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Responsibility to protect: the never-ending rhetoric or actual baseline for the EU's possible action

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CFSP	Common Foreign and Security Policy
CIVCOM	Committee for Civilian Aspects of Crises Management
COM	European Commission
CSDP	Common Security and Defence Policy
DDR	Disarmament, Demobilisation, Reintegration Program
DRC	Democratic Republic of Congo
EC	European Community
ECJ	European Court of Justice
ECHO	Directorate General of the European Commission for Humanitarian Aid
ECHR	European Convention on Human Rights
EP	European Parliament
ESDP	European Security and Defence Policy
ESS	European Security Strategy
EU	European Union
EUMC	European Union Military Committee
EUMS	European Union Military Staff
EWM	Early Warning Mechanism
EWU	Early Warning Unit
HLPT	High Level Panel on Threats, Challenges and Change
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICTY	International Tribunal for Former Yugoslavia
IfS	Instrument for Stability
IGO	Intergovernmental Organisation
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
JA	Joint Action
NATO	North Atlantic Treaty Organisation
PSC	Political and Security Committee
RRM	Rapid Reaction Mechanism
RtoP	Responsibility to Protect
SEA	Single European Act

TEC	Treaty Establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TIM	Temporary International Mechanism
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
VLCT	Vienna Convention on the Law of the Treaties

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

The concept of the Responsibility to Protect (RtoP) was created in 2001 by the International Commission on Intervention and State Sovereignty (ICISS)[1]. Building upon obligations inherent in the principle of state sovereignty and existing international law it has been designed to address failures in preventing genocide, war crimes, ethnic cleansing and crimes against humanity. Through the responsibility to prevent, react and rebuild embodied in the RtoP such atrocities were to be diminished[2].

The international community[3] unanimously adopted the RtoP at the 2005 World Summit attributing it a status of the newly developing legal norm[4]. However, the consensus on RtoP's scope has yet to be reached, especially considering the persisting disagreements among states, lawyers and scholars on the legality of humanitarian intervention, the important RtoP part[5]. But the RtoP encompasses much more than mere humanitarian intervention, therefore its operationalisation remains highly desirable. Enshrining the RtoP principle into the relevant international or regional organisations other than the United Nations (UN) can contribute to this objective[6].

The European Union (EU) has been generally supportive of the RtoP concept since its creation including it regularly into the documents of its institutions as well as statements presented under the

[1] See International Commission on Intervention and State Sovereignty, at http://www.iciss.ca/about-en.asp (consulted on 5 June 2011).
[2] ICISS, 2001 (1).
[3] The term «international community» refers generally to the UN member states.
[4] A/RES/60/1, 24 October 2005, paras. 138-140.
[5] ICISS, 2001 (2), pp. 15-26.
[6] Evans, 2007.

framework of the Common Foreign and Security Policy (CFSP)[7] proclaiming its adherence to the human rights and fundamental freedoms stemming from the constitutional traditions of its member states, general principles of law and EU's Primary legislation (currently, the human rights present a very heart of the Lisbon Treaty[8])[9]. Moreover, the EU seems equipped with various mechanisms and tools able to carry the RtoP components and therefore can possibly play important role in the RtoP realisation[10].

Unfortunately, despite EU's vocal supportiveness, the evidence in its actual work as well as regular and systematic use of the RtoP concept is still lacking[11]. EU seems to be cautious to invoke the RtoP in real situations attributing it the status of «rhetoric» rather than that of an actual legal and policy norm.

At this point, it becomes crucial to move beyond mere legal considerations and discuss how the EU can actually carry out the RtoP concept, more precisely, how the decisions concerning the RtoP would have to be taken. The EU represents the intergovernmental organisation (IGO). Despite the deeper integration, it still possesses no real sovereignty and is dependent on the voluntary decisions of its member states[12]. Especially within EU's CFSP, where significant part of the RtoP would be dealt with, the EU can have its ambitions reverberated in its statements and documents, however, the particular decisions will often depend on the individual states. The EU has learnt in the past years for example during the Yugoslavian conflict, that its foreign policy can be effective only if spoken out with one voice[13]. Needless to say, even if this has been acknowledged, the intergovernmental decision-making can still hamper the one-voice foreign policy and related EU's power limiting the RtoP realisation[14]. This would be the case especially if the national interest of any EU member state is at stake[15].

By the adoption of the Lisbon Treaty, the EU codified its willingness to enhance its capabilities in the field of external action and become more coherent and effective international player capable of a rapid

[7] For all EU statements consult The EU-UN: Partnership in Action, at http://www.europa-eu-un.org. Particular documents will be presented later in the thesis.
[8] TEU (Lisbon Treaty, as amended).
[9] See inter alia Evans, 2007; Ahmed & Butler, 2006, pp. 771-801; Piris, 2010, p. 71.
[10] Evans, 2007.
[11] *Ibidem*.
[12] Malici, 2008, pp. 5-6.
[13] *Ibidem*, p. 13.
[14] Fraser, 2007, pp. 172-174.
[15] *Ibidem*.

response to emerging problems[16]. The steps undertaken in relation to the recent crises in Libya present a positive evolution in this direction. However, is there a fair prospect that the EU will generally overcome the above-mentioned problems and in relation to the RtoP move beyond the mere rhetoric and start regularly using the concept in its external policies?

Considering EU law, the existing tools and mechanisms at EU's disposal and the nature of the EU as an IGO, the guidelines are drawn explaining how EU's action should be led under the RtoP concept. By the assessment of EU's conduct in the Libyan crises in the light of the proposed guidelines, the thesis critically discusses EU's ability to carry out the RtoP showing that prospect of the explicit inclusion into EU's external action exists especially taking into account EU law and recent practice. Having in mind that scholars rather focus on the RtoP at the international level, the topic remains quite new within European studies. Taking further into account the role the EU can play in the RtoP's operationalisation, the thesis should contribute to this crucial, and hopefully emerging, debate.

[16] Piris, 2010, p. 14.

CHAPTER 2

METHODOLOGY[17] AND THE STRUCTURE OF THE THESIS

As outlined in the introduction, the thesis focuses on the possible inclusion of the RtoP into EU's external action. The RtoP is a legal, political as well as human rights concept. As David P. Forsythe argues, the human rights are an interdisciplinary subject. Their study can therefore entail number of approaches[18]. Having this in mind, the approach to the topic studied emphasises wide range of relevant aspects, with the aim to accommodate the important perspectives from other disciplines.

A legal analysis creates concededly the major part of the thesis and permeates the entire work. Some parts, however, transcend the mere research on what the binding law says and focus rather on the normative viewpoint: «What ought to be? What would the good practice look like[19]?» Taking into account its present normative setting would the EU be able to embrace the RtoP in its external action? Does it fit into its current normative setting as such?

Next to the legal studies, the issue of system performance must be addressed[20]. Understanding the characteristics of the EU as an IGO and the procedures of its decision-making is crucial to examine the implementation of the legal framework into EU policies.

Lastly, a possible translation of laws and policies into the actual practice is assessed. Building on the existing laws, norms and tools, is the EU able to carry out the RtoP in practice? Studying the mere law

[17] The methodology has been inspired by Kamminga, Coomans & Grünfeld, 2009, pp. 45-108.
[18] Forsythe, 2009, p. 59.
[19] Brems, 2009, p. 78.
[20] *Ibidem*.

can bring misleading results. Social and political realities influence the use of law. Considering such realities helps to discover possible problems in the implementation of proposed laws and policies and allows to realistically assess the prospect of the RtoP's explicit implementation into EU's external action.

Having said that, the third chapter discusses the theoretical underpinnings of the RtoP concept focusing on the analysis of the existing international law and seeking whether it encompasses the responsibilities proposed by the RtoP concept. The evolution of the concept and its acceptance by the international community create the necessary basis for the working RtoP definition drawn in the end of the chapter and used throughout the thesis.

Chapters 4 and 5 then focus on the basis for the RtoP within the EU itself. Firstly, EU's Primary and Secondary legislation as well as the soft law instruments are examined. The purpose is to find the legal basis for the RtoP in order to assess whether EU law as it exists can actually carry out the RtoP concept. How would be the RtoP defined in accordance with EU law? Secondly, the thesis focuses particularly on the RtoP seeking when the EU has actually invoked the concept. The examination of the legal and political implications of the documents is a necessary part since the research goes further beyond the analysis of the legislative texts. The purpose is to confirm EU's own perception of the RtoP.

Without the existence of RtoP basis in EU law similar to those endorsed at the international level, the EU would never be able to invoke the concept in its external action. The same becomes true as regards the explicit acknowledgement of the RtoP existence by the EU, which would not be possibile without RtoP elements found in EU law. Therefore, the mentioned analysis plays crucial role in relation to the thesis question.

The subsequent chapter examines briefly what kind of institution the EU is and what are its decision-making procedures, which becomes important while assessing the operativeness of the instruments to uphold the RtoP analysed later in the thesis. What kind of implications raise for an effective exercise of the RtoP?

The seventh chapter examines what kind of tools and mechanisms are at EU's disposal to carry out the RtoP. Since the instruments stem from EU's legal provisions, the underlining factor of the chapter is still the legal analysis. The structure of the organisation drawn in the previous chapter would be considered to assess which elements of the RtoP may be problematic for the EU to carry out.

The subsequent chapter creates the guidelines on how the best

practice would look like taking into account all the aspects examined in the thesis. It therefore provides a reflection of existing laws, mechanisms, procedures and tools and proposes the way to consolidate all these aspects into one universal step-by-step approach that should be used in a case the RtoP situation emerges. The rationale behind such analyses remains simple. In case the EU possesses enough mechanisms to carry out the RtoP concept as a whole (in case the possibility exists to create the realistic guidelines), it indicates the possibility the EU would be able to use the RtoP in its external action. Therefore, the considerations become crucial for the research question.

To support the hypothesis that the EU is actually capable of carrying out the RtoP the case study on Libya is included in the last chapter. The application of the guidelines to the actual practice helps to assess whether the proposed step-by-step approach can be implemented and whether the hypothesis that the EU is equipped to carry out the RtoP is valid.

Taking into account the analysed EU law, rhetoric, existing mechanisms and current practice, the conclusion answers the question to what extent will the EU be able to carry out the RtoP in the future and pinpoints the possible problems[21].

[21] The thesis assesses merely whether the RtoP can be explicitly invoked in EU's external actions in the future. The effect of EU policies on the actual operationalisation of the RtoP at the international level goes beyond the scope of the thesis.

CHAPTER 3

RESPONSIBILITY TO PROTECT: EVOLUTION, LEGAL BASIS AND DEFINITION

Since it remains crucial to present the concept in question before moving towards the analysis at EU level, the chapter addresses the definition and the legal basis of an international RtoP. Starting with the concept as proposed by the ICISS[22], other crucial documents and their legal value are mentioned in order to discuss the RtoP's endorsement at the international level and draw the internationally accepted definition.

Analysis of the RtoP's legal basis emanates primarily from the concept of state sovereignty and the related obligations, the UN Charter, the international human rights law (IHRL), international humanitarian law (IHL), international criminal law and the customary international law that create strong grounds for the general idea as well as the specific responsibilities envisaged by the RtoP. The individual obligations are discussed in the second part of the chapter.

3.1. THE BIRTH, THE EVOLUTION AND THE ENDORSEMENT

The creation of the RtoP reflected, among others, upon the horrors of the 1994 Rwandan genocide and the atrocities committed one year later in the former Yugoslavia[23]. The particular attention has been paid to the failure of the international community to prevent a bloodshed stemming from the implications of Article 2(7) UN Charter and related lack of consensus regarding the legitimacy of humanitarian intervention[24]. Responsive to the former UN Secretary General's (UNSG)

[22] ICISS, 2001 (1).
[23] Williams & Bellamy, 2005, pp. 27-29; Ben-Naftali, 2009, p. 43.
[24] Article 2(7) states that nothing in the Charter shall authorise the United Nations to

calls for a need to use existing legal basis and re-think the idea of humanitarian intervention and the concept of state sovereignty[25], the independent ICISS presented its proposal in December 2001[26]. It created core principles for the RtoP rooted in obligations inherent in the principle of state sovereignty, the responsibility of the UN Security Council (UNSC) in maintaining international peace and security, the obligations under international law and the developing states' practices[27] concluding that every sovereign state has the responsibility to protect its own population from genocide, war crimes, crimes against humanity and ethnic cleansing. If the state is unable or unwilling and the population suffers the serious harm thereof, the responsibility to protect should be borne by the international community[28]. Peaceful means must be employed first, but the military intervention remains an option as a last resort and under certain rules[29]. One of the rules is the right authorisation, which lies primarily within the UNSC. The ICISS nevertheless proposes the possibility in case the UNSC is paralysed by the veto of one of its permanent members[30]. The RtoP embraces the responsibility to prevent, react and re-build, while the prevention is emphasised[31].

Despite the fact that the ICISS has been solely an advisory body founded to support the UN and to reconcile the international community over these issues[32] and its report therefore has no real legal value, it contributed significantly to an ongoing debate on how the international community should respond to the massive violations of human rights and humanitarian law and resulted in further documents and reports.

The UN High Level Panel for Threats, Challenges and Change (HLPT) appointed by the UNSG has taken up the concept in 2004 document *A More Secure World: Our Shared Responsibility*[33] encouraging prevention and focusing on RtoP's development as a primary

intervene in matters within the domestic jurisdiction of any state and together with the principle of sovereignty (Article 2(1)) and non-use of force (Article 2(4)) serves as a legal argument against the humanitarian intervention. United Nations, Charter of the United Nations, 24 October 1945, Article 98.

