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RESPONSIBILITY TO PROTECT AND THE EXTERNAL SECURITY POLICY OF THE EUROPEAN UNION

This paper presents the overview of the Responsibility to Protect (R2P) doctrine implementation to the European Union Security and Defense policy. In this context, the references on the notion of R2P in the EU documents are traced. The article defines the main barriers for the effective and progressive implementation of the mentioned doctrine. Special attention is paid to the EU participation in the establishment of the internationalized criminal and human rights tribunals as a form of R2P implementation.

INTRODUCTION

European Union security depends not only on the effective internal measures that are planned to prevent terrorist attacks or any other threats. The significant part of the security policy are the preventive mechanisms (we can call them external part of the security policy) that aim to ensure the world stability and peace. For the highly globalized countries and *sui generis* formations, which in addition play the role of world power, it is very important to take part in the maintaining of peace in the world. Passive defense and security policy can lead to the splash of unanswered threats. US realized this after the 9/11. Europe is in the process of recognizing this[1]. Unfortunately, starting and developing of active security policy is connected with the tragedies. European states faced them in London 2005, Madrid 2004, Burgas 2012, Donbas and Crimea 2014. All these examples differs from each other but all are linked with the global political problems outside EU.

Undertaking of preventive measures should have some international law form just to avert the chaos in international relations. In earlier times states used different conceptions to prove their right for the preventive measures in order to ensure own security (self-defense, preemptory self-defense, collective self-defense, self-help etc.) One of the latest doctrines that is highly accepted by the UN is a Responsibility to Protect (R2P) doctrine. It is directly mentioned in the official EU documents and is recognized as lawful mean for the maintenance of the obeisance of international human rights standards and other preemptory norms of international law. I recognize that thesis about human rights protection

[1] Kaunert Ch., Leonard S., Pawlak P. (2012). *European Homeland Security: A European Strategy in the Making?* New York: Routledge.

may sound in a way that Western superpowers are exporting their standards and rules to other countries to make them more predictable and appeasable. However, in this point, I cannot but agree with the position of the prominent Austrian philosopher and lawyer Hans Kelsen: "The attempts to substantiate the idea that states are permitted to behave as they want support imperialism but not a sovereignty"[1]. In this connection, I consider R2P more as an instrument for preventing imperialism and permissiveness then an excuse for the sovereignty limiting.

In this paper, I would like to challenge how EU can implement R2P doctrine. The first part will deal with the general explanation what is R2P doctrine. The second part will be devoted to the issue of R2P doctrine implementation to the EU defense and security policy. Finally, the third one will consist of examination of possibility of the EU participation in the creation and administration of the criminal and human rights tribunals *ad hoc*.

PART I.
RESPONSIBILITY TO PROTECT CONCEPT IN THE INTERNATIONAL LAW

Responsibility to protect (R2P) doctrine in its consolidated form was firstly formulated in the report of the International Commission on Intervention and State Sovereignty (ICISS) in 2001[2]. The report starts with the analysis of state sovereignty as a defining principle of interstate relations and a foundation of the world order[3]. At the same time, the UN Charter`s provisions about the actions which the UN Security Council can undertake in situations of the "threat to the peace, a breach of the peace or an act of aggression" are examined as a state sovereignty limitation statement.[4] Authors of the report consider that sovereignty belongs rather to peoples than to states.[5] This formulation seems a modernized and not extremely controversial modification of Scelle's thoughts about the state as an agent of the real subjects of international law – people[6].

[1] Kelsen, H. (2009). *General Theory of Law and State*. Harvard: Harvard University Press.
[2] Report of the International Commission on Intervention and State Sovereignty. *The Responsibility to Protect.* <http://responsibilitytoprotect.org/ICISS%20Report.pdf>
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Cassese, A. (1990).Remarks on Scelle`s Theory of "Roles Splitting" (dedoublement fonctionnel) in International Law. *EJIL, No. 210*.

