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Article

Does R2P constitute an exception to the prohibition of use of force under customary international law?

Liming Ma*

1. Introduction

The use of force is prohibited under both treaty law and customary international law.[1] Traditionally, there are three exceptions to the prohibition of use of force recognized by international law: the right to self-defense; collective enforcement via United Nations Security Council (UNSC); and action with the consent of the pertinent state.[2] However, as Peter Stockburger rightly points out, there is a contention that the responsibility to protect (R2P) also constitutes an exception to the prohibition of use of force under customary international law.[3]

* LLB (SWUPL), LLM (Berkeley), MA Candidate (CUHK).

[1] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14 [184]

[2] Oliver Dörr, 'Use of Force, Prohibition of', *Max Planck Encyclopedia of Public International Law,* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e427?rskey=fq36yN&result=3&prd=OPIL> accessed 18 December 2021, paras 36-44.

[3] Peter Stockburger, 'Emerging Voices: Is The R2P Doctrine the Greatest Marketing Campaign International Law Has Ever Seen' (*Opinio Juris*, 23 August 2013) <http://opiniojuris.org/2013/08/23/emerging-voices-is-the-r2p-doctrine-is-the-greatest-marketing-campaign-international-law-has-ever-seen> accessed 23 July 2021.

Indeed, responsibility to protect has been closely associated with military intervention since its emergence. In 2001, International Commission on Intervention and State Sovereignty (ICISS) published a report on whether a coercive military intervention can be justified by the humanitarian cause of 'protecting people at risk in that other state'.[4] To justify a humanitarian intervention, the report coined a new concept, 'the responsibility to protect', where a 'factual change in international law'[5] would occur. After the adoption of responsibility to protect in World Summit Outcome Document 2005 (WSOD)[6], UN Secretary General submitted a report on 'Implementing the Responsibility to Protect' to the 63rd General Assembly (GA or UNGA), where a three-pillar approach was proposed to operationalize the concept of responsibility to protect. The first pillar is the 'responsibility of the State to protect its population'[7]. The second pillar is the responsibility for international community to assist sovereign states to fulfil their obligations to protect their population and to help states build the capacity to do so.[8] The third pillar also imposes a responsibility on international community, however, contrastingly, the responsibility is more responsive than preventive as it opens the door for intervention via unpeaceful means when the peaceful means are inadequate or pertinent states have failed to fulfil their obligations.[9] Clearly, under this approach, responsibility to protect may constitute an exception to the prohibition of use of force. However, it is still unclear if such initiative, or vision, has really been embedded in the international legal system as a rule of customary international law, or if it remains to be an initiative with no legal authority.

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[4] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001, VII (Foreword).

[5] 'Helge von Horn and Christoph Krämer, 'The ICISS – Report: 'The Responsibility to Protect' (*Root Causes of Conflicts*, March 2004) <http://www.rootcauses.de/publ/icissummen.htm> accessed 23 July 2021

[6] UN Doc A/RES/60/1 para 138-140.

[7] UNGA 'Implementing the responsibility to protect: Report of the Secretary-General' (2009) UN Doc A/63/677 para 11.

[8] Ibid.

[9] Ibid.

This paper examines whether the responsibility to protect constitutes an exception to the prohibition of use of force as a rule of customary international law. Firstly, this paper will identify the test to determine the status of the rule under examination. Secondly, the evidence underpinning this research and the method used to gather the evidence will be outlined and finally, this paper will analyse the evidence gathered and render the conclusion accordingly.

2. Test

A. General Test to Identify Customary International Law

Although Art. 38 of the Statute of the International Court of Justice includes a list of sources of international law including international custom, the Statute tells us little about how exactly such custom can be identified. Fortunately, the very same Article indicates that 'the teachings of the most highly qualified publicists' can function as subsidiary means to determine rules of law. Therefore, two documents, as the representative works by the most prestigious jurists in the field, will be especially valuable to help us identify the international customs laid down in this article: Draft Conclusions on Identification of Customary International Law (Draft Conclusions) and the Statement of Principles Applicable to the Formation of General Customary International Law (London Statement).