[25] Annan, 1999.

[26] ICISS, 2001 (1), p. V.

[27] *Ibidem*, p. XI, Article 2.

[28] *Ibidem*, Article 1.

[29] *Ibidem*, pp. XI-XII.

[30] *Ibidem*.

[31] *Ibidem*, p. XI, Articles 3 and 4.

[32] The Responsibility to Protect: About the Commission (Mandate and Organisation), available at http://www.iciss.ca/mandate-en.asp (consulted on 22 May 2011).

[33] HLPT Report, 2004.

strategy. Emphasis was placed on the primary responsibility of the national state, but the further obligation of the international community in case the national state fails to act also found its place in the report[34].

One year later the UNSG himself endorsed the RtoP concept in the 2005 report *In Larger Freedom: Towards Security, Development and Human Rights for All*[35]. Despite the fact the UNSG lacks the legislative function, the legal value of the report can be derived from the power attributed to the UNSG under Article 98 of the UN Charter, namely to perform functions in the area of the maintenance of international peace and security[36]. The report constitutes a soft law instrument, similarly as paragraphs 138 and 139 of 2005 World Summit Outcome Document that endorsed the RtoP at the level of UN member states[37], the subsequent modest resolution on RtoP adopted by the UN General Assembly (UNGA) in 2009[38] and the UNSG recent report focusing on the RtoP implementation[39]. The value of the soft law instruments cannot be underestimated. UNSC has also recalled the RtoP in his Resolution on protection of civilians in the armed conflict[40] and others often acting under the Chapter VII of the UN Charter attributing the resolutions the enforceability by law[41].

Introduction of the RtoP into all these instruments speaks in favour of the acknowledgement of the concept by the international community and opens doors for its further considerations. However, in spite of its wide citation at the international level and some legal value of the resolutions invoking it, the RtoP cannot be considered a legal norm «yet.» Carsten Stahn even argues that the RtoP might have rather been meant as a «soft law» norm or the political principle rather than hard legal norm[42]. Irrespective of these considerations, the operationalisation of RtoP would play a role in preventing gross human rights violations threatening the international peace and security that seems to be understood at least a moral duty[43]. The repeated citations of the RtoP in numerous UN documents show further the concern of the inter-

[34] *Ibidem*.
[35] Annan, 2005.
[36] United Nations, Charter of the United Nations, 24 October 1945, Article 98. See Conforti, 2005, pp. 227-229 for the interpretation.
[37] A/RES/60/1, 24 October 2005, paras. 138-139.
[38] A/RES/63/308, 7 October 2009.
[39] A/63/677, 12 January 2009.
[40] S/RES/1674/2006, 28 April 2006, para. 4.
[41] UNSC recently mentioned the RtoP in its Resolution dealing with violations of human rights in Libya. See S/RES/1973/2011, 17 March 2011.
[42] Stahn, 2007, p. 118.
[43] Tesón, 1988, p. 217; Arbour, 2008, pp. 445-458.

national community and the willingness to uphold it[44]. The question remains in which form and to what extent. The answer shall now be sought in the existing body of international law.

3.2. THE LEGAL BASIS

International law shows that some of the RtoP components are already deeply rooted in the existing legal norms. Understanding the legal basis of the concept will help to establish the RtoP definition accepted by the international community and identify elements that still remain controversial and need to be reconciled. Such considerations will become crucial while assessing EU's perception of the RtoP. Since the RtoP is an international norm, EU's analysis must move along the RtoP at the international level.

Bearing in mind the definition proposed by the ICISS the RtoP's legal core is firstly sought in the obligations inherent in the UN Charter and the concept of the state sovereignty and the international security, and secondly in IHRL, IHL, international criminal law and customary international law. The legal analysis is complemented by the references to the changing international law and state practice.

3.2.1. The UN Charter, Emergence of the Human Rights Discourse and a Changing Concept of State Sovereignty and International Security

The emergence of human rights norms played a crucial role in the shift in the Westphalia understanding of state sovereignty[45] hand in hand with an uncontested legal sovereignty allowing the states to enter international legal regimes and let the supranational authorities to control their affairs[46]. The adoption of the UN Charter provided for many possibilities to recognise human rights internationally[47].

The purposes of the UN listed in Article 1 of its Charter are among others to maintain international peace and security and promote respect for the human rights and fundamental freedoms[48]. The foun-

[44] See for example the later UNSC Resolution on protection of civilians in the armed conflict (S/RES/1894/2009, 11 November 2009) or various Human Rights Council Resolutions on situations requiring the special attention of the council (for more information consult http://www2.ohchr.org/english/bodies/hrcouncil/), etc.

[45] Krasner, 2001, pp. 234-239; Oppenheim, 1992, pp. 998-1020; Ben-Naftali, 2011, p. 33.

[46] See inter alia ICISS, 2001 (2), pp. 7-10; Newman, 2001, pp. 239-241; Krasner, 2001, pp. 231-239; Stahn, 2007, pp. 110-113. EU demonstrates such an example.

[47] Oppenheim, 1992, pp. 988-993.

[48] United Nations, Charter of the United Nations, 24 October 1945.

dation of the UN created for its members as Oppenheim argued «[...] at least moral, and – however imperfect, a legal-duty to use their best efforts [...] to act in support of a crucial purpose of the Charter[49].» The Charter expresses in its Preamble the determination «to reaffirm faith in the fundamental human rights[50].» Further, these rights are to be of the UN objective in an economic and social cooperation and understood as a prerequisite for the stability and well-being – the basis for the friendly relations among nations[51]. In Articles 55 and 56 the UN member states pledge themselves to achieve purpose of the UN and promote universal respect for human rights[52].

The sovereignty in this sense encompasses not only rights but also duties and obligations. Articles 2(1)[53] and 2(7)[54] of the UN Charter cannot be read in isolation, but rather understood in the framework of the entire document. The relevance of Articles 1(3)[55] and 55[56] UN Charter cannot be doubted[57]. One of the aspects of the RtoP reflects such an interpretation of the UN Charter and stresses the importance of understanding sovereignty not as a control, but as a responsibility to protect the rights of citizens of the state concerned[58].

The UN Charter therefore represents the basis for the primary RtoP that lies within the state as well as the responsibility of the UN to maintain international peace and security, which as it will be described later, creates another important RtoP aspect.

However, the Charter alone cannot fully guarantee the protection especially due to the vague definition of human rights related obligations[59]. Subsequent proliferation of the various human rights instruments such as the International Bill of Rights[60], the UN Convention

[49] Oppenheim, 1992, p. 989.
[50] United Nations, Charter of the United Nations, 24 October 1945, Preamble.
[51] United Nations, Charter of the United Nations, 24 October 1945, Article 55. See Oppenheim, 1992, pp. 988-993 for further analysis.
[52] United Nations, Charter of the United Nations, 24 October 1945, Articles 55-56.
[53] *Ibidem*, Article 2(1).
[54] *Ibidem*, Article 2(7).
[55] *Ibidem*, Article 1(3).
[56] *Ibidem*, Article 55.
[57] Stahn, 2007, pp. 110-112.
[58] ICISS, 2001 (2), pp. 5-13.
[59] Particularists for example support the non-intervention principle enshrined in Article 2 UN Charter claiming that human rights remain within the explicit domestic jurisdiction of every state. Such interpretation negates the international responsibility for the human rights protection.
[60] International Bill of Rights consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

against Torture[61], the UN Genocide Convention[62] as well as the establishment of various international criminal tribunals[63] further shaped the human rights discourse. Some of the included provisions became a customary international law and some imposed the binding and enforceable obligations upon the parties to them[64] creating stable basis for the RtoP concept.

Besides the sovereignty the concept of security has also been evolving reflecting upon the provisions of the Charter. Firstly, by the adoption of the UN Charter, the international community has acknowledged that human rights are crucial to maintain international peace. Secondly, security does not mean purely the absence of war anymore, but reflecting upon the provisions in the Charter includes *inter alia* a social development and a social justice as part of the conflict prevention and stability maintenance strategies[65]. Broadening of the conception of international peace and security has played an important role in possible overcoming of the non-intervention principle[66].

Furthermore, the scope of threats to international peace and security has broadened absorbing new security issues such as proliferation of armed conflicts of internal nature and related weakening of state structures and institutions and increasing vulnerability of civilians. The humanitarian catastrophe in any country regardless how distant it is may affect the world peace and security[67].

The shift in understanding of state sovereignty and established link between the human rights violations and the instability presents a starting point for the RtoP reasoning providing the international community with a right to uphold the RtoP, while the peace and security in the world presents the solid basis for an argument in favour. However, the core for the RtoP reasoning lies within the crimes it encompasses and obligations it promotes. We shall now turn to these particular RtoP aspects.

[61] A/RES/39/46, 10 December 1984.
[62] A/RES/260(III)A, 9 December 1948.
[63] See for example the Rome Statute (A/CONF.183/9, 17 July 1998), the ICTY Statute (S/RES/827/1993, 25 May 1993), the ICTR Statute, (S/RES/955/1994, 8 November 1994), the Charter of the International Military Tribunal (8 August 1945).
[64] Many of the provisions of the UDHR became the customary international law, moral obligation and standard for the action. Instruments like a Genocide Convention became legally binding (see Oppenheim, 1992, p. 1002).
[65] Oppenheim, 1992, p. 988; Annan, 2008.
[66] ICISS, 2001 (1), p. 9.
[67] *Ibidem*, pp. 4-5.

3.2.2. The Four RtoP Crimes in International Human Rights, Humanitarian, Criminal and Customary Law and the Primary Obligation to Prevent Adjudicated to the Home State

The acts of genocide, ethnic cleansing, war crimes and crimes against humanity, the four RtoP crimes, are considered flagrant breaches of international law codified in the existing international instruments. Such an argument plays very much in favour of the RtoP realisation. The analysis of these instruments is therefore necessary in order to discuss whether the RtoP obligation exists.

The core of the RtoP lies in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention)[68]. Genocide is defined by the Convention as an act with the intention to «[...] destroy in whole or a part of the national, ethnical, racial or religious group[69].» Article 1 of the Convention confirms the genocide a crime under the international law[70] including next to the act of genocide itself also the conspiracy, incitement or attempt to commit the genocide as well as the complicity in it and explicitly obliges the parties to the Convention to prevent and punish such a crime[71]. The punishment should work as a deterrent and play a role in discouraging the future crimes. The responsibilities to prevent and punish are often understood as connected[72].

To examine the obligation to prevent attributed to the parties to the Convention it becomes necessary to assess the Genocide Convention as an instrument of the international criminal law first. Next to Article 1, Article 9 provides for the disputes relative to the responsibility of states for genocide, to be referred to the International Court of Justice (ICJ)[73], which in the case of *Bosnia and Herzegovina v. Yugoslavia* ruled in favour of the state's obligation to prevent under the Genocide Convention[74]. Moreover, with the emergence of the IHRL, many other human rights instruments started to oblige the states to ensure protection to their citizens[75]. IHRL

[68] A/RES/260(III)A, 9 December 1948. For the explanations see Ben-Naftali, 2009, pp. 27-57.

[69] A/RES/260(III)A, 9 December 1948, Article 2.

[70] *Ibidem*, Article 1.

[71] *Ibidem*, Article 3.

[72] *Ibidem*; Ben-Naftali, 2009, pp. 27-57.

[73] A/RES/260(III)A, 9 December 1948, Article 9.

[74] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*) (Judgment) [2007] ICJ, para. 438.

[75] *Ibidem*, para. 429; A/RES/39/46, 10 December 1984, Article 2; A/RES/49/59, 9 December 1994, Article 11. ICCPR states that are parties to the Covenant must respect and ensure to all individuals the rights recognised by the Covenant (A/RES/2200A(XXI), 16 December 1966, Article 2(1)). For commentary see Seibert-Fohr, 2009, pp. 356-361.

places the state not only under the negative obligation to refrain from violating human rights, but also under the positive obligation-duty to prevent the violations[76]. The obligation to prevent has been further confirmed as a legal duty by the ICJ in *1951 Opinion on the Reservations to the Genocide Convention* confirming the crime of genocide a crime under the customary international law[77]. Therefore, every state even without being the party to the Convention carries such an obligation. The prevention of genocide represents one of the RtoP aspects, therefore, the obligation stemming from the Genocide Convention prevents the controversy as regards this particular RtoP point.

The RtoP concept further encompasses war crimes and crimes against humanity – both confirmed by the International Law Commission (ILC) as crimes under the international law[78]. War crimes, the oldest of the four RtoP crimes, derive already from the 1907 Hague Convention[79]. The status of punishable international crime has been further confirmed in many international instruments defining it as a grave violation of the Geneva Conventions[80] and the laws or the customs of war[81], however, no consensus existed whether the crimes committed in the non-international armed conflict should also be included[82], which would be the key question for the RtoP. Current conflicts are rather of non-international character. The 1998 Rome Conference confirmed the willingness of the international community to ensure the international criminal liability also for the acts committed during the non-international armed conflict[83], which resulted in four categories of war crimes recognised by the Rome Statute – two of them dealing with international and the other two with non-international armed conflict[84]. Since the mentioned two crimes fall

[76] CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8; Seibert-Fohr, 2009, pp. 361-369.

[77] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), 28 May 1951, available at http://www.icj-cij.org/docket/files/12/4283.pdf (consulted on 2 June 2011) stated that «[...] the principles underlying the Convention are recognised by civilised nations as binding even without any conventional obligations.»

