

THE “RESPONSIBILITY TO PROTECT” AND THE EUROPEAN UNION

A "RESPONSABILIDADE DE PROTEGER" E A UNIÃO EUROPEIA

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SUMMARY: I. INTRODUCTION; – II. BRIEFLY DEFINING THE “RESPONSIBILITY TO PROTECT”; – III. THE LEGAL FRAMEWORK, THE INSTITUTIONS INVOLVED AND THEIR INSTRUMENTS; – IV. RELEVANT STATEMENTS; – V. RELEVANT PRACTICE; – VI. CONCLUDING REMARKS; VII. REFERENCES

ABSTRACT: Ever since its genesis up until its first implementations, the principle of “Responsibility to Protect” (RtoP) has been shaped by the interpretations of International Organizations and their State Members to fit better in their political agenda. At the same time, once International Institutions took into considerations the RtoP, some of their actions and structures have been influenced by the principle itself. The focus of this article is on these mirror relationship and mutual development between the European Union and the RtoP. Finally, it is possible to infer from the outcomes of such relationship the consequences of the interaction between the principle of the RtoP and other Regional Organizations.

KEYWORDS: Responsibility to Protect; RtoP; responsibility to prevent; responsibility to react, responsibility to rebuild; European Union; EU; mutual development between the EU and the RtoP; genocide; war crimes; ethnic cleansing; crimes against humanity; conflict prevention; humanitarian crisis management; post-conflict stabilization.

SUMÁRIO: I. INTRODUÇÃO; - II. RESUMIDAMENTE DEFINIÇÃO DA "RESPONSABILIDADE DE PROTEGER"; - III. O QUADRO JURÍDICO, AS INSTITUIÇÕES ENVOLVIDAS E SEUS INSTRUMENTOS; - IV. DECLARAÇÕES RELEVANTES; - V. PRÁTICA RELEVANTE; - VI. OBSERVAÇÕES FINAIS; VII. REFERÊNCIAS BIBLIOGRÁFICAS

RESUMO: Desde a sua gênese, até suas primeiras implementações, o princípio da "Responsabilidade de Proteger" (RtoP) foi moldada pelas interpretações das Organizações Internacionais e os seus Estados membros para caber melhor em sua agenda política. Ao mesmo tempo, uma vez que as instituições internacionais levaram em considerações a RtoP, algumas de suas ações e estruturas foram influenciadas pelo próprio princípio. Esta relação especular e este desenvolvimento mútuo entre a União Europeia e a RtoP são o foco deste artigo. Finalmente, é possível inferir a partir dos resultados de tal relação as consequências da interação entre o princípio da Responsabilidade de Proteger e outras Organizações Regionais.

PALAVRAS-CHAVE: Responsabilidade de Proteger; RtoP; a responsabilidade de prevenir; a responsabilidade de reagir; a responsabilidade de reconstruir; União Européia, UE; desenvolvimento mútuo entre a UE e a RTOP; genocídio; crimes de guerra; limpeza

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étnica; crimes contra a humanidade; a prevenção de conflitos; gestão de crises humanitárias; estabilização pós-conflito.

INTRODUCTION

This paper aims to highlight the liaison between the principle of the Responsibility to Protect (RtoP) and the European Union (EU). Albeit there is no direct evidence manifesting any explicit reference to the RtoP in EU primary law, there are many circumstantial evidences from which the RtoP influence on the EU's recent developments may be inferred. It is also possible to argue that the EU embraces the RtoP doctrine to the fullest, as it is apparent from the amendments brought in by the Lisbon Treaty, which entered into force on December 1, 2009. Conversely, the 2008 Report on the Implementation of the European Security Strategy³ did include a direct reference to RtoP.

This work will first draw the attention on the present relevant legal sources in the light of RtoP implementation, the Institutions, Bodies and Agencies involved and their instruments. It will subsequently take into account the related statements of this International Organization (IO), thereby illustrating its *opinio iuris* on the matter. The aim is to show how “the words [have been turned] into deeds”, borrowing UN Secretary-General Ban Ki-moon's expression; i.e. which cases may be labelled as application of the principles enshrined in the concept of the RtoP. Finally, once all these evidences will be collected, they will corroborate the thesis according to which there exist a mutual development and mirror relationship between the EU and the RtoP: on one hand, the RtoP integrates the progress of the EU external policy, on the other hand the EU contributes to develop the principle of the RtoP by putting it into practice, where it is achievable. The *opinio iuris* and practice of this IO related to the implementation of RtoP and, via its apparatus, its Member States will ultimately back up the thesis of the emergence of the principle in question as a rule of customary international law.

1. BRIEFLY DEFINING THE “RESPONSIBILITY TO PROTECT”

The idea of “Responsibility to Protect” was first conceived in December 2001 by the International Commission on Intervention and State Sovereignty (ICISS), an independent

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³ It was issued by Javier Solana, the High Representative of the Union for Foreign Affairs and Security Police, and it is regarded as a political statement rather than a binding document with a legal status.

commission composed of international experts⁴ appointed to represent different perspectives on the topic of humanitarian intervention, and financed by the Canadian government. The Commission published a report titled “Responsibility to Protect”, combining newly invented norms with pre-existing principles of customary international law and *erga omnes* obligations and creating a momentum underpinning the fact that sovereignty entails responsibility. The aim of the report was to find an alternative to humanitarian intervention, about which there was a bitter international denial, and build a consensus for a consistent response to humanitarian crises by the international community⁵ in order to avoid the failures of the United Nations (UN) occurred in the 1990s, such as the massacre in Srebrenica and the genocide in Rwanda.