According to the Draft Conclusions, two constituent elements must be proven to establish a rule of customary international law. The first element is objective element, such as a general practice by states.[10] The second, subjective, element requires that the aforesaid general practice has to be accepted as law, which is known as *opinio juris*.[11] Although, the conclusion 3 of the Draft Conclusions requires both elements to be assessed[12], it seems that the two elements are not

[10] ILC, 'Identification of customary international law' (2016) UN Doc A/CN.4/L.872 2.
[11] Ibid 3.
[12] Ibid 2.

always equally weighed when identifying customary international law in practice. According to the London Statement, on the one hand, a relative lack of one element can be compensated by a substantial manifestation of the other.[13] On the other hand, it is not usually necessary to demonstrate *opinio juris* before and during the formation of customary international law.[14] However, this does not mean that *opinio juris* does not matter in the formation of such law. Rather than being assessed solely as an independent element, the main function of *opinio juris* is to identify which practice is relevant evidence that is helpful to determining whether a customary rule is formed.[15]

To establish objective element for an examined rule, two elements have to be substantiated: generality and uniformity.[16] In terms of generality, a state practice has to be extensive and representative.[17] This being said, the question of generality is not a question of how many, but a question of which.[18] Should the participation be sufficiently representative with no significant dissent, even a majority of participatory states is not required.[19] In terms of uniformity, a state practice can meet this criterion when it is uniform both internally and collectively, which means that not only should the practice of different participatory states be similar and consistent, but also a particular state's own behavior pattern should be stable and coherent.[20] Only when all four conditions (extensive and representative generality, internally and collectively uniformity) are met, a state practice towards a customary rule can be taken as sufficiently uniform and general.

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[13] Committee on Formation of Customary (General) International Law, 'Statement of Principles Applicable to the Formation of General Customary International Law' in International Law Association Report of the Sixty-Ninth Conference (London 2000) (International Law Association, London 2000) 751.
[14] Ibid 721.
[15] Ibid.
[16] Ibid 731.
[17] Ibid 734.
[18] Ibid 737.
[19] Ibid.
[20] Ibid 733-734.

In terms of the subjective element, as mentioned above, *opinio juris* is not always required to establish a customary rule in its own right, but is usually examined incidentally in assessing state practice. In addition to that, it is also noticeable that individual consent or belief of certain practice or rule as legally binding is also unnecessary.[21] Rather, it is enough to prove a general belief that certain practice is a legal obligation or right.[22]

Finally, a few words about the evidence: Practice includes both verbal and physical acts.[23] In fact, verbal acts are especially important in demonstrating the formation of new customary norms. Not only can verbal acts serve as evidence for both objective and subjective elements[24], but also at the emergence stage verbal acts are naturally expected to be more common than other acts. In contrast, "physical acts, such as arresting people or seizing property, are in fact less common"[25].

B. Modification of Peremptory Norm of General International Law

The alleged peremptory character of the rule of prohibition of use of force also deserves attention". Although there is no universal consensus among states about what amounts to a peremptory norm of general international law (*jus cogens*), the prohibition of use of force is viewed as *jus cogens* by many. For example, the International Law Commission (ILC) considers prohibition of use of force as a conspicuous example of *jus cogens* in the 1960s, which is reiterated by International Court of Justice (ICJ) in *Nicaragua vs. United States*.[26] Recently, ILC also repeated such views, identifying the prohibition of aggressive use of

[21] Ibid, 743-744.
[22] Ibid 743.
[23] ILC, 'Identification of Customary International Law' 2 (n 10).
[24] Committee on Formation of Customary International Law, 'Statement of Principles' 725 (n 13).
[25] Ibid.
[26] *Nicaragua vs. United States* (n 1) 189.

force as one of 'the most frequently cited candidates for the status of *jus cogens*'.[27]