In the Report the humanitarian intervention was considered as an effective and appropriate measure for the protection of human life, freedom and dignity[1]. The legality of intervention is advocated despite the ICJ design in *Nicaragua v United States* case, where it was stated that "where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring the respect for human rights as are provided for in the conventions themselves ... In any event ... the use of force could not be the appropriate method to monitor or ensure such respect"[2]. Among non-military forms of intervention international economic and political sanctions and international criminal prosecution figure in the ICISS report[3].

On the base of the ICISS Report 2001, the Permanent Representative of Canada in the UN issued the letter on 26 July 2002[4]. Formulations from the letter constitute more persuading than in 2001 Report evince of the domination of military way of understanding of intervention[5].

As Natalie Oman rightly notes, ICISS in its conclusions came to the fact that R2P, while not yet an established principle of customary international law, is "crystallizing" as an "emerging guiding principle"[6]. The fact that sovereignty cannot be the justifier of anti-human actions is possible to find in the *Aaland Island Case, Southwest Africa a*dvisory opinion, *Western Sahara* and *Namibia* cases[7]. In the letter of Canada's permanent representative in the UN it was mentioned that non-intervening in some particular situations (Rwanda) causes the same critics as intervention does[8]. If we accept this position, it is then possible to explain why R2P notwithstanding its controversial character can be treated as an emerging guiding principle of international law.

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1 Report of the International Commission on Intervention and State Sovereignty. *The Responsibility to Protect.* <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

2 Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Jurisdiction of the Court and Admissibility of the Application, International Court of Justice (ICJ), 26 November 1984.

3 Report of the International Commission on Intervention and State Sovereignty. *The Responsibility to Protect.* <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

4 Letter dated 2002/07/26 from the Permanent Representative of Canada to the United Nations addressed to the Secretary-General. *UN Documents Database*. <http://www.un.org/ga/search/view_doc.asp?symbol=A/57/303>

5 Ibid.

6 Oman, N. (2009). The Responsibility to Prevent': A Remit for Intervention? *Canadian Journal of Law & Jurisprudence, 22,* 218–249.

7 Ibid.

8 Letter dated 2002/07/26 from the Permanent Representative of Canada to the United Nations addressed to the Secretary-General. *UN Documents Database*. <http://www.un.org/ga/search/view_doc.asp?symbol=A/57/303>

R2P is not a pure doctrinal disquisition. After its formulating in 2001, it was reaffirmed by the states practice and mentioned in several fundamental international documents. Thus, the final statement of UN's 2005 World Summit and the Security Council Resolution number 1674 contains the direct acceptance of R2P principle[1]. The UN Secretary General report concerning the implementation of the responsibility to protect (in support of the South Sudan Permanent Representative to the UN Francis M. Deng position) qualify sovereignty as an obligation[2]. The wording of statute of African Union differs from the statute of the Organization of African Union[3]. Recent document language maintains the non-indifference but not the non-interference[4]. This change of accents seems very symbolic.

In the ICISS report the SC resolution as a ground for the military intervention was considered mandatory[5]. Still, nonmilitary types of intervention do not need some special justification from the SC[6].

As we can see from the short analysis of state sovereignty doctrine, the sovereignty of the state cannot be perceived as an absolute. That is why protective intervention is not only theoretical and dead conception. States responsibility to protect is connected with obligations under the international treaties and especially with the *erga omnes* obligations. In cases when some state enroach on human rights, violate other *erga omnes* obligations, implementation of the R2P doctrine seems necessary. Applying of the doctrine raise the question of corporate veil and use of the R2P in geopolitical purposes. SC sanctions for the military intervention and consensus of the world community for the non-military measures are the best today options for minimizing the allegations in improper use of R2P. Certainly, the mentioned above accusations cannot but will arise.

