Responsibility to Protect in the Use of Force

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Abstract: The concept of the "Responsibility to Protect" was introduced by the UN Security Council when it took on the important issue of safeguarding human rights in the world. The emergence and development of this concept means that the international community has begun to treat the protection of human rights and security of citizens in armed conflict more profoundly and systematically. However, since the international community has not institutionalized the specific content and initiation procedures of the "Responsibility to Protect", it has been widely discussed that the "Responsibility to Protect" is the reason for the UN Security Council to authorize member states to take all necessary measures, including force. This article will reflect on the "Responsibility to Protect" through a discussion of how to deal with the relationship between the responsibility to protect and respect for sovereignty, how to allow permanent members to use their veto prudently in this regard, and how to limit the excessive use of force within the framework of the responsibility to protect.

1. Introduction

Since the end of the Cold War, conflicts have continued in all corners of the world, such as the Gulf War and the atrocities in Rwanda.[1] This has resulted in people in many countries still living in dire straits, and even the most basic human rights to life and health cannot be guaranteed. When unilateral humanitarian intervention cannot be recognized, the international community, led by Canada, has put forward a new concept and policy proposition of responsibility to protect.[2] In the results of the *Word Summit* in 2005, the responsibility to protect was ratified and became the international community's commitment to safeguard human rights.[3] The definition of the responsibility to protect clearly states that if a country fails to fulfill its responsibility to protect people from four serious atrocity crimes, the international community will take collective action to protect the basic rights of the people of that country.[3] The action mentioned here refers to taking necessary military or non-military means. According to Chapter 7 of the *UN Charter*, the UN Security Council is the only body with the authority to authorize the use of force to maintain or restore international security and peace. This provision also means that the UN Security Council will be the only legal body that can decide whether to activate the responsibility to protect and whether to use force to fulfill the responsibility to protect.

With the adoption of a resolution by the UN Security Council in 2011 to apply the responsibility to protect to resolve the Libyan crisis for the first time, the responsibility to protect as an important

crisis solution for the international community began to appear more and more in people's vision.[4] At the same time, the problems existing in the UN Security Council's process of initiating the responsibility to protect and authorizing the use of force have begun to gradually come to light. In this regard, the paper will focus on how the Council can activate the responsibility to protect and authorize the use of force to that end, how to address the relationship between the responsibility to protect and respect for sovereignty, how to allow permanent members to use their veto power prudently in this regard, and how to limit the excessive use of force in the framework of the responsibility to protect.

2. How Will the UN Security Council Initiate the Use of Force to Fulfill the Responsibility to Protect?

The responsibility to protect is another measure proposed by the international community to protect human rights after humanitarian intervention. Previous humanitarian intervention was essentially the use of coercive measures by some Western countries to intervene in the affairs of other countries without authorization from the UN Security Council. The adverse impact of these measures has made the international community suspicious of such behaviour that uses humanitarianism as a cover to implement its own political goals. To make humanitarian protection measures legitimate and reasonable, the responsibility to protect was gradually created and developed. In the process of explaining the responsibility to protect, the Secretary-General of the United Nations pointed out that this principle has three pillars as its core content, namely, the responsibility of sovereign states to protect their people, the responsibility of the international community to assist, and the responsibility to protect when sovereign states are unable to protect their people.[5] Among them, the third pillar has caused widespread discussion. The existence of the third pillar also means that the Security Council can authorize the use of force to fulfill its obligation to help a country in crisis protect its nationals. Therefore, this part of the discussion on how the Security Council initiates the responsibility to protect is essentially to analyse how the Security Council can reasonably authorize the use to protect human rights.