According to the concept of RtoP, each State has the primary duty to protect those under its jurisdiction from crimes against humanity, genocide, war crimes and ethnic cleansing and to prevent the incitement of these crimes. If a State manifestly fails to protect its citizens from these crimes – whether because it is unable or unwilling or both to do so -, the international community should step in to take collective action, in a timely and decisive manner, through the Security Council (UNSC), in accordance with the UN Charter in order to halt and prevent mass atrocities.⁶ The RtoP Report outlines positive obligations for the States (especially for those holding a Permanent Member seat within the UNSC). States should proactively prevent those four crimes, react - if necessary with military intervention - and rebuild. Indeed, the principle of RtoP provides tripartite collective responsibilities.

Under the RtoP, six criteria need to be fulfilled in order to launch a justified military intervention: just cause, right intention, *extrema ratio*, right authority, proportional means and reasonable prospects. The experts, who took part in the work of the ICISS, advocate that the idea of RtoP could make the Security Council work better and more efficiently. They hold that if the majority of Security Council supports an intervention, a Permanent Member of the SC should abstain from using its veto to block the intervention, unless the State concerned has a vital national interest therein. Actually, that was what happened with SC Resolution 1973 (2011) on Libya, which was not vetoed in fact by China and Russia.

In case the Security Council fails to act in a situation of RtoP concern, the ICISS proposes two options, beyond the traditional rule of international law whereby the use of force

⁴ The ICISS was co-chaired by Gareth Evans and Mohamed Sahnoun and its members were: Gisèle Côté-Harper, Lee Hamilton, Michael Ignatieff, Vladimir Lukin, Klaus Naumann, Cyril Ramaphosa, Fidel Ramos, Cornelio Sommaruga, Eduardo Stein, Ramesh Thakur.

⁵ See International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect: Report of the International Commission on Intervention and State Responsibility*, International Development Research Centre, 2001.

⁶ See 2005 World Summit Outcome, A/RES/1, Sept 15, 2005

shall be expressly authorized only by the Security Council under Chapter VII⁷: to resort to the UN General Assembly under the “Uniting for Peace”⁸ procedure issuing a decision in favour of action or to rely on a regional or sub-regional organization acting within its geographical boundaries. Both ways would provide with an adequate degree of legitimacy for an intervention.⁹

The RtoP is interlinked with the concept of “Human Security”, which is focused on the protection of individuals and human dignity rather than the protection of the State and its boundaries as “Traditional Security” used to be.¹⁰ In this way RtoP, coupled with Human Security, challenges the sovereignty of those States, whose policies are disrespectful of human rights, by providing the international community for a ground to interfere in their home affairs.

Notwithstanding the fact that the RtoP was formally adopted by the UN General Assembly Resolution 60/1 (2005),¹¹ and its concept incorporates legal obligations with *jus cogens* status, the principle of RtoP is currently regarded as soft law, wherefrom no legally binding obligations come.¹² The fate of the principle will depend on the implementation of the principle itself in current and future situations.¹³ This is why this article will be centred on how a major Regional Organization such as the EU can contribute to turn the RtoP into a principle of customary international law – therefore, binding upon all Nations – by implementing it throughout its Institutions.

⁷ UN Charter Art. 2(4) in conjunction with Art. 42, beside the use of force in self-defence, as set forth in Art.51.

⁸A/RES/377(V)[A-C], Nov. 3, 1950: in this resolution the GA affirms “that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.” The outcome of such process is not, however, legally binding.

⁹See EVANS GARETH, *The Responsibility to Protect: ending mass atrocity crimes once and for all*, Brookings Institution Press, 2008, pp. 375-391.

¹⁰See AXWORTHY LLOYD, *The Responsibility to Protect, The Promise of stopping mass atrocities in our time*, Oxford University Press, 2011 p. 8.

¹¹ The UN General Assembly Resolution 60/1 (October 25, 2005, paragraphs 138, 139, 140), according to the Court’s reasoning in ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (ICJ reports 1996, para. 70), may have a normative value as it provides evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.

¹²See in this sense AIDAN HEHIR, *The Responsibility to Protect: “Sound and Fury Signifying Nothing”?*, *International Relations SAGE*, 2010, p. 232; WILLIAM M. BURKE, *The Responsibility to Protect, The Promise of stopping mass atrocities in our time*, Oxford University Press, 2011 p. 34; or Sir MICHAEL WOOD, who believes that the RtoP is not even a legal concept as he stated at the 2013 Ljubljana Conference on the “Responsibility to Protect in Theory and Practice”.

¹³See LUCK EDWARD C., *The Responsibility to Protect: the promise of stopping mass atrocities in our time*, Oxford University Press, 2011, p. 85-106.

2. THE LEGAL FRAMEWORK, THE INSTITUTIONS INVOLVED AND THEIR INSTRUMENTS

The main traces among legal provisions of the constituent Treaty proving an eventual influence wielded by the concept of RtoP on the EU can be found in articles 21, 42(1), 43(1) of the Treaty on European Union (TEU) and article 214(1), 214(4), 214(7) of the Treaty on the Functioning of the European Union (TFEU).

