., A/HRC/19/69, Report of the independent international commission of inquiry on the Syrian Arab Republic.
¹¹⁹ Ibid., para. 126.
¹²⁰ Ibid., para. 125.
¹²¹ Ibid., para. 131.
¹²² UN Doc., A/HRC/19/L.38/Rev.1 (2012)
¹²³ UN Doc., A/HRC/19/L.38/Rev.1 (2012)

¹²⁴ UN Doc., S/PV.6627 (2011), statement by Mr. Churkin (Russian Federation)

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ UN Doc., A/HRC/19/L.38/Rev.1 (2012)

¹²⁸ Ban Ki-Moon, Implementing the Responsibility to Protect, para. 53.

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