2.1 The Legal Basis for the Use of Force Authorized by the UN Security Council

First, only Chapter 8 of the *UN Charter* mentions the word authorization, but this chapter obviously has nothing to do with the issue of the use of force. Chapter 7, which is related, does not clarify that the Security Council has the power to authorize. In this regard, the international community believes that Article 24 of the *UN Charter* grants the Security Council the power to maintain peace. This means that the Security Council has the authority to use the use of force mentioned in Article 42 to maintain world peace. At the same time, although the international community does not have a clear legal basis for the issue of the Security Council authorizing the use of force, this method of maintaining peace has been practiced many times in the international community and is widely accepted, which can be regarded as a form of an international custom. In addition, the resolution of the UN Security Council authorizing the use of force to implement the responsibility to protect, is only generally authorized by Chapter 7 of the *UN Charter*. This means that the *UN Charter* gives the Security Council the power of its own interpretation and flexible application in fulfilling its responsibilities to maintain peace. Therefore, it is legal for the Security Council to authorize the use of force to fulfill the responsibility to protect.

2.2 The Process by Which the Security Council Initiates a Resolution Authorizing the Use of Force for the Responsibility to Protect

First, the Security Council must determine whether there is a threat to world peace and whether there is an act of destruction or aggression. This is because Article 24 of the *UN Charter* states that the Security Council has the responsibility to maintain world peace and security and is authorized to enjoy the powers listed in Chapter 7 of the *UN Charter*. Article 39 of Chapter 7 of the *UN Charter* requires the Security Council to clarify whether acts that threaten or undermine world peace exist before taking measures listed in Chapter 7. This is also considered to be an indispensable prerequisite for the Security Council to initiate necessary measures.

For example, in the Libyan crisis, a typical case in which the use of force was authorized due to the responsibility to protect, the Security Council first assessed whether there were acts endangering the peace of the international community. Although Article 39 of the *UN Charter* states that the degree of conflict must be judged, it does not clearly provide criteria. Other international law rules are also relatively vague on this issue. This also means that the Security Council can make its own judgment and interpretation on this issue. The Libyan crisis is actually a conflict between the Libyan authorities and the opposition, but the violence used in this conflict caused serious casualties among civilians and even killed thousands of civilians in less than a month. Although this figure was not the result of an investigation in which the Council was directly involved, the constantly updated data on the number of civilian casualties from different international organizations at the time led the Council to conclude that the continuation of the crisis would pose a threat to international peace, even to the extent of constituting a crime against humanity. The Security Council also reflected this judgment in its resolution authorizing the use of force to protect the rights of civilians, that is, the Security Council in Resolution 1793. The preamble directly states that the situation in Libya has posed a threat to world peace. This also reflects the fact that this judgment is a prerequisite for the Security Council to initiate subsequent procedures for authorizing the use of force.

Second, the Security Council must have taken necessary non-force measures to ease tensions and protect civilians in the country concerned. In handling the Libyan crisis, the Security Council first adopted Resolution 1970. The resolution calls on the Libyan authorities to cease violence and decide to send humanitarian aid to Libya. At the same time, the Security Council also resolved to adopt travel bans, arms embargoes, and asset-freezing measures against Libya. These are essentially non-force measures and humanitarian assistance adopted by the Security Council to end the crisis as soon as possible. In this resolution, the Security Council clearly stated that measures must be taken by Article 41 of the *UN Charter*, which is different from many previous resolutions of the same nature made by the Security Council. This resolution aims to make it clear that all the measures listed are non-force methods. This also fully reflects the requirement of the second pillar of the responsibility to protect, that is, the international community assists sovereign states when they are unable to fulfill their responsibilities to protect their nationals.[6] In addition, the Security Council referred the situation in Libya to the International Criminal Court as a non-force measure to prevent the further expansion of the crisis. This also means that Article 41 of the *UN Charter* only provides examples of what non-force measures may contain, but it does not exhaust all non-force decisions that the Security Council has the power to make. Therefore, the second prerequisite for the Security Council to authorize the use of force under the responsibility to protect is that necessary and reasonable non-force measures have been applied.