The guiding principles of the European Union's external action enshrined in art. 21 TEU overlap with the objectives pursued by the principle of the RtoP as it was first conceived by the ICISS. Indeed, the ICISS Report aims to protect individuals and human dignity by triggering an international solidarity¹⁴ to prevent a wide spectrum of calamities affecting Human Security throughout multilateral actions and a forward-looking approach, and art. 21 TEU seems to be exactly on the same page by sharing the same values, taking into account the same causes as sources of threats for international security – such as lack of a democratic systems and sustainable economical developments fit to cope with the rise of authoritarian regimes and tackle poverty, respectively – and promoting global stability through multilateralism and proactive efforts.

The Lisbon Treaty, drafted and signed by the Member States on December 13, 2007, includes a new Section 2 into Chapter 2 of Title V of the TEU, dealing with the Common Security and Defence Policy. What we are interested in this regard is the first paragraphs of articles 42 and 43 TEU, and the timing of this prominent change. Art. 42(1) envisages that the Union shall have civilian and military assets, and makes it possible to employ these means outside its boundaries for peace-keeping, conflict prevention and strengthening international security. What it is immediately evident is that such possibility to react in order to prevent conflictechoesthe preventive approachrequired by theRtoP in the face of looming mass atrocities. Art. 43(1) points out that the tasks referred in art. 42(1) – peacekeeping, conflict prevention, strengthening international security, in the course of which the Union may resort to use civilian and military means – might include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, task of combat forces in crisis management, including peace-making and post-conflict stabilization, and the fight against terrorism. Art. 43 makes clear that the Union's external action shall not only have a preventive dimension but also shall react with peace-making operations,

¹⁴ As ANNE-MARIE SLAUGHTER explained in her work, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, *Amer. J. Int'l L.* (2005), "this new conception of security rests on solidarity more than self-defence", p. 619.

where the circumstances so required to handle crisis management. Plus, the Union might be entrusted with rebuilding tasks through missions supervising post-conflict scenarios. So, both the implementation of the responsibility to react and rebuild are covered by the EU's external action. If we take into account the fact that these provisions were inserted some years after the wording of the RtoP, it is possible to assume an etiological relationship between the latter, being the cause, and the former, regarded as the effects.

With the entry into force of the Treaty of Lisbon in 2009, a further step forward has been taken in respect of RtoP application by including a new Chapter III on Humanitarian aid in Title III of the TFEU and providing article 214. This provision makes it possible to provide *ad hoc* assistance and relief and protection for people in third countries who are victims of natural or man-made disasters. This can be considered as another clue of the strong resemblances between the ICISS Report and the EU Constituent Treaty, as the Report intended to address both overwhelming natural and man-made catastrophes. Another similarity in tackling threats to individuals is the emphasis on the *ad hoc* assistance, which is meant to be supplied in order to meet the humanitarian need resulting from the different situations, as the ICISS report underlined that means should be carefully tailored to the objectives pursued. Art. 214(4) and art. 214(7) underline the importance of acting in concert with competent International Organizations to ensure the success of humanitarian aid operation, thus sharing the view of the principle of the RtoP on the weight wielded by regional organizations in preventing mass atrocities.

As to the EU Institutions, that calls the shots when it comes to implement these provisions, the last paragraph of art. 21 entrusts the Council, the Commission and the High Representative of the Union for Foreign Affairs and Security Policy (HR) with the task to ensure the consistency between the various areas of the Union's external action and between these and its other policies. Hence, the institutional key actors in the Union's external relations are the Council, the Commission and the HR, and, as far as the implementation of the RtoP via EU institutions is regarded, we shall primarily look up Title V of the TEU, pertaining the Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP).¹⁵

As art. 24 TEU stipulates, the CFSP covers all areas of foreign policy and all matters relating to the EU's security. It is to be defined and implemented by the European Council and

¹⁵See BART VAN VOOREN, *A legal-institutional perspective on the European External Action Service, 2010 (Centre for the Law of EU External Relations – CLEER)*, pp. 1-32.

the Council, acting by unanimity unless the Treaties provide otherwise, and it shall be put into effect by the HR. The CSDP is closely interlinked with CFSP, but it differs from the latter since it is elaborated further on security issues. The CSDP represents the Union's tool in order to undertake civilian or military missions, with the purpose to react in the face of humanitarian emergencies in third countries.

The Council is the primary decision-making body of the CFSP and CSDP. According to art. 16 TEU, the Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote. Therefore, the Council of Ministers shall meet in different configurations, depending on the matter it is dealing with. As far the CFSP and CSDP are concerned, the standard composition of the Council is that of the Foreign Affairs Council, which carry out policy-making in these fields during the sessions chaired by the HR. The Council takes the necessary decisions in order to implement the CFSP and CSDP, as they are framed by the general guidelines and the strategic lines defined by the European Council.

Moreover, under art. 28(1) TEU, where the international situation required operational action by the Union, the Council shall adopt the duly decisions, which shall provide their objectives, scope, the means to made available to the Union, if necessary their duration, and the conditions for their implementations. Such decisions shall commit all the Member States in the positions they adopt and conducts of their activity.

Pursuant to art. 29 TEU, the Council can also take decisions defining the approach of the Union to a particular matter of geographical or thematic area, and Member States' national policies shall comply with the Union position.

In addition, under art. 33 TEU, the Council appoints, on the proposal of the HR, Special Representatives (EUSRs), mandated with a particular policy issue. By monitoring sensitive situations in troubled countries and regions, the EUSRs might contribute to increase early-warning capacities, which are so essential in discharging the preventive obligations under the principle of RtoP. Currently, there are ten EUSRs working on issues related to Afghanistan, the African Union, Bosnia and Herzegovina, Central Asia, the Horn of Africa, Kosovo, the Middle East Peace Process, the South Caucasus and Georgia, the Southern Mediterranean region as well as Sudan and South Sudan. They support the office of the HR, by endeavouring to strengthen peace, stability and the rule of law in their competent regions.