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1 Implementing the responsibility to protect: report of the Secretary-General. A/63/677 (12 January 2009). *UN Documents Database.* <http://undocs.org/A/63/677>

2 Ibid.

3 Ibid.

4 Ibid.

5 Report of the International Commission on Intervention and State Sovereignty. *The Responsibility to Protect.* <http://responsibilitytoprotect.org/ICISS%20Report.pdf>; Letter dated 2002/07/26 from the Permanent Representative of Canada to the United Nations addressed to the Secretary-General. *UN Documents Database*. <http://www.un.org/ga/search/view_doc.asp?symbol=A/57/303>; Implementing the responsibility to protect: report of the Secretary-General. A/63/677 (12 January 2009). *UN Documents Database.* <http://undocs.org/A/63/677>

6 Ibid.

PART II.
IMPLEMENTATION OF THE R2P CONCEPT TO THE EU DEFENSE AND SECURITY POLICY

The European Union is interested in implementation of the R2P doctrine because of two main reasons: sharing the responsibility in human rights protection and maintenance of peace all over the world; personal interest in security ensuring and self-positioning as an influential global political player. The second reason is obvious. As for the first reason it is interesting to look at the Supreme Court of the Netherlands judgment in the case of Muslims from Srebrenica. The Court ruled that the Netherlands peacekeepers should share the responsibility for the tragedy in Srebrenica in 1995 as far as they deported 300 Muslims from the peacekeepers base and did not ensured their safety[1]. This case illustrates that today we can speak not only about moral obligation, but also about the emerging of legal obligation to help potential victims in other countries exists.

In the beginning, I would like to touch the question of formal incorporation of the R2P into EU official documents. This doctrine can be traced in the following legal acts: the European Consensus on Development; European Security Strategy; EU-Africa Joint Strategy (First and Second Action Plans); EU Situation Room tasks; EU Parliamentary Resolutions concerning the Darfur Crisis and Libya Crisis. All these documents consist direct mentions of the R2P. They proclaim deep understanding of the impossibility of staying by the crimes of genocide, war crimes and crimes against humanity; threats that these crimes can cause for the world community in general and the EU particularly. National legal acts of Germany, UK, Denmark, Norway and France also contain references to the R2P.

According to the mentioned above documents, the EU understand under the R2P the following measures or their complexes:•
strengthening of the regional and sub-regional organizations role in the coordination of the donor support in the area of conflict prevention[2];

- participation of UN peacekeepers in the protection of population (even without the consent from the government[3]);

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[1] Netherlands Held Liable for 300 Deaths in Srebrenica Massacre. *New York Times*. <http://www.nytimes.com/2014/07/17/world/europe/court-finds-netherlands-responsible-for-srebrenica-deaths.html?_r=0>

[2] The European Consensus on Development. *European Commission official site*. <http://ec.europa.eu/development/icenter/repository/eu_consensus_en.pdf>

[3] European Parliament resolution on the situation in Darfur. *European Parliament official site*. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0052+0+DOC+XML+V0//EN>

- cooperation with the International Criminal Court[1];
- imposing a travel bans and freezing the financial assets of government members[2];
- installation of no-fly zones[3];
- conflict prevention and peace support activities[4].

Such understanding of the R2P is adequate in comparison with the international law documents that describe the doctrine. One more important issue in the regard of R2P is the so-called early warning instrument. In 2009, the UN General Secretary provided report on the topic of early warning where he stated that this is the crucial analytic tool for the identifying of fragile situations and risks associated with them[5]. General Secretary noted that regional organizations (as far as *sui generis* formations) should be involved to this process of early warning[6]. As for the EU, its Situation Room can carry out the tasks of early warning[7]. It is desirable to include the direct mention and description of early warning to the Situation Room authorizing documents.

Summing up all mechanisms which international community can use to realize the R2P doctrine it is possible to divide them into following categories:

- early warning (as a not self-sufficient tool which may possible early reaction and early engagement)[8];
- political and economic measures (direct involvement by the UN Secretary-General; fact-finding missions, friends groups, eminent persons commissions; dialogue and mediation through good offices; international appeals; non-official dialogues and

[1] European Parliament resolution of 22 May 2008 on Sudan and the International Criminal Court (ICC). *European Parliament official site.* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0238+0+DOC+XML+V0//EN&language=EN>

[2] Libya: EU imposes arms embargo and targeted sanctions. *The Council of the EU.* <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/119524.pdf>

[3] Ibid.