Finally, the Security Council can authorize the use of force if the first two prerequisites are met. Security Council resolutions rarely directly authorize the use of force but instead authorize necessary measures. In Resolution 1973 on Libya, the Security Council used the expression "to take all necessary measures." This expression also reflects to a certain extent the Security Council's caution

and finality in the use of force, that is, the application of force can only be initiated when there are reasonable grounds to believe that peaceful means cannot achieve the purpose of realizing the responsibility to protect. In Resolution 1973, the United Nations adopted both force and non-force measures by Articles 41 and 42 of the *UN Charter*. Among them, non-force measures include mandatory arms embargoes and asset freezes. The *UN Charter* does not provide for any progressive relationship between Articles 41 and 42. However, in practice, it is not difficult to realize that the military strikes against Libya by the United States, the United Kingdom and France, led by the members of the Security Council, were not carried out immediately after the adoption of the resolution, but rather after the Qadhafi Government had accepted the resolution and then backtracked on it.[6] This proves that the authorization to use force will only be initiated when the Security Council objectively believes that peaceful means can no longer control the development of the crisis and realize the responsibility to protect and be implemented.

However, what needs to be noted here is that the Libyan crisis is the first and so far only case in which the responsibility to protect has been fully integrated into the entire resolution and authorization process of the Security Council. The Security Council's resolutions on other cases may not be so clear and complete due to changes in geopolitical and other factors. In addition, the application of the responsibility to protect does not have very specific international legal rules or much practice, which also means that how to use force to realize the responsibility to protect still needs further exploration in practice.

Therefore, in current practice, the Security Council's authorization to use force to realize the responsibility to protect is mainly divided into three steps, namely, determining whether there is a threat or disruption to international peace, applying reasonable non-force means, and finally using force to protect civilians.

3. The Security Council Authorizes the Use of Force to Fulfill the Responsibility to Protect and Respects Sovereignty

To analyse the responsibility to protect or even the legality of authorizing the use of force to realize the responsibility to protect, it is inevitable to discuss the issue of national sovereignty. This is because the use of force to protect the basic rights of a country's citizens in conflicts between countries or between different regimes will have an impact on the traditional theory of sovereignty. Therefore, the emergence of the responsibility to protect may require the international community to sort out the relationship between the two from a new perspective, which will also enable the Security Council to better apply the responsibility to protect and maintain world peace and stability.

The theory of sovereignty has gone through a long discussion in history until Oppenheim stated that sovereignty is the supreme authority, which means that it is not legally subordinate to the authority pointed out by other laws.[7] Such a view gives the character of sovereign independence. Since then, the modern mainstream view of sovereignty has become more complete, that is, national sovereignty means the highest power internally and independent status externally.[8]

However, from the perspective of the development of sovereignty, the core of this concept is not static. It is a historical product that has been continuously developed and improved according to different international environments. The development and application of the responsibility to protect also requires new enrichment and interpretation of national sovereignty. Former United Nations Secretary-General Kofi Annan pointed out that sovereignty means power and responsibility.[9] The most important responsibility here is to protect its citizens from war and violence.[9] This may be further interpreted in conjunction with Rousseau's social contract theory on the relationship between sovereignty and the responsibility to protect. Social contract theory points out that sovereignty is the product of citizens transferring some of their rights to the country for the normal operation of the

country.[9] This is equivalent to signing a contract with the state, that is, the state exercises the power derived from its citizens to assume the responsibility of protecting the remaining rights of its citizens.[10] The emergence of the responsibility to protect will apply Rousseau's theory and transform the theory of absolute sovereignty into responsible sovereignty.[9] Under this framework, if a country cannot afford to protect its nationals, the sovereignty will not be recognized. At this time, the Security Council will be entrusted by the international community to invoke the responsibility to protect and become the guardian of the country's sovereignty until the crisis in the country is alleviated.[10] For example, in Security Council Resolution 1973, the Security Council authorized all necessary measures to be taken against Libya to protect civilians. This was actually preventing the division of the country caused by the continuation of the violence and trying to guide Libya to re-establish its sovereignty.

Although some people still oppose the use of force when activating the responsibility to protect, these views are not more about denying the state's responsibility to protect civilians but believe that the responsibility to protect itself is too advanced and even exceeds the existing national legal framework.[11] This may lead to problems such as excessive application of measures that worsen the crisis or cause further harm to civilians, making it impossible to regulate. The existence of this issue may also place higher demands on the Security Council, the only international organization that can authorize the initiation of such measures.