The Council can, therefore, initiate specific projects and concrete missions where necessary. It is assisted in the decision-making by the Committee of Permanent Representative

(COREPER), which attempts to reach agreements for most reports in advance by supplying actively fruitful inputs.

The Council may act entirely *proprio motu*, without any prior proposal act, in order to take such decisions in the CFSP; conversely decisions in the CSDP are to be adopted on the initiative of the HR or a Member State, under art. 42(4) TEU, except when such decisions concern operational actions involving the use of civilian and military, as derogated by Art. 43(2). As already mentioned, the Council adopts, under art. 31(1) TEU, its decisions by unanimity, which entails a power for all Council Members to veto the decisions of the Council. However, art. 31(2) TEU provides a qualified abstention mechanism, whereby a Council Member may qualify its abstention by making a formal declaration accepting that the proposed decision commits the Union, without being obliged to apply the decision itself. This mechanism avoids that EU external action be curbed by the unanimity rule and its subsequent veto configuration. Such decision-making procedure has some affinities with the shrinking from using veto in the UN Security Council when there is a majority supporting an intervention for human protection purposes, as proposed by the ICISS Report. Moreover, the abstaining Member shall refrain from taking any action conflicting the Union action based on that decision. The affinities with the ICISS Report may increase if we take into consideration that in the four cases enlisted in art. 31(2), where a qualified majority is sufficient to adopt a decision within the Council – in the event of a decision defining a Union action or position on the basis of a decision of the European Council relating to the CFSP, a decision defining a Union action or position on proposal of the HR, a decision implementing an earlier decision defining a Union action or position, a decision on the appointment of a EUSR – a Member State may oppose the adoption of such decision by adducing its vital and stated reasons of national policy as reasons thereof. Indeed, the ICISS report allowed, and at the same time curtailed the UN Permanent Member to resort to veto only where their national interest are involved.

The General Affairs Council, chaired by the representative of the Member State holding the rotating Presidency of the EU, is responsible to prepare and ensure the follow-up to meetings of the European Council.

It is up to The European Council to provide the Union with the necessary impetus for its development by adopting decision by consensus. It is composed of its President, the heads of States or government of the Member States, the President of the Commission and the HR takes part in its work, too. Based on art. 26 TEU it shall identify the Union's strategic interests, determine the objectives of and define general guidelines for the CFSP, as well as, for matters

with defence implications. The European Council elects its own President – who shall not hold a national office – by a qualified majority, for a term of two and half years. The President shall chair the European Council, drive forward its work, and ensure the external representation of the Union on issue concerning its CFSP, without prejudice to the powers of the HR.

The European Council also appoints the HR, acting by a qualified majority and with the agreement of the President of the Commission, and following the same procedure it may end his term of office. Pursuant to art. 18 TEU, the HR is responsible for conducting the Union's CFSP and CSDP, contributing to their development and discharging his office as mandated by the Council. The HR shall chair the Foreign Affairs Council and be one of the Vice-President of the Commission. In cases requiring a rapid response, the HR may convene, on the basis of art. 30(2) TEU, an extraordinary Council within 48 hours or, in an emergency, within a shorter period. The HR has to consult the European Parliament on the main aspects and the basic choices of the CFSP and CSDP, and make sure that the Parliament views are duly taken into consideration. The Parliament is entitled to ask questions to the Council and the HR related to their work in the CFSP and CSDP, and also to make recommendations to them. Moreover, on the basis of art. 314 TFEU the Parliament is requested to authorize in advance all the expenditures within the CFSP by approving the EU annual budget together with the Council, thus exercising budgetary powers in the EU's external action, it has a relevant role to play.

As it is laid down in art. 30 TEU, the European Commission, besides ensuring consistency between the different areas of the EU external action and between these and other EU policies, may support questions, initiatives and proposal filed by the HR to the Council.

In the domain of the CFSP, the Member States are entitled to submit initiatives, proposals, and to refer question to the Council. A Member State may also ask the HR for summoning an extraordinary Council meeting, when a rapid decision is needed to face a topical event. Under art. 32 of TEU, before undertaking any action on the international scene which might affects Union's interests, Member States are bound to consult with one another within the European Council or the Council on any matter of CFSP to determine a common approach. This entails that Member States shall coordinate their international activities in line with a mutual solidarity.

The subsequent institutional implication of the purposes, recalling to some extent the principle of RtoP – set in articles 21, 42, 43 TEU and article 214 TFEU – results into the need to have in place the following operational bodies in order to pursue precisely those purposes:

- The European External Action Service (EEAS): its legal basis is the *Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service*. The EEAS is a functionally autonomous body of the Union under the authority of the HR, as set up by Article 27(3) TEU, and supports the HR in fulfilling her mandate to conduct the CFSP of the Union and to ensure the consistency of the Union's external action. In its contribution to the Union's external cooperation programmes, the EEAS shall ensure that the programmes fulfil the objectives for external action as set out in art. 21 TUE. In accordance with Article 27(3) TEU, the EEAS comprises officials from the General Secretariat of the Council and from the Commission, as well as personnel coming from the diplomatic services of the Member States. Moreover, the EEAS comprises also the Civilian Planning and Conduct Capability, the European Union Situation Centre and the European Union Military Staff:- the Civilian Planning and Conduct Capability (CPCC) is the permanent structure responsible for an autonomous operational conduct of civilian CSDP operations. Under the political control and strategic direction of the Political and Security Committee and the authority of the HR, the CPCC is entrusted with the effective planning and conduct of civilian CSDP crisis management operations.