If the prohibition of use of force is indeed a *jus cogens* (and evidently it is very likely to be one), the assessment of the presented alleged exception under responsibility to protect will be thornier. This is because this exception is trying to modify a peremptory norm of international law, which can only be modified by 'a subsequent norm of general international law having the same character'.[28] More importantly, if the alleged exception fails to establish itself as a peremptory norm, it cannot even come into existence in the first place for conflicting with a peremptory norm of general international law.[29] Therefore, to establish such a customary rule of general international law, it is also necessary to prove that it is a *jus cogens* itself, which requires the acceptance and recognition from the 'international community of states as a whole'[30]. Such acceptance or recognition is not a simple belief that a certain rule is accepted as law, but a belief that the pertinent rule is a peremptory norm of general international law.[31]

3. Evidence

The research is underpinned by solid evidence collected via the snowball method, by which I mean to begin evidence collection with one or more documents as a starting point and then identify more sources in tracing down their citations. The collection of this research can be divided into three phases. The first phase requires the reading of relevant topics to collect key facts, including landmark events and documents, to guide the following study. After

[27] ILC, 'Report on the work of the seventy-first session', UN Doc A/74/10 (29 April–7 June and 8 July–9 August 2019) 205.
[28] Ibid 158.
[29] Ibid 145.
[30] Ibid 143.
[31] Ibid 164.

the initial round of fact collection, these facts will be selectively used as key words to search for evidence of state practice and *opinio juris* in the second phase. Finally, still using the snowball method, the evidence collected in the second phase will be reviewed in the third phase to find further evidence of state practice and *opinio juris*.

A. Phase I

As recommended by Hoffman and Rumsey, the initial phase of researching customary international law should begin by reading relevant topics.[32] The starting point of this research is two encyclopedia entries, the 'responsibility to protect' entry of Wikipedia[33], and the 'responsibility to protect' entry of Max Plank Encyclopedia of Public International Law (Max Plank Encyclopedia)[34], and the official website of Global Center for the Responsibility to Protect (Global Center)[35]. Admittedly, Wikipedia is not a rigorous source for the purpose of academic research, however, the use of Wikipedia here is only for gathering keywords to support the following research. Based on the information provided by Wikipedia, Max Plank Encyclopedia and the website of Global Center, the following information has been extracted:

Events: Civil War in Darfur, Civil War in Libya, Civil War in Ivory Coast, Civil War in Syria, Civil War in Central Africa Republic (CAR)

Documents: WSOD 2005, Report of Secretary General: Implementing the

[32] Marci Hoffman and Mary Rumsey, 'Chapter 7: Customary International Law, Generally Recognized Principles and Judicial Decision' in Marci Hoffman and Mary Rumsey (eds), *International and Foreign Legal Research: A Coursebook*. (Brill Academic Publishers 2012) 113.
[33] 'Responsibility to Protect, *Wikipedia*, <https://en.wikipedia.org/wiki/Responsibility_to_protect > accessed 18 December 2021.
[34] Janina Barkholdt and Ingo Winkelmann, 'Responsibility to Protect, *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e427?rskey=fq36yN&result=3&prd=OPIL> accessed 18 December 2021.
[35] 'Home-Global Centre for the Responsibility to Protect' (*Global Center for the Responsibility to Protect*) <https://www.globalr2p.org/> accessed 18 December 2021

responsibility to protect 2009 (UNSG Report 2009), Brazil's proposal of Responsibility while protecting (RwP proposal).

B. Phase II

The second phase uses the events and documents identified and extracted in the first phase as key words, to search for further evidence of state practice. The search engines used in this study are UN digital library, the built-in search engine of the website of the Global Center, Google, and the built-in search box of Mendeley to search within the materials already at hand.

By searching WSOD 2005 in UN digital library, it is learnt that the WSOD was adopted without a vote, which is considered identical to a consensus with the absence of objection rather than a particular majority.[36]

By searching UNSG Report 2009 in Google and UN digital library, two relevant documents are found. The first is A/RES/63/308, a GA resolution recognizing the aforesaid report. The second document is A/63/PV.101, the official records of the 101st plenary meeting where the report was discussed.