[78] A/CN.4/SER.A/1950/Add.1, 6 June 1957.

[79] Hague Convention, 18 October 1907; Schabas, 2010, p. 195.

[80] A/CONF.183/C1/SR.5, 15 June-17 July 1998, para. 75.

[81] *Ibidem*, para. 33.

[82] See *inter alia* Hague Convention, 18 October 1907; Charter of the International Military Tribunal (8 August 1945); A/RES/3074(XXVIII), 3 December 1973; A/CN.4/SER.A/1950/Add.1, 6 June 1957, para. 89; Schabas, 2010, pp. 192-206 for explanations.

[83] A/CONF.183/9, 17 July 1998.

[84] First and third category deals with grave breaches of Geneva Conventions, former during the international armed conflict, and later during the non-international one. The second and forth category encompass «other serious violations of the laws and customs» applicable similarly in international and non-international armed conflict (A/CONF.183/9, 17 July 1998, Article 2).

also under the RtoP concept, the applicability of the RtoP to the armed conflict of non-international character must be undoubtedly considered.

The International Criminal Court (ICC) has jurisdiction over all three abovementioned crimes. Such principle of the universal jurisdiction is related to the norms recognised as *erga omnes* and *jus cogens* bringing certain obligations binding upon the states[85]. Most norms of IHL, especially those prohibiting war crimes, crimes against humanity and genocide obtained such status and therefore are non-derogable[86]. States, even though they are not party to the ICC, Geneva Conventions or other international treaties, must refrain from and prevent such acts and also punish the individuals responsible for these crimes[87]. State responsibility to prevent these crimes, including in the armed conflict of non-international character, cannot further be doubted, which means that this particular RtoP part already exists in EU law.

The last RtoP aspect, the ethnic cleansing, notwithstanding no agreed legal definition exists and the crime is not explicitly included in the ICC jurisdiction, can also to some extent be considered as a crime under the international law. The term has emerged in relation with the Bosnian war and is included in the Statute of the International Criminal Tribunal for Former Yugoslavia relative to the grave and widespread breaches of humanitarian law[88]. In fact, the ethnic cleansing can be defined as more or less isolated violations of international human rights law and international humanitarian law ranging from administrative and political measures[89] to the most egregious violations such as terrorising civilian population with the intent to force their flight[90]. In the worst case such practices can amount to the other three abovementioned crimes[91].

[85] See *Prosecutor v. Furundzira* (Judgment) ICTY-95-17/1 (10 December 1998), para. 520; *Prosecutor v. Delalic* (Judgment) ICTY-96-21-A (20 February 2001), para. 138; *Prosecutor v. Krstic* (Judgment) ICTY-98-33-T (2 August 2001), para. 541; Schabas, 2010, pp. 192-206.

[86] Thalmann further argues that the analyses of the *travaux preparatoires* and the provisions show that the Geneva Convention provide for the universal jurisdiction (thalmann, 2009, p. 252).

[87] See A/CN.4/SER.A/1950/Add.1, 6 June 1957, p. 55, para. 89 confirming that crimes against humanity constitute crimes under the international law; Charter of the International Military Tribunal (8 August 1945), Article 6(c); and A/RES/3074(XXVIII), 3 December 1973 for the obligation under international law to punish such crimes.

[88] ICTY Statute, S/RES/827/1993, 25 May 1993; Schabas, 2010, pp. 192-206.

[89] Petrovic, 1994, p. 353.

[90] A/RES/47/121, 18 December 1992, Preamble; Schabas, 2010, p. 131; Petrovic, 1994, pp. 348-352.

[91] *Prosecutor v. Krstic* (Judgment) ICTY-98-33-T (2 August 2001); Barbour & Gorlick, 2008, p. 11.

Many scholars argue that ethnic cleansing is included in the crimes against humanity[92], therefore, encompassed in Article 7 ICC Statute and Article 5 of the Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY)[93]. The ICTY ruled in the Krstic case that obvious similarities exist between the genocide and the policies of ethnic cleansing[94]. UNGA later condemned these practices and called for the necessity to punish the crime of ethnic cleansing[95]. Such a wide acceptance of the inclusion of the ethnic cleansing within the crimes against humanity or genocide gives it recognition as a crime under the international law. Possibly, in relation to the RtoP, the wide definition of an ethnic cleansing provides for additional space of what can be considered an RtoP case[96]. Further, the obligation to prevent all four RtoP crimes becomes undisputable.

The assumption that can be made from the analysis of the core RtoP crimes is threefold. Firstly, the RtoP is based on the violations of the human rights widely recognised as crimes under the international law and even more importantly under the customary international law. Therefore, the obligation to prevent directly stems from these crimes. Secondly, as it has been shown, the state's obligation to prevent in relation to these crimes has been widely recognised in the international law. Thirdly, every state then carries inherent legal duty to protect human rights of individuals under its jurisdiction. Such conclusions underline the proposed First pillar of the RtoP concept referring to the undisputed primary obligation of the home state to prevent genocide, war crimes, crimes against humanity and ethnic cleansing.

The crucial consideration for the RtoP remains whether the obligation to protect exists for third parties. Without such an obligation, any international or regional organisation, importantly for the topic analysed – the EU, would have the responsibility towards the citizens of the other states. Such issues shall then be assessed in the next part of the thesis.

[92] Petrovic, 1994, p. 353; Barbour & Gorlick, 2008, p. 11.

[93] A/CONF.183/9, 17 July 1998, Article 7; S/RES/827/1993, 25 May 1993, Article 5 deal with crimes against humanity.

[94] *Prosecutor v. Krstic* (Judgment) ICTY-98-33-T (2 August 2001), paras. 560 and 562.

[95] *Prosecutor v. Krstic* (Judgment) ICTY-98-33-T (2 August 2001); A/RES/47/80, 16 December 1992, OP 4.

[96] Together with the establishment of the international criminal tribunals, the international jurisprudence developed and for example rape is now legally recognised as a part of ethnic cleansing in relation to the Bosnian conflict and even as a part of genocide (see ICISS, 2001 (1), p. 22).

3.2.3. The Third Parties and the Obligation to Prevent

Since the Genocide Convention played significant role in imposing the RtoP like obligations, we shall again turn to it. Article 8 of Genocide Convention provides for the right to call for an attention of the competent UN organs to take appropriate action in order to prevent or suppress genocide[97]. Basing the reasoning on Judge Lauterpacht's 1993 Separate Opinion[98], Ben-Naftali argues that while Article 8 is read in conjunction with Article 1 of Genocide Convention the obligation of the third parties to prevent and punish genocide exists under the international law[99]. «The duty to prevent genocide is a duty that rests upon all parties and is a duty owed by each party to every other[100].»

Lauterpacht's opinion opened the door for considerations of states' responsibility to employ all necessary means to prevent genocide[101]. Similarly such an obligation falls to the international community. Moreover, we shall remember that the obligation to prevent is *jus cogens* norm, therefore the obligation *erga omnes*, which has the implication regarding the obligations of the third parties.

In case the mentioned obligations can further be proven, the Second and Third RtoP pillar requiring the international community to react if the state concerned is unable or unwilling to assume the RtoP towards its citizens – in the light of the present analysis, to prevent genocide, ethnic cleansing, war crimes and crimes against humanity –, the international community would be requested to assume the responsibility to prevent these crimes. Building on the existing basis in international law for the duty of third parties to prevent genocide, the issue of acceptance of such an obligation remains crucial.

Firstly, justification of North Atlantic Treaty Organisation's (NATO) intervention to Kosovo by UNSG and part of the international community was based in the obligation to prevent genocide[102]. The reluctance of the international community using the term «genocide» in relation to the events in Rwanda shows the acknowledgement of responsibilities to prevent this particular crime[103]. Furthermore, the mechanisms established under the UN auspices such as the mandate of

[97] A/RES/260(III)A, 9 December 1948, Article 8.
[98] Separate Opinion of Judge Lauterpacht (Provisional Measures Order) [1993].
[99] Ben-Naftali, 2009, pp. 36-41.
[100] Separate Opinion of Judge Lauterpacht (Provisional Measures Order) [1993], para. 86.
[101] Ben-Naftali, 2009, p. 39.
[102] *Ibidem*, p. 43.
[103] Williams & Bellamy, 2005, pp. 27-29; Ben-Naftali, 2009, p. 43.

the UN Special Rapporteur on the extrajudicial, summary and arbitrary executions[104], the Advisory Committee on the Prevention of Genocide[105], the UN Special Advisers on Genocide[106] and the RtoP[107] including the Early Warning Mechanisms (EWM) aiming to prevent genocide as well as the acknowledgement that the international community should help the state concerned to protect its population from genocide[108] demonstrates the acceptance of such responsibility. However, does it apply to other RtoP crimes?

Turning the attention towards the obligation *erga omnes* in relation to the crimes under the international law, Article 31 of the Vienna Convention on the Law of the Treaties (VLCT) states that while constructing the Treaty obligation, the other existing relevant international obligation must be taken into account. Bearing such consideration in mind, Ben-Naftali suggests that the jurisdiction over genocide should therefore be similar to that over other international crimes[109]. Such assumption seems sufficient to conclude that the obligation of the international community to prevent is inherent in the existing international law and therefore the Second and Third RtoP pillar in relation to the prevention already exists.

3.2.4. Responsibility to React

The reaction of the international community to the introduction of the RtoP has actually reflected previous considerations. The responsibility to prevent has been accepted by the international community with the relative ease. The opposite is, however, truth as regards the responsibility to react that still seems to struggle due to the controversies surrounding the humanitarian intervention[110]. The difference between the RtoP and the humanitarian intervention shall be briefly addressed first. The extent to which the RtoP managed to overcome the controversial aspects of the humanitarian intervention reflects the level of probability to which the international community will be able to uphold the RtoP.

[104] A/HRC/RES/8/3, 18 June 2008, OP 2.
[105] SG/A/1000, 3 May 2006.
[106] S/2004/567, 13 July 2004.
[107] *Ibidem*.
[108] A/RES/60/1, 24 October 2005, paras. 138-139. The UN activity in the area of peacekeeping also encompasses the preventive component. See for example the mandate of the UN mission in Congo (MONUC) pursuant the UNSC Resolution 1291/2000 explicitly including the prevention and punishment of the genocide. S/RES/1291/2000, 24 February 2000.
[109] Ben-Naftali, 2009, p. 52.
[110] Wheeler & Bellamy, 2005, pp. 546-564; Annan, 1999.

The ICISS presented the responsibility to react as a necessary response «to situations of compelling human needs with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention[111].» The humanitarian intervention is contrary to this concept being defined as a forcible (military) intervention to another state without its consent to address humanitarian catastrophe usually caused by the grave breaches of human rights[112]. Fernando Tesón talks about three types of intervention aiming at influencing the policies of the state concerned: (1) Discussions about the human rights situation, recommendations and use of diplomatic means; (2) Adoption of the coercive measures such as economic sanctions or arms embargoes; and (3) forcible intervention – the humanitarian intervention[113]. The RtoP comprises all these three aspects, which shall be employed in the consecutive order. Less coercive and peaceful measures shall always be considered first[114].

Since the mere forcible humanitarian intervention presents the problem, while the other coercive measures are already included in the established practice of states and the United Nations, the international community may be able to accept the major part of the second RtoP responsibility – responsibility to react. The analysis regarding the EU must be later in the thesis lead exactly in these lines assuming that the EU will similarly face the problem of the possible military (humanitarian) intervention.

Moreover, the humanitarian intervention could have been carried unilaterally, which proved unacceptable for many states[115]. The RtoP seeks to reconcile the issue of state sovereignty and intervention dividing the responsibility between the home state and the international community stating that the primary responsibility remains within the home state and the forcible intervention is possible only as a last resort when the home state is manifestly unwilling or unable to protect its population[116]. Taking into account these considerations, legal basis for the responsibility to react shall be sought from different perspective than those for humanitarian intervention, namely through the obligations inherent in the Charter and the existing legal instruments.

[111] ICISS, 2001 (1), p. XI, para. 3(b).
[112] See for example Wheeler & Bellamy, 2005, p. 556; Tesón, 1998.
[113] Tesón, 1998, pp. 325-326.
[114] ICISS, 2001 (1), p. XI.
[115] Tesón, 1998, p. 323.
[116] Stahn, 2007, p. 103; ICISS, 2001 (1).

As demonstrated on the UN Charter provisions and related IHRL, the state has the obligation to act in certain ways to protect human rights[117], while breaching these obligations now constitute the legitimate concern of the international community. Notwithstanding Article 2(7), the legal basis exists to act in case of the grave breaches of human rights, which presents the crucial element for the RtoP reasoning.

Having discussed Article 8 of the Genocide Convention[118] as a legal basis for the international community's obligation to prevent, the similar conclusion can actually be drawn as regards the responsibility to react since Article 8 provides not only for the prevention but similarly also for the suppression of the crime of genocide. However, the main basis for the responsibility to react stems from the UN Charter and the obligation of the UNSC, the most important UN body in this respect, to maintain international peace and security.