- the European Union Military Staff (EUMS) provides military expertise to EU bodies as directed by the EU Military Committee (EUMC), and performs, mainly, early warning, situation assessment and strategic planning for missions and tasks identified in the European Security Strategy, as it is established in the *Council Decision 2005/395/CFSP of 10 May 2005*. It is composed of military personnel seconded from the Member States acting in an international capacity. Furthermore, it plans, assesses and makes recommendations regarding the concept of crisis management and the general military strategy and implements the decisions of the EUMC. Upon request of the HR or the Political and Security Committee, it may support temporary missions to third countries or international organizations, in order to provide advice and assistance on military aspects of conflict prevention, crisis management and post-conflict stabilization. In crisis management situations, it also contributes to crisis response strategic planning for joint civilian and military operations through the development of strategic options.

- the European Joint Union Situation Centre (SITCEN) is the EU intelligence agency providing the HR and the Council with strategic analysis, early warning, situation monitoring and assessment, notably, focused on counter-terrorism. It is formed by intelligence officers seconded by the Member States, and works as a cell to share classified information among the Member States to strengthen internal security. In this regard, the European Satellite Centre (EUSC), established by Council Joint Action 2001/555/CFSP, is one of the CDSP key institutions by providing the Council with analyses of satellite imagery and collateral data. The European Union Institute for Security Studies (EUISS) also plays an important role in this respect,

being an autonomous agency, whose core mission is to advance a common security culture for the EU by offering a forum to discuss strategic projects within the CFSP, as set in Council Joint Action 2001/554/CFSP, later amended by Council Joint Action 2006/1002/CFSP.

- The Political and Security Committee (PSC) meets at the ambassadorial level, is chaired by a representative of the HR in accordance with *European Council Decision 2009//881/EU of 1st December 2009*, and is entrusted with a threefold function pursuant to art. 38 TEU: to monitor the international situations of interest to CFSP and CDSP, to contribute to the definition of policies by delivering Council; and the most important task is to exercise – under the responsibility of the Council and of the HR – the political control and strategic direction of the crisis management operations referred in art. 43 TEU.

- The European Union Military Committee (EUMC) is the highest military body within the Council, is composed of the Member States' Chiefs of Defence, represented by their military representatives, acting regularly as their deputies. The Chairman of the EUMC is appointed by the Council on the recommendation of the Committee itself. Its legal basis is *Council Decision 2001/79/CFSP*. Its main functions is to exercise military direction of all EU military activities and provide the PSC with military advice and recommendations on all military matters.

- The European Defence Agency (EDA), active in the field of defence capabilities development, research, acquisition and armaments, is responsible for identifying operational requirements, promoting measures to satisfy those requirements, and contributing to identifying and implementing any measure needed to strengthen the industrial and technological base of the European defence sector, as stated in articles 42(3) and 45 TEU, brought in with the Lisbon Treaty.

- The European Commission's Directorate-General for Humanitarian Aid and Civil Protection (ECHO) supplies victims of crisis, armed conflicts, natural and man-made disasters with immediate financial assistance and urgent humanitarian aid, regardless they are inside the EU territory or outside. Its operations aim namely to provide relief and protection for the local population, food aid and assistance to refugees, and to carry out post-crisis rehabilitation actions and civil protection operations, as part of the Union's Civil Protection Mechanism, whose guideline principles are prevention, preparedness and response to crisis. Since the entry into force of the Lisbon Treaty, the EU has been endowed with shared competence in the area of humanitarian aid and, nowadays, is the world's largest international donor of humanitarian aid, by providing, together with its Member States, more than half of official humanitarian aid, according to statistics provided by the Development Cooperation Directorate of the Organisation for Economic Cooperation and Development (OECD).

- The European Instrument for Democracy and Human Rights (EIDHR), established by Regulation 1889/2006 of December 20, 2006, is a valuable financing tool to strengthen respect for human rights and fundamental freedoms in countries where they are at stake. It is deployable without the consent of the third country concerned. It seeks to enhance the role of civil society in promoting democratic reforms, assure the reliability and transparency of democratic elections by making available the means to monitor them, and enhance the rule of law.

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The provision of such various human rights-conflict prevention-oriented structures set up within the EU may well amount to the evidence of the influence of the principle of RtoP on the EU development following the Lisbon Treaty. As well as, they may amount to the intention of embracing and implementing the principle of the RtoP, as phrased by the ICISS.

3. RELEVANT STATEMENTS

The *European Security Strategy* (ESS)¹⁶ and the *Report on the Implementation of the European Security Strategy* (RIESS)¹⁷ might well be regarded as pivotal statements endorsing the principle of RtoP. The ESS was issued on December 12, 2003 by Javier Solana, then the High Representative of the Union for Foreign Affairs and Security Policy in charge.¹⁸ The ESS acknowledges the progress made by the EU towards a coherent security policy and effective crisis management, and at the same time, it remarks the need to establish a common strategic culture promoting robust and rapid intervention, where necessary. By observing that no country is able to face today's trans-boundary menaces on its own, this document points out the security threats and challenges the EU shall take in duly consideration, sharing a responsibility for the world safety. The key threats identified by the ESS – terrorism, proliferation of weapon of mass destruction, regional conflicts, state failure, organized crime – matches undoubtedly with some of the security priorities addressed by the ICISS Report. Interestingly, the two documents share not only some security challenges, but have in common also the way to confront them, by strengthening multilateralism and the role of regional organizations. Therefore, the intent and the *modus operandi* to oppose those very threats may amount to advocate the principle of RtoP. Since that the ESS was not adopted on the basis of what was then art. 13, its legal status resides

¹⁶ A Secure Europe in a Better World – The European Security Strategy.