By searching Darfur Civil War in Mendeley and Google, one document is identified. S/RES/1706, authorizes UNMIS 'to use all necessary means'[37] to protect civilians under responsibility to protect.

By searching Libya Civil War in Google, two documents, S/RES/1970 and S/RES/1973 are located and one relevant event, NATO bombing against Libya government forces, is identified.

[36] UN Library, 'What does it mean when a decision is taken 'by consensus'?' (*United Nations*) <https://ask.un.org/faq/260981> accessed 11 January 2021.
[37] UNSC Res 1706 (31 August 2006) UN Doc S/RES/1706 6.

By searching Ivory Coast Civil War in Google, one relevant UNSC resolution, S/RES/1975, is located.

By searching Syria Civil War in Google, two series of events are identified. The first one is China and Russia's repetitive veto in UNSC on Syria matter. The second is the unilateral air strike launched by France, U.S., United Kingdom, Australia, and others.

By searching CAR Civil War in Google and Mendeley, one document is located, S/RES/2127 authorized French forces and MISCA to fulfil the responsibility to protect.[38]

C. Phase III

In phase three, the information gathered will be reviewed to identify evidence of state practice and *opinio juris,* as well as new key words to find additional evidence. That being said, this essay hereafter only presents the evidence identified by the research and does not lay out the remaining searching process.

First, in terms of WSOD 2005, it is adopted without a vote, and, according to UNSG Report 2009, has 'received the support by the 'assembled world leaders'[39], which may serve as the evidence of *opinio juris* that the community of states is committed to collective action via UNSC under Chapter VII of UN Charter, since they 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

[38] UNSC Res 2127 (5 December 2013) UN Doc S/RES/2127 paras 28, 50.
[39] UNGA 'Implementing the responsibility to protect' paras 2, 4 (n 7).

and crimes against humanity.[40]

In this paragraph, three elements of the timely and decisive manner can be drawn: firstly, the pertinent state has to manifest failure in, or unwillingness to, fulfil responsibility to protect. Secondly, the employment of such manner can only take place when peaceful means are not enough. In other words such manner should be the last resort. Thirdly, the mechanism via which the manner is taken should be UNSC collective security mechanism.

Secondly, the UNSG Report 2009 formulated the three-pillar approach to the responsibility to protect. In addition to the three elements listed above, it also stressed the need for consent of the pertinent state.[41] Moreover, in terms of providing evidence, it did not only point out the existent acceptance to WSOD 2005, but also found evidence of corresponding state practice even before the formulation of the concept of responsibility to protect itself. As pointed out by the report, the Constitutive Act of the African Union allowed the Union to intervene in its member states, when necessary, as a response to mass atrocity.[42]

However, the debate that took place in GA was unfavorable to a new customary rule as it shows divergent state practice and *opinio juris*. For example, the delegation of Russia seemed to employ a language of responsibility to protect to justify the invasion of Georgia, but also stated that what justified its action is the right to self-defense.[43] The delegation of Kenya stated that necessary measures should not be equated with use of force.[44] Such opinion is echoed by the delegation of Lesotho, for whom, the third pillar does not necessarily mean use of coercive force.[45] The representative of Holy See also

[40] 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 para 139.
[41] UNGA 'Implementing the responsibility to protect' para 40 (n 7).
[42] Ibid para 8.
[43] UNGA 101st Plenary Meeting (28 July 2009) UN Doc. A/63/PV.101 21-22.
[44] Ibid 3.
[45] Ibid 5.