The UN Charter explicitly authorises the UNSC to deal with the issues relative to international peace and security in Chapters VI and VII. Chapter VI orders the UNSC to seek solution primarily by peaceful means in case that it identifies the issue that could endanger the international peace and security. Under Article 11 of the UN Charter, General Assembly «may call the attention of the Security Council to situations which are likely to endanger international peace and security[119].» The UNSC itself can in accordance with Article 39 «[...] determine the existence of any threat to peace [...] make recommendations or decide what measures shall be taken [...][120].» All peaceful means must be exhausted first[121]. The UNSC shall act under Chapter VII of the UN Charter and use forcible means that can even amount into military intervention[122]. Since the UN, more specifically, the UNSC is in accordance with the Charter responsible for maintaining international peace and security, it is therefore further

[117] The rules concerning the basic rights of the person such as «Right to life» constitute the obligations *erga omnes* as well as are reflected in the 4th Preambular paragraph of the ICCPR (A/RES/2200A/XXI, 16 December 1996) and the UN Charter obligation to promote universal respect for human rights. Non-compliance with such obligations shall be viewed as an unfriendly act in accordance with the Vienna Convention on the Law of the Treaties (VLCT, 23 May 1969, Article 26). Article 2(1) ICCPR mentions the positive obligation to refrain from the human rights violations and negative obligations to prevent, punish, investigate and redress harm under the jurisdiction of the state concerned. Failure to do so constitutes a legitimate interest of the international community. See CCPR/C/21/Rev.1/Add. 13, 26 May 2004; Ben-Naftali, 2009, p. 43.

[118] See Chapter 3.2.3.

[119] United Nations, Charter of the United Nations, 24 October 1945, Article 11(3).

[120] *Ibidem*, Article 39.

[121] *Ibidem*, Article 41.

[122] *Ibidem*, Articles 41 and 42.

obliged by the UN Charter to protect human rights in the world and act in the case of grave breaches. Mentioned provisions then create legal basis for the responsibility to react under the RtoP.

The question of a right authority to approve the intervention remains very valid. In the first place, the UNSC shall be the first to authorise the intervention. That seems clear and generally accepted by the international community[123]. However, what if the UNSC fails to act or stays paralysed by the veto of one of its permanent members? In an answer to that question, the international community remains divided, which will later be visible also at EU's approach.

Following the interpretation of Carsten Stahn, the rights authority differs in the ICISS report, the 2005 World Summit Outcome Document, the Report of the HLPT and the UN Secretary General's report[124]. The ICISS proposes the possibility to overcome the UNSC by bringing the agenda to the UNGA under *Uniting for Peace* Resolution[125] or leaving the regional organisations or coalitions of states to act. Unilateral action is undesirable[126]. Contrary to that, the World Summit Outcome Document leaves the possibility of unilateral intervention opened, but the problem must be dealt on the case-by-case basis. Furthermore, no explicit responsibility is directly included in the document. Individual states rather demonstrate the willingness to conduct possible action rather than to explicitly accept an obligation[127]. The HLPT and the UN Secretary General have expressed the most cautious approach. Both reports allow humanitarian intervention only with the authorisation of the UNSC acting under Chapter VII of the Charter without providing for any other possible option[128].

To sum up, the legal basis for the RtoP remains undisputed as well as some aspects of the responsibility to react excluding the military intervention that needs further consideration by the international community.

3.2.5. Responsibility to Rebuild

As it has been stated at the beginning of the chapter the RtoP goes beyond the responsibility to prevent and react aiming to assist states in post-conflict situation by providing full assistance that would lead to

[123] HLPT Report, 2004, para. 81; ICISS, 2001 (2), pp. 29-37; Annan, 2005; A/RES/60/1, 24 October 2005, para. 139.
[124] Stahn, 2007, pp. 99-120.
[125] A/RES/377(V), 3 November 1950.
[126] ICISS, 2001 (2), pp. 47-55.
[127] Stahn, 2007, pp. 108-109.
[128] *Ibidem*, pp. 102-110.

recovery, reconstruction and reconciliation during their transition to a durable peace, good governance and sustainable development[129].

As it will be explained in more detail later in the thesis, the responsibility to rebuild primarily stems from the responsibility to prevent. Given the cyclical nature of the conflict, the state often falls back into the conflict if the peace is not effectively consolidated and the root causes of the problem effectively tackled[130].

The international community has also acknowledged that in the World Summit Outcome Document endorsing the RtoP[131]. The UN member states claimed the commitment to build capacity of war-torn societies in order to protect the population from the RtoP crimes[132]. Therefore, the primary legal basis has to be sought in the confirmed responsibility to prevent and rebuild. The responsibility of the international community to rebuild war torn societies has been codified in many UN resolutions[133] and the rampant state practice[134].

Based on this presumption, it is worth noting that the responsibility to rebuild is directly linked to Article 55 of the UN Charter seeking the international co-operation in economic and social affairs[135]. Promotion, protection and respect for human rights without discrimination[136], in-

[129] ICISS, 2001 (1), pp. XI and 39; A/RES/60/1, 24 October 2005, para. 139.

[130] See Swanström, Weissmann, 2005. The conflict cycle will be explained in the detail in Chapter 8. The example could be the conflict in Sierra Leone that re-escalated after the signature of the Abijan Peace Agreement signed in November 1996 as well as Bosnia and Herzegovina, where the root causes of the problem (ethnic division) were not effectively tackled and despite of the robust rebuilding efforts of the international community, the country is now again about to fall into the conflict phase (UNAMSIL, Sierra Leone: Background, 2005, available at http://www.un.org/en/peacekeeping/missions/past/unamsil/background.html (consulted on 3 May 2011); International Crises Group, Bosnia: The State Institutions under Attack, Europe Briefing No. 62, 6 May 2011, at http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/b062-bosnia-state-institutions-under-attack.aspx (consulted on 20 March 2011)).

[131] A/RES/60/1, 24 October 2005, para. 139.

[132] *Ibidem*.

[133] The UNGA resolutions confirmed the right of victims of conflict to receive international assistance as a part of post-conflict building in the Resolutions A/RES/43/131, 8 December 1988, and A/RES/45/100, 14 December 1990. The outcome document also confirmed this right of victims/responsibility of the international community (A/RES/60/1, 24 October 2005).

[134] The international community is active in building post-conflict societies through complex peace operations including peace-building component, capacity-building, justice and reconciliation as well as transfer of the institutional ownership to the people. See for example: S/RES/1289/2000, 7 February 2000, mandating the UN Assistance Mission in Sierra Leone; S/RES/1925/2010, 30 June 2010, UN Stabilisation Mission in the Democratic Republic of Congo (MONUSCO).

[135] The lack of development, economic instability and poverty often fuel the internal conflicts. Political repression, drive for power and corruption must also be taken into account. HLPT Report, 2004, pp. 16-23.

[136] United Nations, Charter of the United Nations, 24 October 1945, Article 55(c).

cluding minority rights and attempts to integrate all groups into the decision-making process must create a part of a peace consolidation, but also conflict prevention strategies. The assumption generally supports the stated hypothesis[137]. Such consideration must be addressed since it will play an important role while assessing EU's perception of the RtoP and its possible action. As it will be shown, the EU places huge emphasis on the structural prevention that stems from the link between development, human rights, security and the emergence of the RtoP situation. However, before turning to the EU the international RtoP definition must be established.

3.3. RTOP DEFINITION: THE CURRENT RTOP CONCEPT BY THE INTERNATIONAL COMMUNITY

It is worth repeating that the ICISS does not present the UN body, therefore its report provides rather guidelines for an interpretation. Notably, the RtoP concept can be found in the international law, however, must be interpreted within the current conditions. As it has been shown, the international community is now moving farer from the rigorous concept of state sovereignty towards the international protection of human rights.

Since the RtoP is not a legal norm yet, the most powerful document to uphold it remains the outcome document of the 2005 World Summit adopted unanimously by all the UN member states and the subsequent consensual adoption of the UNGA Resolution on RtoP[138]. Therefore, the obligation of each state to protect inherent in the principle of state sovereignty (RtoP's «Pillar One») remains undisputed[139]. Such a consensus has further been confirmed in many legally binding UNSC resolutions issued under Chapter VII UN Charter[140]. The acknowledgement that international community should further assist the states to carry this responsibility, especially through the preventive mechanisms can be considered as a support for the third party obligations to prevent (RtoP's «Pillar Two»)[141].

Second paragraph of the outcome document allows for an inter-

[137] Annan, 2005.
[138] A/RES/63/308, 7 October 2009.
[139] A/RES/60/1, 24 October 2005, para. 138.
[140] As a recent case we can cite the S/RES/1970/2011, 26 February 2011, PP 4 on the situation in Libya explicitly stating that the primary responsibility to protect must be carried out by the state concerned.
[141] A/RES/60/1, 24 October 2005.

vention without the consent of the state concerned (RtoP's «Pillar Three»), but rather than a duty states the preparedness to act through the UNSC on a case-by-case basis[142]. This assumption shows that the agreement of the international community on the obligation to act remains yet very fragile[143]. Taking into account the previous considerations, the obligation to act remains rather linked to the maintenance of international peace and security. The link with human rights violations under the responsibility to act is therefore rather implicit.

Considering the responsibility to rebuild, according to Carsten Stahn the World Summit Outcome Document is a result of the compromise on one hand and an attempt to give the idea a legal meaning on the other[144]. The statement does not imply any obligation after the military intervention-reaction by the international community and seems that it does more refer to the prevention rather than post-conflict reconstruction[145]. The responsibility to rebuild is contained in the positive obligation and extraterritorial application of the obligations included in the international human rights law as well as the responsibility to prevent itself[146].

Even thought the legal basis for the RtoP exists, there is not yet a place for an overall consensus in our political reality. The international community still remains caught between the universal and particular understanding of human rights, the power politics and the fear of the misuse of the concept by the stronger states in order to intervene into the small ones persists. Taking into account the evolution of the human rights discourse during the past sixty, and more profoundly, past twenty years and the evolution in the international law, the place for the RtoP consensus exists. The need for further consideration by the international community was still reverberated in the World Summit Outcome Document[147]. We shall now examine whether the EU, one of the strongest RtoP supporters, can already carry out the RtoP idea in its policies.

[142] *Ibidem*, para. 139.

[143] The discussion in the UNGA while adopting the RtoP Resolution confirmed that many states still have the problem with the RtoP concept being afraid of its possible misuse by the powerful nations (Venezuela, Cuba, Sudan, Nicaragua, Iran). Some states explicitly stated that there is no RtoP consensus yet. See GCR2P Summary of Statements on Adoption of Resolution RES A/63/L80 Rev 1, September 2009, available at http://globalr2p.org/media/pdf/GCR2P_Summary_of_Statements_on_Adoption_of_Resolution_on_R2P.pdf (consulted on 7 June 2011).

[144] Stahn, 2007, pp. 109-110.

[145] *Ibidem*.

[146] *Ibidem*.

[147] A/RES/60/1, 24 October 2005, para. 139.

CHAPTER 4

COMPATIBILITY OF THE RESPONSIBILITY TO PROTECT WITH THE LAW OF THE EUROPEAN UNION

As it has been said, the EU can be an important player in the actual realisation of the RtoP doctrine that in the time being lies somewhere between the simple rhetoric and a baseline for an action. Before assessing EU's abilities to use the concept for its own action, it is necessary to find out, whether a basis for the RtoP exists in EU law.

The sources of EU's law comprise of Primary legislation, which consists of founding treaties including the amendments, the international agreements involving the EU, the Secondary legislation through which the European institutions exercise EU's competence (directives, regulations, decisions, recommendations and opinions), the international treaties that are binding upon all EU member states in the areas where the EU assumed the responsibility, the judgements of the Court of Justice of the EU (formerly European Court of Justice (ECJ)), the general principles of law and the recommendations that have been adopted in the light of the existing treaties[148]. Other non-binding acts also create part of the European law[149]. The following chapter seeks the legal framework for the RtoP in these sources of EU law.

Primarily, as a definition stemming from the previous chapter states the RtoP is a concept seeking to reconcile the existing tension between the human rights on one hand and the sovereignty and non-intervention on the other[150]. To seek the meaning of human rights, sovereignty and non-intervention in EU law is essential in order to establish

[148] Wyatt & Dashwood, 2006, pp. 126-127.

[149] E.g. joint declarations, recommendations of the Joint Committee, communications, etc. (Wyatt & Dashwood, 2006, p. 127). In accordance with Article 290 the Commission may also adopt non-legislative acts that may have general implications. TFEU (Lisbon Treaty, as amended), Article 290.

[150] See Chapter 3.2.

the legal basis for the entire RtoP concept. Subsequently, the existence of the RtoP obligations in EU law must be analysed. In this sense, the internal dimension, e.g. which responsibility the EU has towards its member states will be assessed. If the EU would not be able to act in accordance with the RtoP in its internal policies it would hardly assume such obligation at the international level.

The EU further clearly declares the goal to be an active global player[151]. Would it be able to carry the RtoP if a non-EU state is unable or unwilling to protect its own population? The second part of the chapter seeks to identify the legal basis for EU's external action and the values and principles the EU foreign policy stands on. Does the link between the human rights and international peace and security exist in EU law? Is there any legal obligation in the RtoP sense?

The third part of the chapter then focuses on the four RtoP-related crimes. Are they explicitly mentioned in EU law? Do they imply any related obligations?

Further, the legal basis for the individual RtoP parts (prevent, react and rebuild) is discussed assessing whether they are clearly coming up or EU law must be extended and interpreted in the way that would allow for the accommodation of the particular RtoP components. Here the law must be interpreted in even broader way and also some non-legislative acts must be taken into account[152].