[4] Joint Africa-EU Strategy 2014-2017 // Fourth EU-Africa Summit. *Site Africa-EU partnership*. <http://www.africa-eu-partnership.org/sites/default/files/documents/2014_04_01_4th_eu-africa_summit_roadmap_en.pdf>

[5] Early warning, assessment and the responsibility to protect Report of the Secretary-General. *International Coalition for the Responsibility to Protect Official Site*. <http://www.responsibilitytoprotect.org/N1045020%281%29.pdf>

[6] Ibid

[7] The EU Situation Room. *EU External Actions Official website*. <http://eeas.europa.eu/crisis-response/what-we-do/eu-situation-room/index_en.htm>

[8] Early warning, assessment and the responsibility to protect Report of the Secretary-General. *International Coalition for the Responsibility to Protect Official Site.* <http://www.responsibilitytoprotect.org/N1045020%281%29.pdf>

problem-solving workshops; political sanctions; diplomatic isolation; suspension of organization membership; travel and asset restrictions on targeted persons; "naming and shaming");
- economic measures (promises of new funding or investment or favorable trade terms; trade and financial sanctions; withdrawal of investment; withdrawal of international financial institutions support; curtailment of aid and other assistance);
- legal measures (offers of mediation and arbitration; adjudication through *ad hoc* tribunals, domestic trials using universal jurisdiction or ICC; monitors to observe compliance with human rights standards);
- military measures (stand-off reconnaissance; consensual preventive deployment; the threat to use force)[1].

In terms of the mechanisms nature, they can be contingently divide into two groups: sanctions type and non-sanctions type mechanisms. From the procedural and political point of view, the difference between these two types is considerable. It was illustrated by Ukrainian crisis that achieving of consensus on sanctions is very problematic as far as all states first tries to observe their own interests. In fact, the clumsiness of the EU in adoption of sanctions is its fee for not caring the name of federation.

The right to undertake initiatives concerning sanctions lies with any member state and with the High Representative of the Union for Foreign Affairs and Security Policy (can act also with the support of the European Commission). The Political and Security Committee discuss the sanction proposal in details. The last step before the approval through the Committee of Permanent Representatives II (COREPER II) and the Council is the Foreign Relations Counsellors Working Group where the representatives of EU member states negotiate the specific and concrete terms of each restrictive measure[2].

As Francesco Guimelli notices there are different types of targeted sanctions. In some cases Council have only to inform European Parliament while in others (fighting terrorism) Council and Parliament

[1] Responsibility to Protect – Engaging Civil Society A Project of the World Federalist Movement's Program on Preventing Conflicts -Protecting Civilians. International Commission on Intervention and State Sovereignty. *Responsibility to Protect Official Site*. <http://www.responsibilitytoprotect.org/files/R2PSummary.pdf>

[2] Giumelli, F. (2013). How EU sanctions work: a new narrative. *Chaillot Papers, 129.*

have to define the framework for administrative measures with regard to capital movement[1].

As we can see the sanctions adoption meets not only political difficulties, but also procedural. In this regard, it is possible to single out the situations, in which the political part of the question is not a primarily important:

- situations in which other world powers are not involved;
- situations which are not connected with the substantial spending of funds;
- situations which were the subject of consideration of the SC (with the adoption of Resolution);
- situations where preemptory norms of international law were severely broken and no one state contests this.

In other cases, the sanction adoption process will be additionally complicated by the political perception. It is obvious that the big part of world crisis where R2P can be used for their effective solution or minimization of tensions do not correspond the mentioned above models.

Military intervention is the last measure for addressing possible grave violations of human rights. Realization of the peacekeeping operations cause a lot of critics. In the same time, absence of international political will to organize the humanitarian intervention is criticized a lot to. The examples of Rwanda (mainly) and Syria (in some regard) are the most symbolic in this line. When the EU decides to realize R2P doctrine in the form of humanitarian intervention, the question of staff for this goal emerges. There are three main possibilities of mentioned staff formation: forces of the EU member states, NATO forces and special *ad hoc* EU units.