expressed the similar worry that the third pillar that justifies the intervention is unnecessarily characterized by use of violence and there could have been a milder approach to implementing this pillar.[46] The delegation of Sudan perhaps contended that paragraph 139 of WSOD does authorize the use of force which they thought is not just a reaffirmation of the Chapter VII, but is introduced as a new approach allowing military intervention in the context of responsibility to protect.[47] However, he also expressed the concern that such new development may be exploited for political purposes and even pose a threat to the cardinal principle of non-intervention in international law.[48] Argentina simply expressed an attitude of approval to pillar three without elaboration. Many states such as Cameroon, Lesotho and Sudan, considered the implementation of third pillar as primarily a UNSC issue, and therefore called for reforms in UNSC. Finally, the opinions of delegates are also divergent in terms of the legality of the third pillar of the responsibility to protect.[49]

In sum, the debate shows: 1) that many states believe that the measures of third pillar is not identical to use of force; 2) that most states, at least those who have spoken in the debate, locate the pillar three in the bigger picture of UNSC collective security mechanism; 3) that states do not think that responsibility to protect is a well-developed instrument, rather, it needs further elaboration; and 4) that, for Russia only, the state practice of responsibility to protect is inconsistent.

In Ivory Coast, although the resolution invoking the concept of responsibility to protect is S/RES/1975, the document that authorized use of force and stipulates the mandate thereof is S/RES/1528 in 2004.[50] Therefore, despite

[46] Ibid 17.
[47] Ibid 10-11.
[48] Ibid.
[49] Ibid 6-8, 10-11, 13, 15, 17, 20.
[50] UNSC Res 1528 (27 February 2004) UN Doc S/RES/1528 para. 8.

such practice is technically in consonance with the later operations in Libya, Sudan, and CAR, it is doubtful if such practice was called upon under a sense of legal obligation or right. As to the civil wars of Sudan (Darfur) and CAR, the situations are relatively simple where force was used under UNSC's authorization to fulfill the responsibility to protect.[51]

What happened in Libya juxtaposed with the above two scenarios, is similar but also thornier as doubts were raised to question if the intervention in Libya was really justified by the pertinent UNSC resolution. The S/RES/1973 authorized member states to take all necessary measures to protect civilians and to enforce a No-Fly Zone.[52] However, in the name of such vague authorization, NATO conducted hundreds of airstrikes against the Gaddafi government, which did not only injure many civilians but also gave the rebels a military advantage against the government, finally causing regime change. This action is considered by pertinent states as legal since it was authorized by the UNSC resolution.[53]

Given that there was no wording explicitly authorizing the use of force, such action is considered to exceed the authorization approved by UNSC and hence, illegal. China believed that the authorization was limited to enforcing a No-Fly Zone, and what the coalition did was evidently exceeding the mandate of UNSC.[54] Vladimir Putin went further to argue that the action was illegal and run afoul of the principle of sovereignty.[55] On 14th April 2011, the BRICS

[51] UNSC Res 1706 (n 37); UNSC Res 2127 (n 38).
[52] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 paras 4, 8.
[53] Office of the Press Secretary, 'Letter from the President regarding the commencement of operations in Libya' (*Whitehouse*, 21 March 2011) <https://obamawhitehouse.archives.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya> accessed 11 January 2021.
[54] See Andrew Jacobs, 'China Urges Quick End to Airstrikes in Libya' (*New York Times*, 22 March 2011) <Mhttps://www.nytimes.com/2011/03/23/world/asia/23beiijing.html> accessed 10 January 2021.
[55] See Ellen Barry, 'Putin Criticizes West for Libya Incursion' (*New York Times*, 26 April 2011) https://www.nytimes.com/2011/04/27/world/europe/27putin.html accessed 10 January

countries issued a joint declaration, rejected the use of force and called for use of peaceful means in Libya.[56] Among them, the position of South Africa deserves additional attention, because it was the only state among the five that voted for the resolution, but then changed its position after the NATO bombing.[57]