4.1. INTERNAL DIMENSION: HUMAN RIGHTS, SOVEREIGNTY AND NON-INTERVENTION PRINCIPLE IN EU LAW AND RELATED OBLIGATIONS

Despite the fact the first treaties relative to the European integration[153] did not include any reference to human rights, the European Court of Justice (ECJ) ruled in the Internationale Handelsgesellschaft case that human rights are contained in general principles of law and in the constitutional traditions of the individual EU member states, and therefore apply to the acts of the Community[154]. A Joint Declaration of

[151] EUCO 21/1/10 REV 1, 12 October 2010.

[152] E.g. documents that have been anonymously adopted by the Council in the area of CFSP, communications form the Commission aiming to interpret some Treaty provisions, common positions and statements anonymously adopted and presented in the international forums.

[153] See Treaty establishing European Coal and Steel Community (Paris Treaty), Treaty establishing the EURATOM and European Economic Community (Rome Treaties).

[154] Internationale Handelsgesellschaft mbHv Einfuhr- und Vorratsstelle für Getreide und

the European Parliament (EP), European Commission (COM) and the Council to respect fundamental rights[155] and the subsequent link to democracy promotion on the basis of human rights in the Single European Act[156] further confirmed that human rights have always had a place in EU law. The Treaty of Maastricht already explicitly stated that «[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law[157].» The EU shall conduct its policies in the light of this objective.

The Amsterdam and Nice treaties introduced the biggest breakthrough establishing a stable fundamental rights system in the EU. The former, the Amsterdam Treaty brought about human rights and fundamental freedoms as a founding principle of the EU[158] and even provided for a preventive mechanism, if there is a risk of a serious breach of these principles[159]. Its Article 7 established the procedure for an action amounting to the possibility of a suspension of voting rights of the state concerned in case that it would seriously and consistently violate human rights. The Nice Treaty further added so called Haider clause that allows the Council to make recommendations to the state concerned[160]. The discussions and recommendations are already considered as a kind of an intervention, therefore the treaties provide for part of the responsibility to react (not mentioning the possibility of the military intervention at this stage).

Articles 6 and 7 brought up by these treaties imply primarily that the human rights are deeply rooted in EU law. Second assumption could be made on the principle of sovereignty. The Treaty provisions allowing to invoke measures against the EU member state in case of grave breaches of human rights and fundamental freedoms reaffirm that EU member states voluntarily agreed to give up part of their sovereignty and share it with EU institutions[161].

Futtermittel [1970] ECJ 1125 E. C. R. 11-70, para. 4. The *Internationale* presented the first relevant case. See also the *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* (First Chamber) [2004] ECJ C-36/02.

[155] Joint Declaration concerning the protection of fundamental rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms [1977] OJ C 103/1.

[156] SEA (Rome Treaty, as amended), 17 February 1986, Preamble and para. 3.

[157] TEU (Maastricht Treaty), Article F (2).

[158] TEU (Amsterdam Treaty, as amended), Article 6.

[159] *Ibidem*, Articles 6 and 7.

[160] *Ibidem*; Wyatt & Dashwood, 2006, p. 260.

[161] Tillotson & Foster, 2003, p. 49.

The new provisions in the Nice Treaty also imply that the EU finds itself responsible for upholding human rights and fundamental freedoms in its territory. The same conclusion can be made regarding the non-intervention principle. Based on Article 7 of the Treaty of the EU (TEU), the human rights do not fall under the explicit jurisdiction of individual member states[162]. Furthermore, Article 6 states that «[t]he Union shall provide itself with the means necessary to attain its objectives and carry through its policies[163].» In this sense Article 6 may imply an obligation to protect human rights of EU citizens and implies the primary responsibility as included in the RtoP concept.

The Lisbon Treaty that has entered into force in December 2009[164] further confirms that human rights lie in the heart of the EU[165]. The document enhances human rights protection and related obligations in Europe even more, while moving the established EU values forefront[166]. Article 6 provides for two important changes. It puts formerly non-binding Charter of Fundamental Rights to the same place as EU's Primary law[167] making it legally binding[168]. The EU is therefore obliged to ensure the observance of human rights of its citizens. The primary responsibility to protect its own people naturally lies within EU member states taking into account the subsidiary principle[169]. Extending this statement further, in accordance with Article 3 TEU, EU's «aim is to promote [...] well being of its own people[170].» The RtoP-related responsibility has therefore been acknowledged at two levels – the level of the state and the level of the EU.

Further, the Lisbon Treaty provides for EU's accession to the European Convention of Human Rights (the act of the accession is currently under preparation[171]) to ensure that EU's acts will not violate fundamental rights of EU citizens and will not go against the protection of fundamental rights offered by the individual EU member states[172]. Such a change confirms the legal meaning of Article 2 TEU

[162] TEU (Nice Treaty, as amended), Article 7.
[163] *Ibidem*, Article 6(4).
[164] TEU (Lisbon Treaty, as amended); TFEU (Lisbon Treaty, as amended).
[165] Piris, 2010, p. 71.
[166] *Ibidem*.
[167] TEU (Lisbon Treaty, as amended), Article 6(1).
[168] Piris, 2010, pp. 50-72.
[169] *Ibidem*, pp. 60-70. Subsidiary principle provides for the policy making at the most decentralised level, therefore, the individual member states play crucial role within the EU.
[170] TEU (Lisbon Treaty, as amended), Article 3.1.
[171] 18244/10, 22 December 2010, pp. 1-2.
[172] TEU (Lisbon Treaty, as amended), Article 6(2).

showing that EU values are not only symbolic political words anymore. It provides for a condition to be respected by the EU as a whole, its institutions and member states and reaffirms that breaches of these values will not remain unpunished[173]. The act of accession can be understood as a responsibility to prevent human rights violations not only by states but also by the institutions reflecting the important RtoP aspect.

The demonstrated evolution in EU law and the constant EU's approximation to the human rights standards, their excessive articulation in the legislation and the mentioned provision adopted in the Lisbon Treaty suggest that the EU and its members adhere further to the principle of protection of fundamental rights inside the EU. The law therefore lies down the basis for the acceptance of the primary RtoP of the EU towards its citizens with the emphasis on the responsibility to prevent. The next chapter will examine, whether the EU accepted this responsibility explicitly in its rhetoric, however, it is necessary to focus first on the RtoP and EU's external dimension.

4.2. EXTERNAL DIMENSION: RESPONSIBILITY TO PROMOTE AND PROTECT HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN NON-EU COUNTRIES

In contrast to the long tradition of the human rights protection within EU member states and institutions, the creation of EU's CFSP dates back only to the Treaty of Maastricht that entered into force in 1993[174]. However, since the beginning it has been based in EU's fundamental rights and values. Article J.2 stated that one of the objectives of the CFSP shall be «to safeguard the common values [...] of the European Union, [...] strengthen security of the Union and its Member States in all ways, [...] preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter [and] develop the consolidated democracy and the rule of law and respect for human rights and fundamental freedoms[175].» Here, the same rhetoric can be followed as for the link between human rights and peace and stability at the international level presented in the previous chapter.

The dissolution of Yugoslavia led later to the reform introduced in the

[173] Piris, 2010, p. 71.
[174] TEU (Maastricht Treaty).
[175] *Ibidem*, Article J.2.

Amsterdam Treaty reflecting the need of the EU to be more effective in its external action and to be able to react to the threat in a timely and coherent manner[176]. The recognition that gross violations of human rights constitute the threat to EU's security by incorporating Petersburg tasks into Title V of the Treaty stating that the EU shall safeguard its security through humanitarian aid, peacekeeping missions, etc.[177]. The link between human rights and security of the EU plays important role in the further realisation of an obligation towards non-EU states under the RtoP since such a link is one of the basis for the RtoP principle at the international level. Moreover, the Lisbon Treaty reaffirms the connection between human rights security in its aim to create more efficient EU able to better meet current challenges[178].

Considerably, Title V, *General Provisions on the Union's External Action and Specific Provisions on CFSP*, as amended by the Lisbon Treaty, serves as a legal basis for the RtoP beyond the primary responsibility of the home state. Article 21.1 states that:

«The Union's action on the international scene shall be guided by the principles that inspired its own creation and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms respect for human dignity, the principles of equality and solidarity, and respect for the principles of the UN Charter and international law[179].»

Article 21.2 further mentions that the common policies, which the EU pursues externally, shall «safeguard its values[180],» «support democracy, rule of law, human rights and principles of international law[181],» «preserve peace, prevent conflict and strengthen international security in accordance with purposes and principles of the UN Charter»[182] and «assist populations, countries and regions confronting natural or man-made disaster[183].» Article 21.2(g) explicitly mentions the obligation to assist the population or country in need – in case the government of the state concerned finds itself unable to protect its own population[184]. The article therefore directly obliges the EU to assume an

[176] Common Foreign and Security Policy, available at http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a19000_en.htm (consulted on 11 July 2011).
[177] *Ibidem*.
[178] Piris, 2010, p. 14.
[179] TEU (Lisbon Treaty, as amended), Article 21.1.
[180] *Ibidem*, Article 21.2(a).
[181] *Ibidem*, Article 21.2(b).
[182] *Ibidem*, Article 21.2(c).
[183] *Ibidem*, Article 21.2(g).
[184] *Ibidem*; Piris, 2010, pp. 18-24.

action as a part of the Second RtoP pillar – responsibility to assist if the state concerned cannot protect its own population.

As regards the possible intervention without the consent of the state concerned, the situation remains more complicated. Since the EU has adhered to the fundamental freedoms and especially to the respect for human dignity also in its external action where it intends to promote and protect them, it might be considered to be against the Treaty not to act in case if any of four RtoP crimes occurs[185]. Moreover, the EU stresses its acceptance of the principles in the UN Charter and in the international law. Since the interpretation of the Charter provides for the grounds for intervention in order to safeguard people's lives as it has been shown in the previous chapter, EU's external action could be lead in the same manner[186]. Moreover, genocide, ethnic cleansing, war crimes and crimes against humanity violate the international law[187]. If the EU wants to act in respect of the international law, it must take an action to prevent serious breaches to it.

One may argue that the sovereignty and non-intervention also presents principles of international law and the EU shall respect it in its actions. However, as the previous chapter explained, there has been growing consensus that the serious breaches of human rights can no longer be hidden behind the fig leaf of the sovereignty or non-intervention principles and that rigorous state sovereignty has never existed and has always been doubted and breached by the individual states for number of reasons. In accordance with the explanation of the EU Treaty the fundamental rights and the principle of the human dignity that has been deeply rooted in EU law prevails while considering the possible action in order to deal with the four RtoP crimes[188].

Having in mind these considerations, EU law not only provides for the possibility to intervene in case of the human rights violation but to some extent also stipulate the obligation in the line with the Third RtoP pillar aside of the military intervention. The situation of military

[185] As it will be shown later in the thesis, the recent practice speaks very much in favour of this idea (considering all possible ways to intervene, i.e. understanding the public criticism of the human rights record of the state concerned also a kind of intervention).

[186] Similarly, the thesis seeks to prove the hypothesis that the EU usually acts in the line with the United Nations.

[187] See Chapter 3.2.2.

[188] In the Communication from Commission on Implementation of the Human Rights in the Charter, the Commission confirmed that through its external policy, the EU shall wider human rights and promote respect for human dignity on the international scene. It has also confirmed that the Charter on Fundamental Rights applies to EU's external action. The Communication of the Commission is not a legal act, however, can play a role in the interpretation of EU law. COM 2010(573)final, 19 October 2010, p. 5.

intervention becomes more complicated therefore it will be addressed in detail later in the chapter. However, it remains undoubted that due to the above-mentioned reasons the possibility of even military intervention for the humanitarian purposes could be justified on the basis of EU's Primary law.

4.3. RTOP SPECIFICS AND RELATED OBLIGATIONS IN EU LAW

To sum up briefly, it has been shown that EU law explicitly encompasses the provisions to protect and safeguard human rights internally and externally, therefore carries the necessary potential to uphold the RtoP doctrine. Next part of the chapter focuses on the specific elements of the RtoP – the four RtoP crimes and the three responsibilities it encompasses.

4.3.1. Genocide, War Crimes, Crimes against Humanity and Ethnic Cleansing in EU Law and Related Obligations

As soon as the legal basis for the general RtoP idea can be found in the primary source of EU law as well as in the general principles of law, it obviously also encompass all four RtoP crimes, which are all to the simplest possible extent covered by the international human rights and humanitarian law. However, to be more specific it is necessary to go into particular details of EU's responsibility as regards these specific crimes. Due to the fact that the treaties do not explicitly mention them, we must look into the other sources of EU law.

As regards the genocide all EU member states are parties to the Genocide Convention. The international treaties binding upon all member states are also considered as a source of EU law in case that the EU has assumed the responsibility in the area[189]. Even though the EU has not assumed the responsibility over all the areas of EU policy that would deal with the RtoP (particularly the CFSP), it has accepted the responsibility to adhere to the promotion and protection of human rights. Since all the member states have ratified the Genocide Convention, which is now binding upon them, it can be assumed that also the Genocide Convention is now part of EU law even thought a crime of genocide is not explicitly mentioned in the treaties[190].

More importantly, the ECJ ruled that international treaties ratified

[189] Wyatt & Dashwood, 2006, p. 127.
[190] Tillotson & Foster, 2003, pp. 227-228.

by EU member states are to be considered the general principles of EU law[191]. Any EU act cannot order the member state not to comply with its obligations under the international law. Further, stemming from Article VI of the Lisbon Treaty, by the accession of the EU to the European Convention on Human Rights (ECHR), it should be ensured that the EU offers at least the same human rights protection as its member states. The same has been confirmed earlier by the above-mentioned *Internationale Handelgesellschaft* case[192]. Since the obligation exists to prevent and punish the crime of genocide here, the EU also assumes the same obligation. Besides, genocide is a crime under customary international law that also applies to the EU and brings about related responsibilities[193].