For the further study of this issue, I would like to turn to the examples of R2P missions in the past. EU used the combined forces from member states for the military operations in Chad and CAR. According to G. Grevi and D. Helly, these were the examples when "once again the EU could successfully project several thousand troops away from Europe without NATO"[2]. The mandate for the missions consisted the notion of civilians' protection and in such way refers to the R2P doctrine.

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[1] Treaty on the Functioning of the European Union (TFEU) as amended by the Treaty of Lisbon (2007). *Foundation foκ EU democracy*. <http://www.eudemocrats.org/fileadmin/user_upload/Documents/D-Reader_friendly_latest%20version.pdf>

[2] Grevi, G., Helly, D., Keohane, D. (eds.) (2009). *European Security and Defence Policy: The First 10 Years (1999-2009).* Paris, EU Institute for Security Studies, 348.

In the EU acts of reaction on Libya crisis, the R2P notion was used for several times. However, its use concerned unmilitary measures. When the SC Resolution on the no-fly zone installation became adopted, the absence of EU consensus caused impossibility of join military EU operations in Libya. In fact, Council adopted its decision concerning the humanitarian aid and military operation on 1 April 2011. However, the terms for attraction EU forces were formulated in such a way that the mission was never started[1]. The EU participation in the military part of the R2P realization consisted in military contingents from the EU member states. The NATO led the operation after the request to do so from the countries, which were realizing their own operations against Libya.

As it has been shown, the EU R2P policy depends on a number of political and technical preconditions. Political preconditions has internal and external components. External one consist of global political constraining factors. Internal component derive from the different foreign policies of the EU member states. This lead to the delays in adoption of common strategy and set of instruments for the stabilization of the situations in problem regions. Technical preconditions are connected with the complicated procedure of the common decision adoption on sanctions or military intervention. This is the fee of the EU to be named Union but not a federation.

In contemporary global misbalances where the EU took an active military part, it actioned through the *ad hoc* military mission or through the coordinated military contingent of member states or in the frames of NATO forces. As far as the level of integration in the foreign policy in the EU is not sufficiently high, it is not good time for creation the permanent EU forces. It seems logical to come up to the creation of such forces through the convergence of the state positions about R2P doctrine. By this I mean the creation of comprehensive stepwise strategy[2] of reacting on the most severe human rights violations. The strategy should contain the

[1] Council stated that the Union should, if requested by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), conduct in the framework of the Common Security and Defense Policy a military operation (EUFOR Libya), in order to support humanitarian assistance in the region. See: Council Decision 2011/210/CFSP. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:089:0017:0020:en:PDF>

[2] See Kirn, A. (2011). The European Union's Role in Promoting and Implementing the Responsibility to Protect in Africa: Turning Political Commitments into Effective Action. *Bruges Regional Integration & Global Governance Papers, 1.*

detailed methodology and toolbox for early warning, the characteristics of criteria's for the severe human rights violation definition, mechanisms of coordination with the UN, Guidebook for the military units about the applied international humanitarian and human rights law etc[1].

PART III.
EU PARTICIPATION IN THE CREATION AND ADMINISTRATION OF CRIMINAL AND HUMAN RIGHTS TRIBUNALS' AD HOC

EU Parliament in the Resolution from 22 May 2008 on Darfur Crisis referred to the R2P norm and strongly condemned Sudan's failure to cooperate with the ICC[2]. This is the only mention of the International Criminal Court in the EU documents on R2P. In the same time, the EU is one of the strongest and consecutive supporters of the idea of international criminal justice. All its member states are signatories of the Rome Statute 1998. International agreements of the EU consist provisions with the obligation for partners to ratify Rome Statute (for instance the Cotonou Agreement[3] with African states, Association Agreements with Ukraine, Georgia and Moldova[4]).