After Libya, the state practice and *opinio juris* became even more divergent. The controversial action in Libya undermined the promise of the third pillar of the responsibility to protect, and the lessons learnt from Libya by China and Russia finally made them to veto similar resolutions when it came to Syria. Nonetheless, western states decided to launch air strikes against Syria with or without UNSC authorization, and finally, the international society witnessed a unilateral strike against Syria. Among participatory states, the U.S. did not offer clear legal justifications.[58] Australia justified its military operation by the right to self-defense instead of responsibility to protect.[59] Hence, these state practice probably lacked clear *opinio juris* and should not amount to evidence contributing to the formation of customary international law. France contended that its action was legitimate, but it did not support such view from an explicit R2P perspective.[60] The UK's efforts to justify the operation was most significant as the justification it offered was humanitarian intervention,[61]

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[56] 'Sanya Declaration' (*BRICS Information Centre*, 14 April 2011) <http://www.brics.utoronto.ca/docs/110414-leaders.html> paras 9-10 accessed 10 January 2021.

[57] See Reuters Staff, 'BRICS powers criticise Western strikes in Libya' (*Reuters*, 14 April 2011) <https://www.reuters.com/article/idINIndia-56321320110414> accessed 10 January 2021.

[58] See Jen Kirby, 'Read Trump's statement on Syria strike: "They are crimes of a monster"' (*Vox*, 18 April 2018) <https://www.vox.com/2018/4/13/17236862/syria-strike-donald-trump-chemical-attack-statement> accessed 10 January 2021.

[59] Renee Westra, 'Syria: Australian military operations' (*Parliament of Australia*, 20 September 2017) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/SyriaMilitaryOps> accessed 10 January 2021.

[60] Jean-Yves Le Drian, 'Action in Syria is legitimate, says Foreign Minister' (*French Embassy in London*, 14 April 2018) <https://uk.ambafrance.org/Action-in-Syria-is-legitimate-says-Foreign-Minister> accessed 10 January 2021.

[61] Prime Minister' Office, 'Policy Paper: Syria Action – UK government legal position'

which is considered by some as identical to a justification for use of force provided by responsibility to protect.[62]

4. Evaluation

The examined contention only states that the responsibility constitutes an exception to the prohibition of use of force under customary international law but fails to identify further details about this rule. The evidence of practice has shown that there are different approaches to implement the third pillar of responsibility to protect, and such divergence should not be taken necessarily as prima facie evidence for inconsistency. This is because it is possible that one specific approach among the many solely satisfy the criteria of a customary rule of general international law despite the existence of other unsuccessful rivals. Therefore, the evaluation of this portion will first start with the most specific approaches, and then move to the examination of more general approaches.

There are two approaches under which responsibility to protect may constitute an exception to the prohibition of use of force. The first approach is the UN approach, which opens the door for use of force in the pretext of R2P via the existent UN collective enforcement mechanism. The second approach is the unilateral approach that allows unilateral military intervention for humanitarian cause. Both approaches, however, cannot give rise to a new customary rule of general international law.

A. UN approach

The UN approach seems to be a promising candidate for a rule of customary international law. On the one hand, the evidence of state practice is abundant.

(*Gov.UK*, 14 April 2018) <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position> accessed 10 January 2021.

[62] UNGA 101st Plenary Meeting 11 (n 43).

On the other hand, there is also evidence of the UNGA debate suggesting that most states have accepted such an approach by adopting WSOD 2005.

Nonetheless, although abundant relevant and admissible evidence is identified, such evidence is not in favor of the formation of new customary international law, as state practice is not uniform. In terms of internal consistency, the behavioral pattern of UNSC and its member states are inconsistent. For UNSC, its approaches vary significantly from case to case. In Sudan, Ivory Coast and CFR, certain forces (mainly UN forces or forces of other responsible parties other than pertinent states) were authorized to take necessary measures to fulfil the responsibility to protect. By contrast, in Libya, UNSC authorized all member states to take necessary measures on the condition of notifying UN Secretary General. This inconsistent behavioral pattern can also be directly observed from the practice of member states. To demonstrate, developing states experienced a shift in attitude from open support (like South Africa) or acquiescence (Russia and China) to open objection (BRICS in general, China and Russia in particular).