Similarly to the obligations brought about by the Genocide Convention at the international level, the EU and its member states have the primary responsibility to prevent genocide. Having in mind the previous considerations of EU's foreign policy as well as the responsibility of the third states discussed in the previous chapter, the responsibility to prevent genocide outside the EU's territory becomes inherent.

The genocide together with the war crimes and crimes against humanity is furthermore dealt with by the ICC jurisdiction. Since all the member states are parties to the Rome Statute the same assumption as above may apply. Going even further, the legal basis for the mentioned three crimes can be found in EU Secondary law. Namely, in the recently adopted *Council Decision on the ICC*[194] as well as the *Council Decision on the Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes*[195] EU member states explicitly declare that crimes falling under the ICC jurisdiction are of common concern and oblige themselves to prevent these crimes and bring perpetrators to justice. The EU confirmed the position in its *Guidance on Promoting a Compliance with the International Humanitarian Law* adopted by the Council of Ministers[196] in order to express its obligation to promote

[191] *Ibidem*, for an interpretation of the case. For ECJ rulings see *Noldt KG v. Commission* [1974] ECJ 2 CMLR 338.

[192] Internationale Handelsgesellschaft mbHv Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECJ 1125 E. C. R. 11-70.

[193] See Chapter 3.2.2.

[194] The recently adopted Council Decision repealed the Council Common Position on ICC (2003/444/CFSP). Council Decision 2011/168/CFSP on the International Criminal Court and repealing Common Position 2003/444/CFSP [2011] OJ L 76/56.

[195] Council Decision 2003/335/JHA on the investigation and prosecution of genocide, crimes against humanity and war crimes [2003] OJ L 118/12.

[196] Guidelines are not legally binding, however, as soon as they have been adopted under the CFSP, all member states must have agreed upon them. That attributes them the significant

compliance with international humanitarian law[197]. The EU acknowledges that breaches of the humanitarian law are of huge international concern also due to the fact that they make the post-conflict reconciliation even harder[198]. Through the guidelines EU member states have voluntarily accepted the responsibility to prevent breaches of the IHL[199]. In accordance with the previous explanations, the crime of ethnic cleansing also falls under this category[200] and therefore the responsibility to prevent exists in the relation to all four RtoP crimes.

As we can see the four RtoP crimes are not only included within the human rights considerations but the EU has also acknowledged separately that these particular four crimes require increased attention because they are of a considerable gravity. The obligation to prevent these breaches and prosecute the perpetrators explicitly stem from EU's Primary and Secondary legislation and customary international law. The voluntary guidelines to prevent the breaches of IHL confirm such a commitment. But does any obligation to react when any of the four crimes seems to occur or to help rebuild the societies torn by the conflict legally arise for the EU? The following part of the chapter recapitulates and further examines the question of the responsibility to prevent, react and rebuild.

4.3.2. Responsibility to Prevent, React and Rebuild

The conflict prevention has a long tradition in the EU. One of the ideas of EU founding fathers was to create the security community in order to prevent the conflict. In this sense, enlargement appears to have been a massive conflict prevention program[201]. Despite such ideas the treaties including Maastricht did not carry any specific reference to the conflict prevention and management and the changes have not been introduced until the Amsterdam Treaty that incorporated Petersberg tasks[202]. The humanitarian tasks, peacekeeping and crises management

political value. From that point of view it could be assumed that at least rhetorically, all EU member states feel abide by the international humanitarian law and the necessity of its promotion. Besides, all EU member states are parties to all four Geneva Conventions and their additional protocols that also oblige state parties to the Convention not only to abide by the international humanitarian law, but also to its dissemination.

[197] 2005/C 327/04, 23 December 2005, para. 3.

[198] *Ibidem*, para. 5.

[199] *Ibidem*.

[200] Refer to Chapter 3.2.2.

[201] Fraser, 2007, pp. 172-174.

[202] EUROPEAID/122888/C/SER/Multi, July 2009, pp. 8-9.

finally appeared in the Treaty[203]. After the Cologne Council in 1999 and the subsequent inclusion of the peace-building, the conflict prevention and resolution into the Cotonou Agreement[204] the European Commission mainstreamed conflict prevention to all areas of development programming[205]. Such thinking has been further endorsed by EU member states at the Goteborg Council[206], where it was decided that the EU should assume fully its responsibilities in the area of conflict prevention[207]. Later the Nice Treaty has already carried legal basis for the conflict prevention within its Article 177 of the Treaty Establishing the European Community (TEC) stating that through the development programs, the European Community shall contribute to the developing and consolidating democracy and rule of law[208]. Together with Title V, Article 11 TEU on CFSP aiming at preserve peace and international security[209], legal basis for the conflict prevention appears to have already existed in the Primary EU law[210].

The responsibility to prevent emanates further from the above-mentioned EU commitments to the IHL and the ICC. As already argued in a relation to the Genocide Convention the punishment of perpetrators is meant to work as a deterrent and therefore plays a role in the conflict prevention[211]. But the prosecution of the perpetrators creates also an important part of the rebuilding of the society after the conflict therefore EU's commitment to ICC would likewise refer to the obligation to rebuild.

The above-mentioned documents opened the space for the EU to intervene if there is a risk of the escalation of the conflict – again speaking about all possible forms of intervention, not only the military one.

Further, as regards the responsibility to react, the conflicts in Balkans and Africa showed that inaction is not always an option and the complex response is needed[212]. However, the treaties similarly have not explicitly

[203] TEU (Amsterdam Treaty), Article J.7(2).

[204] Cotonou Agreement between the EU and African, Caribbean and Pacific states (ACP) included article on peace-building, conflict prevention and resolution. See Cotonou Agreement, 23 June 2000, Article 11.

[205] EUROPEAID/122888/C/SER/Multi, July 2009, p. 1; COM(2001)211 final, 11 April 2001.

[206] SN 200/1/01 REV 1, 15-16 June 2001, para. 52.

[207] Nice European Council Presidency Conclusions, 7-9 December 2000, Annex 6, Article VII.

[208] TEC (Nice Treaty, as amended), Article 177.

[209] *Ibidem*, Article 11.

[210] EU adopted many legislative and non-legislative acts confirming its commitment to the conflict prevention. See *inter alia* 2005/304/CFSP, 12 April 2005; COM(2005)489final, 12 October 2005; 16344/07(Presse 291), 9 December 2007.

[211] See Chapter 3.2.2.

[212] Fraser, 2007, pp. 174-175.

included any reference to crises management until the Amsterdam Treaty that first included among others tasks concerning the combat forces in crises management and peacemaking[213]. Council Regulation No. 381/2000 further created the Rapid Reaction Mechanism in order to deal timely and effectively with the urgent cases or crises[214]. The Cotonou Agreement has then called for a reaction in any case of the flagrant breaches of human rights[215]. Therefore, the possibility to react obviously exists. Does any instruments, however, create an obligation?

The TEU defines questions relative to EU's security[216]. As the legal service of the European Council stated, the creation of the Political and Security Committee (PSC) and the Interim military committee to manage the crises, as discussed by EU member states at the 2000 Nice Summit[217], did not require the change of the existing treaty (Amsterdam Treaty). Conflict management tasks could then have been established on its basis as well[218] confirming that the TEU (as adopted in Amsterdam) can already serve as a legal basis for the possible conflict management[219]. By incorporating the Petersberg tasks into Title V of the TEU, EU member states not only expressed their commitment to the conflict prevention, but also their determination to safeguard the security in Europe through the operations providing humanitarian aid and restoring peace[220]. Having in mind EU's legislation regarding the grave human rights violations and the mentioned TEU provisions, the inaction in case of the four RtoP crimes would not be in conformity with EU's Primary legislation. More than within the UN law, the EU becomes obliged to respond having in mind that the mere statement condemning the practice of the state concerned counts as a part of the responsibility to react. If the situation worsens the EU obviously shall go further.

[213] TEU (Amsterdam Treaty, as amended), Article J.7(2).

[214] Council Regulation EC (No.) 381/2001 creating a rapid reaction mechanism [2001] OJ L 57/5, Article 1. The Regulation further builds upon the legal instruments dealing with economic aid and cooperation with developing countries, food aid and reconstruction, therefore, reaffirm the link between the development, human rights, stability and conflict – important basis for the RtoP doctrine. See *ibidem*, Article 2 and Annex 1.

[215] The Agreement (or its part) can be suspended in such cases. Cotonou Agreement, 23 June 2000, Article 96.

[216] TEU (Amsterdam Treaty, as amended), Title V.

[217] EUROPEAID/122888/C/SER/Multi, July 2009, pp. 8-9.

[218] Santa Maria de Feira European Council Presidency Conclusions, 7-9 December 2000, Annex I, Article II(e).

[219] EU member states decided to create such bureaucratic structure within the Council Secretariat in order to make CFSP more operational by providing military expertise reflecting *inter alia* Laeken Council declaration on operational capability of the ESDP. EU is equipped to conduct conflict management operation. See SN300/1/01, 14-15 December 2001.

[220] TEU (Nice Treaty, as amended), Title V.

The crises management and the peace-building operations are being authorised under Title V in accordance with Article 14[221] stating that the Council shall adopt Joint Action in order to make the CFSP operational, and Article 25[222] mandating PSC to monitor crises and if needed embark under the Council supervision strategic exercise of the crises management. EU Rule of Law Mission in Kosovo as well as EU Police Mission in Kinshasa (Democratic Republic of Congo - DRC) regarding the Integrated Police Unit among others have been created on these grounds[223]. The usage of Title V for the authorisation of such operations further proves the existence of legal basis for possible reaction and re-building and the related EU practice[224].

Drawing on such events and evolution, the recently adopted Lisbon Treaty goes even further accommodating all components of the RtoP doctrine. Besides the general provision to preserve international peace and security[225] that can serve as a ground for all three components taking into account the already established link between human rights and international peace and security, Chapter 2, Article 42(1) Lisbon Treaty provides for the European Security and Defence Policy (ESDP) to be an internal part of the CFSP under the title Common Security and Defence Policy (CSDP). It therefore provides the EU with operational capacities to be used during conflict prevention, re-building and crises management[226]. Further, the Protocol 10 provides for an establishment of the specific procedures to make the funds available for the tasks in Articles 42(1) and 43[227]. Article 208 re-confirms the link between conflict prevention and development and states that the development aid and cooperation shall be conducted in accordance with the objectives of the CFSP[228]. The same applies to the humanitarian aid[229]. Treaty therefore confirms the grounds for the conflict prevention and peace-building. Furthermore, Article 216 provides for the basic agreements in the

[221] *Ibidem*, Article 14.
[222] *Ibidem*, Article 25.
[223] Council Decision 2010/619/CFSP amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo [2010] OJ L 145/13, and Council Joint Action 2004/847/CFSP on the European Union Police Mission in Kinshasa (DRC) regarding the Integrated Police Unit (EUPOL «Kinshasa») [2004] OJ L367/30, Council Regulation EC (No.) 381/2001 creating a rapid reaction mechanism [2001] OJ L 57/5.
[224] Refer to Chapter 3.2.5.
[225] TEU (Lisbon Treaty, as amended), Article 21(2).
[226] *Ibidem*, Article 42(1).
[227] *Ibidem*, Protocol 10.
[228] *Ibidem*, Article 208.
[229] *Ibidem*, Article 214.

field making the EU more operational when it comes to the need of the rapid reaction in a case of emerging problems[230].

The existing law and its actual use in practice suggest that the RtoP can be carried out on these grounds. It can however be argued that neither the treaties nor the other legislative acts explicitly mention that the EU has the responsibility to prevent, react or rebuild beyond its borders. But considering EU's commitment to the human rights, the Lisbon Treaty confirmed that EU's work in the area of human rights and fundamental freedoms extends far beyond its internal policies. Charter of the Fundamental Rights having now the legal value applies also to EU's external action, therefore, in accordance with the Treaty, EU's role at the international scene is to wider democracy, promote and protect human dignity, justice and principles of the UN[231]. The confirmed link between human rights and international security and stability leads the EU towards the action in order to protect its citizens from possible consequences. Therefore, the responsibility of the EU in the RtoP sense to some extent exists in its law. The question remains how the EU wants to exercise it.

4.3.3. The Relationship with the UN and the Possibility of the Military Intervention

Before turning to the whole RtoP concept itself, it is worth noting the relation of the EU to the UN and other regional and international organisations as regards questions concerning the conflict prevention, reaction and re-building. Article 21 TEU states that the EU «[...] shall promote multilateral solution to common problems, in particular in the framework of the [UN][232].» Operational capabilities of the EU (military or civilian) shall be used in accordance with the UN Charter[233]. Protocol 10 to the Lisbon Treaty even provides for the possibility the UN may request the urgent implementation of the mission[234]. Articles demonstrate the adherence of the EU to the established UN rules as regards the dealing with the conflict and imply possible envy of EU member states to implement its capabilities preferentially within the UN action.