¹⁷ Report on the Implementation of the European Security Strategy – Providing Security in a Changing World.

¹⁸ See SVEN BISCOP, *The European Security Strategy - A Global Agenda for Positive Power*, (Ashgate)2005, pp. 92 ff.

in a “quaint legal limbo”¹⁹. None the less, it should be noted that according to the *Annex to Council Decision 2005/395/CFSP of 10 May 2005* the Military Staff shall execute the tasks identified by the ESS.

Although the ESS can be regarded as a political statement rather than a legal basis providing for rights or obligations, it does provide for an *opinio iuris sive necessitatis*, stemming from an influential institution of the EU, and embedding RtoP-inspired standards. Moreover, the *diuturnitas* and *opinio iuris* of any intergovernmental organization, within the limited scope of competence of that organization, might represent the manifestation of the State practice and *opinio iuris* of the Member States involved in the organization²⁰. This means that also intergovernmental organizations participate in the process of establishing customary international law, in the same manner as States.

Javier Solana, acting as the HR, also requested Professor Mary Kaldor to convene an independent international commission on the capabilities the EU would require in order to pursue an effective common security policy. The outcome was a report, entitled *A Human Security Doctrine for Europe*²¹, issued in 2004 by the Study Group on Europe’s Security Capabilities (SGESC). Noting that the key threats, listed by the EES, do not require a purely “hard security” approach, which implies a military deployment, the report highlights the need to implement multidimensional approaches, by leading to the proposal of establishing a “Human Security Response Force”, which should involve a mix of quickly deployable military and civilian capabilities in order to carry out the duties of an effective Human Security policy²². This proposal was turned into facts, indeed, in 2007 the “EU Battlegroups” (EU BGs) became fully operational, consisting of units of 1.500 troops ready to engage in any desired theatre of missions within 15 days. According to the SGESC’s report, Human Security stands for individual freedom from basic insecurities. The report holds genocide, wide-spread or systematic torture, inhuman and degrading treatment, disappearances, slavery, and crimes against humanity and grave violations of the laws of war, massive violations of the right to food, health and housing as intolerable breaches of Human Security. A human security-inspired

¹⁹ HENRI DE WAELE, *Layered Global Player, Legal Dynamics of EU External Relations*, (Springer), 2011, p.58

²⁰ TULLIO TREVES, *Customary International Law, Max Planck Encyclopedia of Public International Law*, (Oxford University Press) 2006, paras 50 ff.

²¹ A Human Security Doctrine for Europe - The Barcelona Report of the Study Group on Europe’s Security Capabilities.

²² Coticchia, Fabrizio (2011, May). “Nuovi approcci alla sicurezza internazionale: Human Security e Securitization, - Le Nuove Relazioni Transatlantiche: Le organizzazioni internazionali e le sfide della sicurezza.” Comitato Atlantico Italiano (CAI). Speech presented at Università degli Studi di Firenze.

policy for the European Union entails that it should actively contribute to the protection of every individual human being affected by those violations mentioned above, irrespectively of where they take place, inside or outside the Union's territory. Somehow, the principles guiding the European Doctrine of Human Security – the primacy of human rights, clear political authority, multilateralism, the bottom-up-approach, regional focus, use of legal instruments, appropriate use of force – reflects the satisfying requirements – just case, right intention, *extrema ratio*, right authority, proportional means and reasonable prospect – needed to invoke an action under the principle of the RtoP, as perceived by the ICISS.

The ESS (2003) and *A Human Security Doctrine for Europe* (2004) likely paved the way for the CFSP and CSDP developments enshrined in the text of the Lisbon Treaty, signed in 2007.

The 2007 *Joint Africa-EU Strategy* adopted by 80 Heads of State and Government from Africa and Europe assured the EU support to enhance African capacities in crisis management, including regional stand-by forces and early warning, and insisted on the ownership and joint responsibility held by the EU and the African Union (AU) to guarantee the respect for human rights, democratic principles and the rule of law, by committing themselves especially to punish the authors of crimes against humanity, war crimes and genocide.

In 2008, the *Report on the Implementation of the European Security Strategy* (RIESS) updates the ESS and seals the bond between the RtoP and the EU with strong references to the principle. Firstly, the RIESS asserts that sovereign governments must take responsibility for the consequences of their actions and have a responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Secondly, it reiterates the significance of agreement reached at the UN World Summit in 2005 in order to defend core human rights. Thirdly, it affirms that the EU itself holds a shared responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, given their unacceptable seriousness and feasible spill-over effects. The RIESS recognizes how the achievements of the CFSP and CSDP are the results of a distinctive European approach, build on principles focused on the protection of individuals, leading the EU to become a more credible and effective actor on the international scene.

4. RELEVANT PRACTICE

Since 2003, when it initiated a military operation in the former Yugoslav Republic of Macedonia (fYROM/CONCORDIA), the EU has been committed in more than twenty

missions, civilian and military ones, outside its territory, most of them with the aims of protecting populations from emerging crisis, preventing State failure, strengthening the rule of law, and promoting democracy. In order to send out missions under its flag, the EU relies on the civilian and military capabilities of its Member States, which, under art. 42(3), shall make them available to the Union to implement the CSDP, as defined by the Council. Moreover, the “*Berlin Plus arrangements*” of March 17, 2003 enable the EU to access to NATO’s collective assets for leading crisis management operations, in which NATO as a whole is not engaged. Thus, the EU military operational proficiency is fully assured.