4. The Veto Power of The Five Permanent Members of The Security Council and the Authorization to Use Force for the Responsibility to Protect

The UN Security Council is actually an international organization for collective political decision-making guided by pragmatism.[6] Its nature determines that the humanitarian need to initiate the responsibility to protect is carried out and promoted under the condition of unanimous decision-making. Article 27 of the *UN Charter* also stipulates that non-procedural matters must receive at least 9 votes from the 15 member states and the five permanent members must not vote against them before they can be adopted. However, since the five permanent members of the Security Council often exercise or threaten to exercise their veto power, the Security Council rarely reaches an agreement on a certain matter and passes a corresponding resolution. This is also the main reason why the responsibility to protect is less practiced.

Regarding the above issues, ICISS pointed out in its report on the responsibility to protect that although the Security Council is the most suitable organization to use the responsibility to protect for military intervention, the issue of veto power will become an obstacle to the adoption of relevant resolutions.[12] In this regard, ICISS calls on the five permanent members of the Security Council to agree not to apply the veto power unless their major interests are involved. Some scholars also pointed out that the content stipulated in Article 27 of the *UN Charter* is only a principle, and its purpose is to ensure that member states perform their obligations in good faith.[13] Under this framework, the five permanent members of the Security Council should voluntarily avoid using their veto power when it comes to resolutions under Chapter 7 of the *UN Charter*. Not only that, many international organizations and countries have called on the five permanent members to exercise caution in exercising their veto power or not to exercise their veto power in cases related to the responsibility to protect. However, these calls have had no effect and the five permanent members still exercise their veto power to prioritize their own political interests.

However, some researchers have found that the five permanent members of the Security Council do not seem to be willing to openly reject the responsibility to protect and hope that their actions will be reasonable.[6] Although it is not ruled out that the five permanent members vote in their own political interests, they have different opinions on the rationality and legality of the action. China and

Russia have objected to Security Council Resolution 1706's plan to deploy force in Sudan and the issue of the use of force against Syria.[14] The reason is that peaceful dialogue should be the best way to resolve conflicts and restore peace and stability.[17] The United Kingdom, the United States and France consider the use of force as an act of coercive protection to be lawful and necessary.[12] The views of these two parties were extremely obvious in the voting of Resolution 1973 adopted by the Security Council in response to the Libyan crisis because the final result was that the United States, Britain and France supported the resolution while China and Russia abstained. To reconcile the views of the two parties, we may have to start from what the two parties have already agreed on, that is, all countries recognize that human rights should be protected.[18] Based on this consensus, the five permanent members of the Security Council should all regard this common goal as their primary pursuit when making resolutions on crises that endanger world peace and temporarily shelve differences caused by their own political interests or other aspects.[18] This may enable the five countries to temporarily reach a consensus on the issue of human rights protection and use their veto power carefully to avoid falling into moral dilemmas.

Therefore, since the responsibility to protect does not constitute a codified rule of international law or an international custom in practice, the five permanent members of the Security Council may have no choice but to seek to harmonize law and morality on the issue of the authorization of the use of force to protect human rights to maximize the legitimacy and legality of the measures taken in the resolution.

5. How Will the Security Council Deal with the Use of Force That Exceeds the Authorization?

Since the Security Council is a political rather than a legal organization, this also results in the Security Council being able to take fewer truly binding measures. This part will propose two feasible solutions in conjunction with the Security Council's time on other international issues.

First, to limit the use of force by participating countries to realize their responsibility to protect, the Security Council can more specifically specify in its resolutions the method, extent and scope of force to be carried out. For example, the Security Council clearly stated in paragraph 4 of Resolution 1973 on the Libyan crisis that it would not station any form of foreign occupying forces anywhere on Libyan territory. This provision actually excludes the use of ground forces by Member States involved in the use of force to enter Libyan territory while authorizing all necessary measures to be taken. This can be thought of as a specific binding condition that the Security Council included in the resolution. This is certainly prudent practice when using force to fulfill the duty to protect. However, NATO still caused civilian casualties to a certain extent when using air strikes to suppress the violence.[6] This has further put forward restrictive requirements for the Security Council's resolutions aimed at protecting human rights, that is, the time, location, means and extent of strikes must be further restricted and made more specific. This may minimize harm to civilians in the host country and also facilitate the country's reconstruction and recovery.