In the European Security Strategy (ESS)[235] EU member states

[230] *Ibidem*, Article 216.
[231] COM(2010)573final, 19 October 2010.
[232] TEU (Lisbon Treaty, as amended), Article 21.
[233] *Ibidem*, Article 42.
[234] *Ibidem*, Protocol 10.
[235] ESS is not a legal document, however, since it has been agreed upon by all EU member

confirmed that the UNSC has the primary responsibility to maintain international peace and security. EU's priority is to equip the UNSC to allow it better perform its duties. With the entry into force of the Lisbon Treaty, the EU is able to assume its own responsibility in the field of conflict prevention, peacekeeping, peacemaking and peace-building, however, considering these provisions, the EU sees this opportunity to contribute to the activities mainly of the UN or other international or regional organisations[236].

Even though EU law does not explicitly provide for military intervention for humanitarian purposes, as demonstrated *inter alia* on the examples of EU mandated operations, the reaction/intervention would be possible on the basis of Title V. The references to the multilateral solution to the problems and to the UN Charter and primary responsibility of the UNSC in the crises management, however, imply that the EU does not seek to pursue such operation on its own. Therefore, taking into account the existing legislation and the current role perceived by the EU itself, without the UNSC mandate, the EU operation should not take place[237].

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To briefly sum up, the possibility in EU law to carry out the RtoP concept stems from EU's adherence to the human rights and the commitment to promote and protect human rights in its external action. As regards the obligation inherent in the four RtoP crimes, EU law must be extended here and the commitments of EU member states under the international law must be taken into account. However, the argument seems strong enough to support the RtoP concept in relation

states, it has considerable political value and can be used to support the legal argument. European Security Strategy, 12 December 2003, available at http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf (consulted on 20 March 2011).

[236] The majority of EU mandated operations existed to support or complement the active UN or other organisation's operations in the particular country. E.g. EULEX Kosovo undertook the Rule of Law element from UN Interim Administration in Kosovo (UNMIK), in Bosnia, the EU has deployed the Police Mission (EUPM) followed the UN international police task force, as well as the European Union Police Mission in Kinshasa has been established while the UN Organisation and Stabilisation Mission (MONUC) has existed in the DRC. EU Mission has also been deployed to Darfur/Sudan to support activities of the AU Mission AMIS (2005/557/CFSP, 20 July 2005) or in Georgia to support OSCE observer mission (see EUROPEAID/122888/C/SER/Multi, July 2009, p. 60). The operations adopted under the framework of Title V are being adopted in the partnership and co-ordination with the UN or other organisations aiming to support them.

[237] The EU seems to move along the lines of the internationally endorsed RtoP. A/RES/60/1, 24 October 2005, paras. 138-140.

to the four crimes of the extreme gravity – genocide, war crimes, crimes against humanity and ethnic cleansing. It is worth recalling that the RtoP seeks to reconcile the controversies surrounding the humanitarian intervention, therefore neither of the responsibilities can be considered solely as the military intervention, but different aspects must be taken into account. Having in mind Title V and its usage to mandate EU's operations, the argument for the possible obligation emanates from the growing EU practice. As for the military intervention, neither existing practice or law shows that the EU would like to pursue such an operation alone – the UNSC mandate and ideally the existing UN or other international organisation's operation should precede EU's action. Does the EU intend to implement the RtoP through multilateralism and within the framework of the activities of other international organisations? The way the EU invokes the RtoP concept in its statements and documents shall provide an answer to this particular question as well as show, whether the above interpretation of EU law is in line with the actual EU's understanding of RtoP.

CHAPTER 5

INVOKING RTOP: THE REFLECTION OF EU LAW AND THE RTOP CONCEPT IN EU STATEMENTS AND OTHER NON-LEGISLATIVE INSTRUMENTS

Notwithstanding the RtoP components seem codified in the EU law, the RtoP concept, as a whole, has not yet been explicitly included in any existing EU's legislation. In order to find out how the EU truly understands the RtoP and whether it accepts it, it becomes necessary to seek the documents explicitly invoking the concept. We shall therefore examine EU's soft law as well as the documents without attributed legal value, but rather the political importance.

As a soft-law instrument the Council Conclusions are examined. They can neither be treated as legislation nor attributed a norm-setting effectiveness, however, since the RtoP as a whole falls under EU's CFSP, the Council Conclusions relative to the RtoP must be approved by the unanimity[238]. The consent of all EU member states gives them a significant political value, demonstrating the wide-acceptance of their content. Similar, as for a political value, applies to the EU statements within the international organisations agreed under the CFSP. The statements, however, have no soft-law status and are rather considered the political declarations[239]. The strength that can be attributed to them lies in the EU's external representation. Once, the organisation of such an importance as the EU expresses publicly its position, it is difficult to change it without losing credibility. Taking this into consideration the statements must be carefully agreed by the entire EU members and generally reflect the true EU position[240].

Another document used is the Communication from the European Commission (hereinafter «Commission»). Even though it does not

[238] Piris, 2010, p. 14.
[239] *Ibidem*.
[240] The considerations reflect the authors own observations during the 65th session of the UNGA held in autumn 2009.

present the legally binding instrument, it explains how the Commission would act in certain situation. The Communications play significant role in the area not covered by the existing legislation and their content can have a recommendatory character, therefore, they must be taken into consideration[241].

Similarly, European Parliament's (EP) resolutions do not present binding instruments. Since the EP is the only EU body directly elected by its citizens and the most vocal on RtoP, its resolutions often invoking the RtoP while considering situation in particular country, cannot be left unconsidered.

The chapter directly reflects the content of such documents explicitly mentioning the RtoP presented in detail in Table 1 annexed to the thesis[242]. Based on this table the thesis examines the way the EU accepts the RtoP and estimates what should be the EU's role within the RtoP framework.

5.1. THE ADOPTION OF THE RTOP

Obviously, the EU has been vocally very supportive of the RtoP and the concept has been welcomed as an emerging legal norm reflecting upon what has been already stated in the international law[243]. Before the endorsement of the RtoP in the 2005 World Summit Outcome Document, the EU referred to the RtoP as presented by the HLPT or the UNSG, focusing on the rights and responsibilities inherent in the principle of state sovereignty and the exclusive role of the UNSC to maintain international peace and security drawing also a link with justice and the importance to fight impunity in relation to the conflict prevention[244] confirming what has been included in EU Primary legislation[245].

The EU attributed high importance to the RtoP prior its adoption and its acceptance has therefore been perceived as a progress by all EU institutions understanding the RtoP as an instrument to combat

[241] Commission Communication, 1 May 2004, available at http://www.sagit.cz/pages/lexikonheslatxt.asp?cd=156&typ=r&levelid=EU_253.HTM (consulted on 20 May 2011).

[242] The chapter is based on documents retrieved from EU and UN Partnership in action, available at http://www.eu-un.europa.eu/ (consulted on 9 June 2011) summarised in the Annex of the thesis (including the references to the particular documents).

[243] See Annex in this thesis.

[244] For relevant documents see Annex in this thesis.

[245] Consult Chapter 4.

atrocities and the human rights violations. The emphasis has been placed on the growing international consensus on the possibility of the collective action through the UNSC. EU further reiterated the acceptance of its RtoP towards EU citizens[246].

The push for an adoption and the absence of EU statements contrary to the RtoP as well as any observed caution towards the concept or its parts show that the EU accepted the RtoP at least in the form as endorsed at the World Summit. Such a position has also been reflected in the 2006 Joint Statement that has the particular importance due to the consensus of all EU institutions needed for its adoption[247].

Further, the EU started to focus on the implementation of the RtoP claiming it as its utmost importance[248]. Expressed support for the mandates of the UN Special Adviser on Genocide and on RtoP also shows the way to push the RtoP from the rhetoric to an action. Later on, after the incumbent UNSG's issuance of the new report on the implementation of the RtoP[249] the EU claimed the willingness to integrate the concept in its normative framework to make it accepted legal norm and contribute to more operational approach through well functioning preventive, reactive and rebuilding measures at the disposal of the international community[250].

5.2. EU'S PERCEPTION OF THE RTOP CONCEPT

Not only has the EU vocally supported the RtoP's operationalisation. It stems from the analysis of the documents reflected in the Annex that while invoking the implementation, the EU has gone a little beyond the internationally recognised definition[251].

Reflecting upon EU's statement during the UNGA debate on the RtoP the EU, unless the member states decide otherwise, wants to keep the RtoP scope narrow focusing on the particular four RtoP crimes[252]. The doors remain therefore opened for an extension. First assumption

[246] *Ibidem*.
[247] European Consensus 2006/C 46/01, 24 February 2006.
[248] See the changes in EU's RtoP reflecting the adoption of the World Summit Outcome Document, Annex of the thesis.
[249] A/63/677, 12 January 2009.
[250] This is the general overview of the EU reflected in most of the statements. See Annex of the thesis.
[251] *Ibidem*.
[252] EU Presidency Statement, UNGA: Debate on the Responsibility to Protect, 23 July 2009, available at http://www.eu-un.europa.eu/articles/en/article_8901_en.htm (consulted on 12 March 2011).

can be made that the EU advocates narrow but deep approach focusing on a prevention. The prevention permeates through the entire RtoP concept and should be included in all three pillars. Even the UNSC shall act in sake of preventing RtoP crimes. As a matter of prevention, the EU often mentions the cooperation with the ICC[253]. The obligation to punish international crimes as a mean of a conflict prevention has been already mentioned in relation to the Genocide Convention[254].

As regards the Second RtoP pillar not only the international community is obliged to provide assistance if the state is unable of its RtoP. According to the EU, under the RtoP concept, the home state is obliged to accept the assistance. The EU draws the link with the humanitarian assistance. The delivery of aid reflects the primary responsibility of the home state – if it is unwilling, the humanitarian assistance will never be effective[255]. Therefore, one of the responsibilities of the international community under the RtoP remains to push for the acceptance of the individual responsibility of the home state even during the emergence of the crises.

As regards the responsibility to act, the EU has stressed that such an obligation exists and has been agreed by the international community – regardless the overall weakness of the text presented by the EU and the fact that the mentioned obligation has been rather expressed as preparedness for the possible action rather than obligation[256]. Similarly to the international RtoP, the responsibility to act shall be exercised primarily through the UNSC[257]. The EU has never stressed that the UNSC assumes the explicit competence on one hand. On the other it remains silent on possibility to surpass the UNSC[258]. Such position reflects the best EU's Primary legislation emphasising the multilateral solution to the problems, however, does not create an obstacle for the possible action without the UNSC authorisation as proposed by the ICISS. The EU seems to realistically assess what it can achieve, which is the reason why it works along the line with the internationally agreed RtoP.

Showing that the EU has accepted the RtoP in the above-mentioned form moves us to the role the EU should play under the RtoP concept.

[253] EU Presidency Statement: United Nations Security Council, Protection of Civilians in the Armed Conflict, S/RES/1894/2009, 11 November 2009, available at http://www.eu-un.europa.eu/articles/en/article_9214_en.htm (consulted on 23 March 2011).

[254] See Chapter 3.2.3. For the further examination of emphasis placed by the EU on the conflict prevention consult the documents included in Annex in this thesis.

[255] See EU Presidency Statement, UNGA: Debate on the Responsibility to Protect, 23 July 2009, at http://www.eu-un.europa.eu/articles/en/article_8901_en.htm (consulted on 12 March 2011). Further, nearly every EU statement mentions the humanitarian assistance in relation to the RtoP. Consult Annex in this thesis.

[256] *Ibidem*.

[257] *Ibidem*.

[258] *Ibidem*.

5.3. ASSUMING EU'S RESPONSIBILITY, DEFINING THE RTOP: EU'S ROLE WITHIN THE RTOP FRAMEWORK DURING THE EMERGENCE OF THE RTOP CASE

The role the EU seeks within the RtoP framework is threefold: Firstly, the EU sees itself primarily as a civilian power ready to employ its diplomatic means and push for an acceptance of the primary RtoP by the government concerned[259]. The EP invoked the RtoP in many situations condemning Burma/Myanmar, North Kivu, Chad, DRC, Darfur or Zimbabwe, and regretting that the EU did not work more unilaterally to push the authorities to accept their RtoP[260]. Reflecting upon the EP's concerns the EU has recently committed itself to continue exerting pressure on Gaddafi in Libya to firstly assume the responsibility of his regime towards his people reaffirming its position of the civilian power[261].

Moreover, as previously stated, the EU emphasises the prevention. That is where it considers itself to be the most important player. The EU aims to contribute to the regional organisations to enhance their capacity to prevent conflict including the donor support[262]. EU has also expressed the commitment to pressure on states to ratify the ICC, if they have yet to do, as the ICC is perceived as part of the prevention[263].

As regards solely the responsibility to rebuild, the EU accents its leadership role in the area of humanitarian assistance, however, it is necessary to bridge the gap between immediate post-conflict reconstruction and long-term peace-building. The EU claims it engages through the electoral observation and assistance, rule of law missions and other capacity building components[264]. Reflecting upon the mentioned conflict cycle and possible fallback into the conflict if the rebuilding strategy is not effective, the above-mentioned role in the field of prevention shall also be employed in the post-conflict rebuilding phase[265].

[259] Fraser, 2007, pp. 172-174.

[260] See third column of the Annex in this thesis attributed to the EP documents.

[261] EU's position towards Libya is included in the «2011» section of the Annex.

[262] EU Presidency Statement, UNGA: Debate on the Responsibility to Protect, 23 July 2009, at http://www.eu-un.europa.eu/articles/en/article_8901_en.htm (consulted on 12 March 2011).

[263] EU Presidency Statement: UNSC Open Debate - Protection of Civilians in the Armed Conflict, 11 November 2009, at http://www.eu-un.europa.eu/articles/en/article_9214_en.htm (consulted on 23 March 2011).