What follows is the analysis of some EU missions, which denote a consistent and comprehensive European external policy increasingly ready to prevent and confront humanitarian challenges, wherever they take place.

Several EU missions might fall within the scope of application of RtoP, in so far such principle requires taking preventive actions at the earliest stage possible of humanitarian emergencies with the minimum use of military force. Precisely, operation CONCORDIA²³ in the first place might be labelled as RtoP implementation with the consent of the State concerned and in a framework of cooperation among regional organizations: the former Yugoslav Republic of Macedonia invited the Union to assume responsibility for the follow-on to the NATO operation “Allied Harmony” in order to provide technical assistance and capacity-building to aid the State in question to fulfil its basic duties owed towards its population.

The missions ARTEMIS²⁴ and EUFOR RD²⁵ Congo send, in 2003 and 2006 respectively, in the Democratic Republic of Congo (DRC) are examples of multilateral fulfilment of RtoP obligations (namely, in the scope of preventing ethnic cleansing): the EU conducted a military operation in the Ituri region in concert with the UN Security Council, that, acting under UN Chapter VII, adopted Resolution 1484 (2003) requesting the deployment of a interim emergency multinational force in Bunia to reinforce the United Nations Organization Mission in the Democratic Republic of the Congo (MONUCO), with the purpose to promote the peace process in the country, facing the deadliest civil war in modern Africa, and in particular to facilitate the early establishment of an inclusive transitional government in the Democratic Republic of the Congo. The mission ended on the 1st of September 2003 leading to

²³ Based on *Council Joint Action 2003/92/CFSP of 27 January 2003, on the European Union military operation in the Former Yugoslav Republic of Macedonia.*

²⁴ Based on *Council Joint Action 2003/423/CFSP of 5 June 2003 on the European Union military operation in the Democratic Republic of Congo.*

²⁵ Based on *Council Joint Action 2006/319/CFSP of 27 April 2006 on the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process.*

a peace deal and in 2006 the EU launched another mission - Operation EUFOR RD Congo – to support the MONUCO in securing the region during the elections in the DRC, as mandated by UN Security Resolution 1671 (2006). However, the peace was ephemeral, since that coup attempts and renewed fighting resumed in the eastern part of the country in 2008 and nowadays the whole Great Lakes Region remains volatile due to ongoing conflicts involving Rwanda, Uganda and the DRC. That is why the EU is remaining actively seized of the matter by establishing, on the request of the DRC government, civilian missions²⁶ that assist the country's reforms process and monitor its unstable situation.

The EUFOR ALTHEA military operation launched on December 2, 2004 in Bosnia and Herzegovina (BiH) is an example of RtoP implementation in the rebuilding phase in order to provide deterrence against any relapse into a conflict, and to contribute to a safe and secure environment in the country. The EUFOR ALTHEA took over from the EU Police Mission in Bosnia, which in turn took over from the UN International Police Force.

Another case of multilateral cooperation, in the scope of reacting to genocide, is the EU civilian-military mission AMIS EU Supporting Action in Darfur, set up by Council Joint Action 2005/557/CFSP of July 18, 2005 with the intent of assisting the enhancement of AMIS II, which was a mission launched by the African Union Peace and Security Council in 2004 in order to ensure the protection of civilians. Few months earlier in a resolution adopted on September 16, 2004, the European Parliament urged the “Sudanese authorities to end impunity and to bring to justice immediately the planners and perpetrators of crimes against humanity, war crimes and human rights violations, which can be construed as tantamount to genocide”. On February 15, 2007 the European Parliament called on “the UN to act in line with its ‘Responsibility to Protect’ doctrine, basing its action on the failure of the Government of Sudan to protect its population in Darfur from war crimes and crimes against humanity, and also its failure to provide humanitarian assistance to the population”. Eventually, on July 31, 2007, the UN Security Council adopted resolution 1769 (2007), authorizing a joint United Nations-African Union peacekeeping operation in Darfur (UNAMID), whose mandate has been extended through July 2013, to address the humanitarian crisis in the western region of Sudan. This shows also how the principle of RtoP can be a compelling leverage for manoeuvring the dialogue among the institutions of different International Organizations towards an action.

²⁶See the EU advisory and assistance mission for security reform in the Democratic Republic of Congo (DRC) ("EUSEC RD CONGO") and EUPOL RD Congo Operation for supporting the reform of the Congolese national police and its interaction with the justice sector.

Moreover, the UN Security Council on September 25, 2007 adopted resolution 1778 (2007) on the situation in Chad, the Central African Republic and the sub-region, whereby emphasized that a proper settlement of the Darfur issue and an improvement of relations between Sudan, Chad and the Central African Republic are the keys to achieve a long-term stability in the region, recalled that the governments of States in question bear primary responsibility for ensuring the security of civilians in their territories, and therefore approved the presence of the United Nations Mission in the Central African Republic and Chad (MINURCAT). At the beginning of 2008, acting in accordance with the mandate set out in the above mentioned UN SC Resolution, the EU sent a military mission – EUFOR Tchad/RCA²⁷ – in eastern Chad and the north-east of the Central African Republic for protecting the civilian population at risk, and supporting the multidimensional presence of MINURCAT. The EU-led military mission came to an end when UN Security Council 1861 (2009) provided MINURCAT with its own military component.