The state practice is not consistent collectively either, as the UN approach itself is also contested. As mentioned above, what happened in Sudan, Ivory Coast, and CFR was very different from the situation in Libya, behind which developing states diverged from developed states. The airstrike solely participated by NATO in the name of UNSC is evidence of collective inconsistency as it was not participated and actually objected by BRICS. Further, after the adoption of S/RES/1973 with the abstention of Russia and China[63], China and Russia exercised their veto rights in UNSC to block any resolutions offering a similar authorization under responsibility to protect, which is evidence of collective inconsistency. Moreover, the GA debate recorded by

[63] Staff, 'BRICS powers criticise Western strikes' (n 57).

A/63/PV.101 shows that even among developing states themselves, how responsibility to protect should be implemented is also very divided, especially about what necessary measures mean (some states confuse necessary means and use of force while other states think they are not identical).

Noticeably, in terms of the controversial operation in Syria, a counter-argument may be brought up to rebut a verdict of inconsistency: the NATO air strike in Syria is only a minor departure to the emerging norm as we have only seen it once. However, in *Nicaragua v. United States*, ICJ ruled that a non-conforming conduct is not fatal only when the pertinent states do not try to justify it legally,[64] which, unfortunately, is what exactly NATO did after the airstrike.

However, what should be acknowledged is that the practice is relatively general. The WSOD is supported by leaders all over the globe and adopted without a vote, which indicates the absence of objection. However, with such divergent state practice, the established generality seems to be insignificant.

In terms of *opinio juris*, it was not clear whether there was a sense of legal obligation which drove the adoption of all the documents mentioned above, despite participatory states of air strike (France, U.S., United Kingdom, Australia, and others) invoked the concept of responsibility to protect and the UNSC resolution to justify its controversial action. However, it was clear that there is an opinion that the operation in Libya was not legal, which indicates that there is no *opinio juris* attached to the practice in Libya. Moreover, states were divided when it came to what legal rights or obligations does the third pillar entail in the debate recorded by A/63/PV.101. Since the *opinio juris* is divided, there is no general belief that a sense of legal right or obligation is attached to any state practice described under UN approach.

[64] *Nicaragua v. United States* [205] (n 1).

Finally, what also deserves attention is that we may be able to find a greatest common divisor under this approach, which is the permission for international society to take necessary measures to fulfil the responsibility to protect under the authorization of UNSC. There is abundant state practice and *opinio juris generalis* underpinning such a great common divisor. However, for two reasons, such a common divisor means little to our examination. First, there is departure to such a common divisor and attempt to justify such departure. Second and most significantly, even though this greatest common divisor meets the standard of customary international law, it cannot necessarily constitute an exception to the prohibition of use of force, since many states do not see necessary measures and use of force as identical terms.

B. Unilateral approach

Except for the UN approach, countries like Russia, France, UK, US, and Australia also seem to follow another pattern of the third pillar of the responsibility to protect, a pattern of unilateral intervention. This approach cannot give rise to a new customary rule of international law either as the *opinio juris* is too divided.

The most significant observation is that *opinio juris* brings inadequate state practice. Although many states undertook unilateral humanitarian intervention, their legal bases are different. Among them, only the UK explicitly justifies its operation in Syria with the notion of humanitarian intervention. Australia explicitly rejects the notion of responsibility to protect to justify its operation, while the US and France are reluctant to provide a clear legal argument about the operation. In terms of the invasion of Georgia, Russia did invoke the concept, saying that Georgia had failed to fulfil its responsibility to protect. Such tone also sounds familiar in the sense that one of the

preconditions of taking all necessary measures according to the WSOD 2005 and 2009 UNSG Report, is that the pertinent state has manifested failure in, or unwillingness to, fulfil responsibility to protect. But still Russia justifies its invasion with the right to self-defense rather than "the inchoate concept of the responsibility to protect."[65]. It is clear that there is no general belief that the responsibility to protect justifies these unilateral actions.