Second, the Security Council can also submit relevant situations to the International Criminal Court by Article 16 of the *Rome Statute* to prompt the institution to investigate and prosecute whether the principal responsible member of a member state who used force in excess of the authorized use of force is suspected of war crimes or genocide.[15] Although the Security Council is not an international judicial body, the International Criminal Court is and it has the power to investigate the corresponding situation to determine whether to prosecute. The Security Council has referred the situation to the International Criminal Court on the Sudan issue.[16] While this practice will not be common in the Council's implementation of the responsibility to protect, the existence of this measure may be enough for the principal leaders of the countries involved in the use of force in this process to carefully understand the content of the Security Council resolutions and take action.

6. Conclusion

This essay provides a brief analysis of how the Council initiates the authorization of the use of force for the responsibility to protect in the context of the *UN Charter* and the timing of the Council's involvement in the Libyan crisis, how such authorization of the use of force relates to the principle of respect for sovereignty, the veto power of the P5 on this issue, and what the Council might do in response to excesses. There is little theoretical development and practical experience in the application of the principle of responsibility to protect and it is like a swaddled baby that hasn't grown yet. Although it has successfully undergone practical testing in the Security Council's handling of the Libyan crisis, it is still an idealized vision that lacks a legal basis and accumulation of results. Therefore, the Security Council's judgment and activation of the applicability of the responsibility to protect, as well as the prevention and response to various possible situations, need to be further improved during the application process.

References

[1] Robert W. Murray & Aidan Hehir, 'Intervention in the Emerging Multipolar System: Why R2P will Miss the Unipolar Moment' (2012) 6(4) Journal of Intervention and Statebuilding 387, 387.
[2] Sahana Dharmapuri, 'Implementing UN Security Council Resolution 1325: Putting the Responsibility to Protect into Practice' (2012) 4(2) Global Responsibility to Protect 241-272.
[3] Cristina Lafont, 'Human Rights, Sovereignty and the Responsibility to Protect' (2015) 22(1) Constellations (Oxford, England) 68, 68.
[4] Jennifer Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP' (2011) 25(3) Ethics & International Affairs 255-262.
[5] Aurora Martin, 'Responsibility to Protect (R2P) in Theory and Practice – Flaws and Challenges' (2018) 10(3) Cogito 84-93.
[6] Aidan Hehir, 'The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect' (2013) 38(1) International security 137-159.
[7] L. (Lassa) Oppenheim, Oppenheim's international law, ed Essex Harlow (9th ed, 1996).
[8] Alireza Karimi, A. Koosha, M. Najafi Asfad & M. T. Ansari, 'Examining of Relationship between Responsibility to Protect & Sovereignty of States in Light of Practice of International Community' (2017) 10(2) Journal of Politics and Law 256.
[9] Patrick Riley, Will and Political Legitimacy: A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant, and Hegel (Harvard University Press, 2014).
[10] Touko Piiparinen, 'Sovereignty-building: three images of positive sovereignty projected through Responsibility to Protect' (2012) 24(3) Global Change, Peace & Security 405-424.
[11] Stevie Martin, 'Sovereignty and the Responsibility to Protect: Mutually Exclusive or Codependent?' (2011) 20(1) Griffith law review 153-187.
[12] Brian D. Lepard, 'Challenges in Implementing the Responsibility to Protect: The Security Council Veto and the Need for a Common Ethical Approach' (2021) 25(2) The Journal of Ethics 223-246.
[13] Jennifer Trahan, Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes (Cambridge University Press, 2020).
[14] Alex De Waal, 'Darfur and the failure of the responsibility to protect' (2007) 83(6) International Affairs 1039-1054.
[15] Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).
[16] Nesam McMillan and David Mickler, 'From Sudan to Syria: Locating 'Regime Change' in R2P and the ICC' (2013) 5(3) Global Responsibility to Protect 283-316.