The interlinked RtoP-inspired decisions of the UN Security Council and the EU Council, ensuing to the spill-over effect of the crisis in Darfur, proved that the principle of RtoP itself may have a positive spill-over effect in widening the area of international action to prevent the spread of humanitarian crisis at a broader regional level.

The RtoP-sympathetic active role of the EU Parliament was reaffirmed in its Resolution of March 10, 2011, whereby the MPs urged the “Member States to honour their Responsibility to Protect, in order to save Libyan civilians from large-scale armed attacks”, and spelled out that “no option provided for in the UN Charter can be ruled out...including the possibility of a no-fly zone aimed at preventing the regime from targeting the civilian population.”

The European Union Training Mission for Somalia (EUTM Somalia) might be considered *lato sensu* a RtoP application operation, in so far it aims to strengthen the Somali National Government and the institutions of Somalia, by providing military training to members of the Somali National Armed Force, thus reducing the threats stemming from a failure State, whose issues might trigger humanitarian crisis falling within RtoP scope *stricto sensu*. Indeed, such operation contributes to prevent terrorist groups or organized crime from settling in that State. Terrorism and organized crime give rise to weapons smuggling and human trafficking, hence they undermine the stability of the whole region by violating basic human rights and providing arms to carry on new conflicts, which in turn trigger larger humanitarian

²⁷ Based on *Council Joint Action 2007/677/CFSP of 15 October 2007 on the European Union military operation in the Republic of Chad and in the Central African Republic.*

emergencies. That is why it is necessary to help a failed State to back on its feet with the aim to avoid further crisis, and such approach is perfectly in line with RtoP goals.

The recent EU approach to the Mali situation confirmed the broad EU engagement in the African continent: on February 18, 2013, in response to the call of the Malian authorities and to the UN Security Council Resolution 2071 (2013), the Council launched EUTM Mali, a military mission to contribute to the training of the Malian Armed Forces in order to assist the State's authority in establishing a constitutional and democratic order throughout Malian territory, threatened by international terrorists, jihadists and narco-traffickers in the north, whose presence puts at risk the fragile transition process in the South, already under military threat. The EU is aware that the Malian situation might jeopardize the whole region, as well as the Union's overall safety through the activities of terrorist networks, Al Qaida affiliated, based in the north of Mali. That is why Council's EUTM Mali operation is only part of a more comprehensive approach to secure the Sahel region, which already initiated in March 2011, when the Council welcomed the presentation of the EU Strategy for Security and Development in the Sahel, drafted by the EU External Action Service. This strategy is based on the assumptions that there exists a strong nexus between development and security, and that the complex crisis in the Sahel requires a regional answer. In the light of this Strategy, the Council also sent a civilian CSDP mission "EUCAP SAHEL"²⁸ in July 2012 in order to fight terrorism and organised crime in Niger and abroad.

CONCLUDING REMARKS

As the UN Secretary-General's Special Advisor on the Prevention of Genocide Adama Dieng has argued: "The governments' capacity to prevent genocide pertains to the existence of structures and institutions designed to protect the population and deter genocide...All States have the responsibility to institute structural and operational measures to address the risk factors [leading to genocide], and create societies that are resilient to genocide in which atrocity crimes [e.g. crimes against humanity, war crimes or ethnic cleansing] are unlikely to occur".²⁹ The reforms undertaken by the EU, as well as by other major Regional Organizations, clearly attest the intergovernmental commitment of fulfilling such responsibility.

²⁸ Based on *Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger)*

²⁹ UN Secretary-General's Special Advisor on the Prevention of Genocide ADAMA DIENG. (2013, April). "Introductory lecture". Responsibility to Protect in Theory and Practice Conference. Speech presented at Ljubljana Law Faculty.

The EU appears as an IO that can contribute to make the RtoP a reality.³⁰ Its institutional developments, over the recent years, have been partially guided by the RtoP itself, as this paper has intended to show: firstly, by recalling the EU primary law provisions – articles 21, 42, 43 TEU and 214 TFUE – with a possible implication in RtoP implementation, then illustrating the organisational consequences in order to apply such provisions, and showing the relevant institutional statements embracing the principle, and in conclusion observing practical cases, that concretely manifest the link between the principle of RtoP and the EU as a global actor.

To summarize, as this article exemplified through the EU, the more Regional Organizations support the principle of the RtoP, the more they benefit from it in terms of strengthening their Institutions, furthering their reciprocal cooperation, and gaining more weight on the international plane. That is because the principle is thought out for exercising collective actions under the banner of a share responsibility ensuing the failure of individual States to avert the occurrence of mass atrocities. As a result, Regional Organizations achieved a greater authority by tacitly performing or manifestly claiming a prominent role in maintaining collective peace and security. Most likely, if we took the rise of the RtoP out of the equation, most of the recent advances on peace and security matters experienced by various Regional Organizations would not take place. Mirrorwise, if Regional Organizations did not carry out the obligations stemming from the principle, the RtoP would hardly rely on such a general consent and *usus* able to generate a rule of customary international law, by definition binding on all Nations.

Now, more than ever, it is the time to delineate persuasive rules able to spur on the response of the international community in the face of large-scale violations of human rights. With this in mind, we can plainly appreciate the significance of the mutually-supportive liaison between Regional Organizations and the principle of RtoP: as the latter influences the former by guiding the institutional developments, the former contribute to the emergence of the latter as international custom by complying with the principle's obligations.

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