With such divided *opinio juris*, it seems that only the UK's state practice is solidly relevant to this approach and Russia's state practice may be admissible but would not be very convincing. Since other state practices are not justified by the responsibility to protect, they should not even be taken into account when assessing this approach. With only the explicit evidence of the state practice of the UK and the ambiguous practice of Russia, the practice is neither general nor uniform.

Both unilateral approach and UN approach are divergent approaches themselves both in terms of state practice and *opinio juris*, and therefore cannot give rise to a rule of customary international law. If neither of these two approaches succeed, then it is even more impossible to witness a more general rule of the responsibility to protect, which creates an exception to use of force because the very existence of two different approaches is *prima facie* evidence of inconsistency.

C. Modification of Peremptory Norm of General International Law

Moreover, it is necessary to remember that the prohibition of use of force is widely considered as a *jus cogens* which makes the acceptance to a new exception to it even more difficult, if not impossible. As mentioned earlier, a peremptory norm of general international law can only be modified by another

[65] UNGA 101st Plenary Meeting 22 (n 43).

norm of the same character. If a R2P exception to the prohibition of use of force rises as customary international law, it should have the same character, which requires it to be accepted as a *jus cogens* by the community of states as a whole. However, not only is the *opinio juris* about the third pillar of responsibility to protect is divergent, but also most states explicitly think that the true justification for use of force under responsibility to protect is not the concept itself but still the UN Charter, as the responsibility to protect 'does not alter, indeed it reinforces, the legal obligations of member states to refrain from the use of force except in conformity with the Charter'.[66]

Even though the above two suffice (state practice and *opinio juris*), it cannot become a rule of customary international law. As can be seen the justification is still the UN Charter rather than this rule itself, which manifests that it "does not aim to alter" (2009 Report), challenge or modify the traditional *jus cogens*, and therefore cannot give rise to a new *jus cogens* that can provide an exception to the prohibition of use of force.

5. Conclusion

The prohibition of use of force is recently challenged by many emerging norms, among which R2P is probably the most imminent threat, as it not only has been seen, but actually also been used, as justification for unilateral interventions. However, whether it can constitute an exception to the prohibition of use of force is unclear. With most legal documents adopting or mentioning it being reticent about its relationship with the prohibition of use of force, perhaps the best chance it can get in challenging the prohibition of use of force is to rise as a customary rule of general international law.

[66] UNGA 'Implementing the responsibility to protect' paras 2-3 (n 7).

This short paper examines this possibility, and argues that it cannot constitute an exception to the prohibition of use of force even under customary international law. The relevant state practice that has the possibility to create an R2P exception to the prohibition of use of force is inconsistent and therefore cannot give rise to a new customary rule of general international law. Although there is a great common divisor about the third pillar of R2P, which may give rise to a new rule of customary international law, such greatest common divisor does not necessarily constitute an exception to the prohibition of use of force. Finally, given that the modification of *jus cogens* can only be done by another *jus cogens*, the emerging R2P exception to the prohibition of use of force must have the same character to be able to modify the prohibition of use of force. Unfortunately, there is no evidence that R2P exception has such quality. That said, it must be pointed out that R2P has probably made most progress in overriding the prohibition of use of force compared to other challengers, and probably represents a promising trend that prohibition of use of force will eventually be modified to open more doors for humanitarian interventions.

Personally speaking, I am deeply concerned by the fact that it has made so much progress on the track of rising as new customary international law. Whether such change, if eventually take place, would be desirable or correct is debatable. On the one hand, never again should humanity witness another Rwandan genocide only because of the helping hands of international community are tied; On the other hand, creating a new exception to prohibition of use of force would also be an attempt to modify one of the most important cardinal legal norms in international law, whose erosion would definitely endanger international peace---after all, the essence of peace is the absence of war, or use of force. If the recent development on R2P really indicates that the modification of the prohibition of use of force is inevitable, it will be better modified in a consensual way, like via an international agreement to which

most states and all the important ones accede to. By contrast, if it eventually rises as a scrappy outgrowth of state practice in the form of a customary rule of general international law instead of a deliberate, delicate design of international society, it could be the beginning point of the end of history.