The International Commission on Intervention and State Sovereignty (ICISS) in its report names the creation of ad hoc criminal tribunals and participation of the ICC in prosecution and acquisition of persons

[1] See also: A Future Agenda for the European Security and Defence Policy (ESDP) (2009). *Working Paper.*

[2] European Parliament resolution of 22 May 2008 on Sudan and the International Criminal Court (ICC). *European Parliament official site*. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0238+0+DOC+XML+V0//EN&language=EN>

[3] The Cotonou agreement. *European Commission official site*. <http://ec.europa.eu/europeaid/where/acp/overview/documents/devco-cotonou-consol-europe-aid-2012_en.pdf>

[4] See: Art. 6 of the Agreement with Moldova and Georgia, Art. 8 of the Agreement with Ukraine. EU-Moldova Association Agreement. *EUEA official site.* <http://eeas.europa.eu/moldova/assoagreement/pdf/md-aa-title-ii-political-dialogue-reform-cooperation-field-foreign-security-policy_en.pdf>; EU-Georgia Association Agreement. *EUEA official site.* <http://eeas.europa.eu/georgia/assoagreement/pdf/ge-aa-title-ii-political-dialogue-reform-cooperation-in-field-of-foreign-security-policy_en.pdf>; EU-Ukraine Association Agreement. *EUEA official site*. <http://eeas.europa.eu/ukraine/pdf/3_ua_title_ii_pol_dialogue_reform_pol_assoc_coop_convergence_in_fsp_en.pdf>

responsible for international crimes among the legal measures in realization of the R2P[1].

In the regard of the mentioned above, it seems perspective for the EU to develop actively the legal direction of the R2P. Such legal direction can be traced on the example of EULEX (the EU mission to Kosovo) which is the first EU mission that together with the aim of protecting civilians directed on the establishment of the rule of law through the corpus of professional judges that was sent from the EU. In April 2014, the EU representatives declared that it plans to create the *ad hoc* international tribunal in Kosovo focusing exclusively on crimes allegedly committed by Kosovo's ethnic Albanian rebels during their war with Serbia in 1998-1999 in the nearest future[2]. This tribunal can become an effective mechanism for the realization of the R2P principle by the EU. Every new international court costs a lot for their creators. The model of internationalized courts established itself as a thrifty and effective form for the internationally controlled justice. International control means fairness, transparency and adequacy of justice but not the latent attempt to create an empire. Human Rights Chamber for Bosnia and Hercegovina – is a good Balkan example of mixed tribunal with the attraction of national and foreign judges[3].

International criminal tribunal for Kosovo possibly will become the first EUs' pen test in realization of R2P in such form. As far as this method of influence on post-crisis region do not demand the fast reaction and it is not as controversial as other R2P measures, it seems possible for the EU to use it more actively.

CONCLUSION

In this paper I tried to show that state sovereignty cannot be understood as a indulgency for unhuman actions. R2P doctrine describes sovereignty as an obligation but not the right. This perception is very human-oriented and similar to the theories of the sociologists of international law. The EU mentioned the R2P in several its documents. Moreover, it used the

[1] Responsibility to Protect – Engaging Civil Society a Project of the World Federalist Movement's Program on Preventing Conflicts -Protecting Civilians. *International Commission on Intervention and State Sovereignty*. <http://www.responsibilitytoprotect.org/files/R2PSummary.pdf>

[2] EU Creating Court for Kosovo War Crimes. *EPOCH Times.* <http://www.theepochtimes.com/n3/601421-eu-creating-court-for-kosovo-war-crimes/>

[3] Human Rights Chamber for Bosnia and Herzegovina. *Official site*. <http://www.hrc.ba/ENGLISH/DEFAULT.HTM>

conception of civilian protection for the mandate for several its missions abroad. In the same time, the R2P doctrine is not included in a proper way to the defense and security strategy of the EU. The military intervention as a most strong measure for the protection of civilians is possible for the EU. Nevertheless, the question rises about the forces that the EU can use for military missions. It seems impossible to create in nearest future the permanent EU forces. One of the most perspective ways of the R2P implementation of the R2P for the EU is the creation and participation in the international and mixed criminal tribunals.