[264] 2985th Foreign Affairs Council Meeting, Conclusions on Human Rights and Democratisation in the 3rd Countries, 8 December 2009, available at http://www.eu-un.europa.eu/articles/en/article_9308_en.htm (consulted on 23 March 2011).

[265] Similarly, the references to the peace-building and EU role in it permeate all the analysed statements. See Annex in this thesis.

Overall, the EU generally accepts the UN primary role in the conflict prevention and leading role in the realisation of the responsibility of the international community[266]. As demonstrated in the previous chapter, together with the ratification of the Lisbon Treaty, the EU has assumed its role as a global player willing to assist the UN in the realisation of its obligations. The EU is willing to commit on the ground through the civilian and military deployment and contribute its capacity to the UNSC to ensure that the UN can react rapidly. It can be concluded that in contrast to the prevention and post-conflict building, where the EU desires to assume more independent role, in relations to the responsibility to react, it aims to work in the line with the UNSC leadership[267].

Based on the analysed documents, it can be assumed that the EU has proven to accept the RtoP. Further the EU law provides more space for the RtoP realisation than the international law permits – especially while talking about responsibilities to react and rebuild. The analysed EU statements and other documents precisely reflect EU law as examined in the fourth chapter implying the possible RtoP codification in the future. The EU seems willing to adhere to the RtoP, however, lacking the «RtoP speak» in the legislation it seems not to intent completely abide itself by the concept. On the other hand, the EU claims having sufficient toolbox of mechanisms ready to uphold the RtoP. We shall now move towards more practical analysis to examine them since the EU could carry out the RtoP doctrine through its external action notwithstanding the law does not explicitly provide for the concept.

[266] *Ibidem*.
[267] *Ibidem*.

CHAPTER 6

ORGANISATIONAL STRUCTURE OF THE EU AND THE DECISION-MAKING RELATIVE TO THE MECHANISMS TO BE ANALYSED

Having proven the legal basis to uphold the RtoP exists in EU law as well as the «theoretical willingness» of the EU to adhere to the concept allow us now to move towards more practical assessment of the possible RtoP's translation into EU's external action. According to the hypothesis presented and confirmed by EU law[268], the EU possesses under its external policies a variety of mechanisms relative to the conflict prevention, management and peace-building that, if used correctly in relevant situations, can carry out the RtoP concept in its entirety. These mechanisms exist under EU's former «Community (First) pillar[269]» and under the CFSP/CSDP (Second pillar) subjected to the intergovernmental decision-making[270]. Since the policies deciding on the deployment of the mechanisms play an important role in their operational capacity the decision-making in every pillar needs to be examined. The chapter briefly discusses EU's organisational structure, decision-making procedures and the level of coherence relevant to EU's external action.

The EU is an intergovernmental type of organisation (IGO) created to ensure the stronger position at the international level that no single EU member state would be able to achieve alone[271]. It is worth recalling that for this reason EU member states shifted part of their sovereignty to EU institutions, so the decisions of the common interest can be made at the level of the organisation. In confirmation that the part of the sovereignty only has been transferred the EU has been originally divided into the «pillar structure» moving along the lines of the TEC[272] and the

[268] See Chapters 3.2.4 and 3.2.5.
[269] Piris, 2010, p. 239.
[270] *Ibidem*.
[271] Portela & Raube, 2009, p. 5.
[272] TEC (Treaty of Maastricht, as amended).

TEU[273] presupposing two different ways of decision-making. The former stemming from the supranational European Community law and the latter reflecting the intergovernmental EU law allowing the member states to maintain national policies through possible exercise of the veto power in some policy areas[274].

Originally, the legal personality belonged exclusively to the European Community (EC) - First pillar, therefore the treaties the EC concluded bound the EC institutions and its member states[275]. Mere three articles of the Rome Treaty that time carried the provisions relative to external relations: Articles 131-133 TEC on common commercial policy[276] and Article 300 establishing the procedure concluding the international agreements[277]. The external trade policy has therefore fallen directly under the explicit competence of the European Community (EC)[278] subject to the procedures set out in Article 300 TEC[279] applicable to the cases of concluding the international agreements or adopting the trade legislation[280]. With the entrance into force of the Maastricht Treaty into force, the development policy has been added under the EC competence[281], while the 2004 Nice Treaty included economic, financial and technical co-operation with the third countries[282].

Article 300 stipulated that the Commission in this area of external policy makes recommendations to the Council, which shall authorise the Commission to begin the negotiations. The Council shall then conclude the agreement after the consultation with the European Parliament exercising its *qualified majority vote*[283]. So-called «co-decision procedure» confers considerable powers to the European Commission.

The Commission as a body of the institution rather supports the objectives of an organisation and obviously its decisions are not hampered by the national interest. It could therefore be assumed that the Commission would be willing to act in case of the RtoP situation since the protection of human rights would be one of the objectives of EU's foreign policy. The Commission has for example played an

[273] TEU (Maastricht Treaty).
[274] *Ibidem*, Article 3(1).
[275] Piris, 2010, p. 239.
[276] TEC (Rome Treaty), Articles 131-133.
[277] *Ibidem*, Article 300.
[278] TEC (Nice Treaty, as amended), Article 133; Piris, 2010, pp. 238-239.
[279] *Ibidem*, Article 300.
[280] Piris, 2010, p. 238.
[281] TEC (Maastricht Treaty, as amended), Articles 177-181.
[282] TEC (Nice Treaty, as amended), Article 181(A). See Piris, 2010, p. 239 for further elaboration on the provisions.
[283] TEC (Nice Treaty, as amended), Article 300.

important role in pushing the Council to pursue actions to prevent conflicts[284]. Further, the qualified majority vote makes it easier for EU to adopt the decision. Therefore, speaking about the operationalisation of the RtoP, the mechanisms under the former Community pillar would be easier to rapidly deploy[285].

On the other hand under Title V, Article 23 the Council shall act *unanimously* as regards the provision of EU's CFSP (Second pillar)[286]. The entrance into force of the Lisbon Treaty abolished the original pillar structure stipulating that «[t]he Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union [...]. These two treaties shall have the same legal value. The Union shall replace and succeed the European Community[287].» The Treaty has also established EU's legal personality merging the two mentioned legal orders into one[288] and enhancing the «cross-pillarisation» of EU policies[289], which has been to some extent already a practice for example in the area of sanctions[290]. However, EU member states insisted on the separation of the area of the CFSP/CSDP, which was then included into the TEU under Title V[291]. The rest of the EU policies and activities have been included into the Treaty on the Functioning of the EU (TFEU)[292]. Notwithstanding the above-mentioned provisions the decision-making procedures in the areas of EU's external relations remained largely unchanged maintaining the former Community and intergovernmental distinction in the decision-making[293].

Two conclusions could be drawn from these considerations. Firstly, two persisting different bases for the decision-making in the area of external action obviously imply the certain level of incoherence between EU institutions and also the possible tension between the decisions taken at EU level and the policies of EU member states[294].

[284] See *inter alia* COM(2001)211final, 11 April 2011; COM(98)146, 24 February 1998; COM(2007)643final, 25 October 2007.
[285] Fraser, 2007, pp. 52-74.
[286] TEU (Nice Treaty, as amended), Article 22.
[287] TEU (Lisbon Treaty, as amended), Article 1.
[288] *Ibidem*, Article 47.
[289] Cremona & de Witte, 2008, p. 20.
[290] Portela & Raube, 2009, pp. 12-16.
[291] TEU (Lisbon Treaty, as amended), Title V.
[292] Piris, 2010, p. 242.
[293] See Cremona & de Witte, 2008, p. 20 for deeper analysis.
[294] The case of the French invitation to the Zimbabwean president Mugabe to the French African Summit despite the visa-ban placed by the EU demonstrates this problem. See Council Regulation (EC) No. 310/2002 concerning certain restrictive measures in respect of Zimbabwe [2002] OJ L 50/4, Annex I; Castle, 2003 for the disagreement among EU member states and Portela & Raube, 2009, pp. 13-16 for overall considerations.

The voting by the unanimity and the exclusive competence of the Council in the area of the CFSP further imply difficulties to adopt certain decisions if the national interest of one or more member states is at stake. This has proven for example during the crises in Iraq and during the subsequent intervention or in relation to the decision over the Kosovo's independence, where the EU was not able to find a common position and therefore some states did not contribute to the civilian and military activities conducted by the EU in concerned countries[295].

The problem could then arise for the RtoP. The complexity of the concept requires the coherent strategy and a clear and well-designed allocation of the competences among EU institutions as well as its member states. The Lisbon Treaty made an attempt to address the problem establishing the function of the High Representative of the Union for Foreign Affairs and Security Policy (hereinafter «the High Representative»)[296]. Such a step makes the EU more operational and therefore enhances the possibility the RtoP would be able to play a role in its external action.

Even though the CFSP/CSDP has been included separately into Title V of the TEU[297] the corresponding chapter has also been created in the TFEU in the relevant EU's external action section[298] aiming to ensure that all EU external activities will be guided by the same objectives – democracy, rule of law, human rights, fundamental freedoms and respect for human dignity – to name some of them relevant for the topic analysed[299].

On the other hand, notwithstanding the provisions exist that the «Member States shall ensure that their national policies conform to the EU positions [...][300]» under Title V, in accordance with Article 275 TFEU, the Court of Justice of the EU has no jurisdiction over the area of the CFSP, therefore the conformity is not enforceable. The only provision we can rely upon remains the reputation of the EU at the international scene largely weakened by such incoherencies, which may

[295] See *inter alia* Portela & Raube, 2009, p. 20; Euractiv Network, Iraq War, 23 February 2003, available at http://www.euractiv.com/en/security/iraq-war/article-117514 (consulted on 19 March 2010); Euractiv Network, EU Nations Remain Divided over Kosovo, 9 February 2008, available at http://www.euractiv.com/en/enlargement/eu-nations-remain-divided-kosovo/article-170383 (consulted on 19 March 2010).

[296] TEU (Lisbon Treaty, as amended), Article 18(1).

[297] TEU (Lisbon Treaty, as amended), Title V.

[298] TFEU (Lisbon Treaty, as amended).

[299] TEU (Lisbon Treaty, as amended), Title V, Article 21(1); *ibidem*, Part 5, Title I, Article 205.

[300] TEU (Lisbon Treaty, as amended), Title V, Article 29.

be of EU member states' concern. Further, the similar provision exists under the external action included in TFEU articles[301] subjected to the ECJ jurisdiction. Therefore, the EU seems moving on one hand closer to embrace the RtoP concept in its external action, on the other, the obvious obstacles still exist.

These considerations must be taken into account while proposing the guidelines for the deployment of EU mechanisms to uphold the RtoP as well as while discussing their implementation. Despite the problems caused by still separated legal basis for EU's external action, at least in the law, the RtoP mechanisms can even though be possibly deployed timely and effectively. We shall now examine these mechanisms and see whether they are sufficient to possibly carry out the entire RtoP-related action.

[301] TFEU (Lisbon Treaty, as amended), Articles 208(1), 212(1) and 214(1).

CHAPTER 7

MECHANISMS AVAILABLE TO THE EU TO UPHOLD THE RTOP CONCEPT

The rationale behind addressing the mechanisms relevant to the RtoP is twofold. Firstly, to support an argument that the EU is equipped to respond to the RtoP crises. Secondly, if the first argument proves right and the EU has capacity to respond as well as the existing mechanisms are sufficient to create a coherent EU strategy, it further supports the hypothesis that the EU would be able to carry out the RtoP in its foreign policies. The chapter is divided into three parts. Reflecting the previous chapter, the former EC mechanisms currently stemming from the provisions included in TFEU are assessed first. Second considerations reflect the Community interaction with the Second pillar and focus on the competences shared between the First pillar and CFSP/CSDP. Thirdly, the attention is turned to the mechanisms existing under the CFSP/CSDP[302]. The observed mechanisms will be used in the following chapter to formulate the step-by-step EU approach in the face of the RtoP situation (guidelines).

7.1. MECHANISMS AVAILABLE TO THE EU UNDER THE FIRST PILLAR

Following the previous analysis, it has been shown that the EU emphasises the conflict prevention with the focus on the long-term (structural) approach[303], which is addressed first followed by the

[302] Since the Lisbon Treaty has not in fact affected the division between the former EC pillar and the CFSP (except for the explicit inclusion of the CSDP under Title V TEU) the thesis continues using the qualification «First pillar mechanisms» for those instruments stemming currently from the TFEU (Lisbon Treaty, as amended), and the «CFSP/CSDP» or «Second pillar mechanisms» for the tools included under Title V of the current TEU (Lisbon Treaty, as amended).

[303] See Chapters 4.3 and 5.3.

mechanisms aiming at react quickly to the nascent conflicts (immediate short-term prevention). Further the focus turns to the specific mechanisms designed for the post-conflict building.

7.1.1. Structural (Long-term) Prevention

Recalling primarily the nexus between development and the conflict prevention discussed in Chapter 4[304] the legal basis for an action under the former Community competence would lie in Articles 177-181 TEC[305] (current Articles 211-213 TFEU)[306] dealing with the development co-operation with the third countries aiming at foster sustainable economic development, fight against poverty and «[...] contribute to the general objective of developing and consolidating democracy and rule of law, human rights and fundamental freedoms[307].» The countries most vulnerable to the conflict are those lacking the economic development, which subsequently implies poverty and those where the democratic processes are the least advanced[308]. Therefore the *development and co-operation programs* are one of the tools aimed to tackle the root causes of the conflict[309].

The promotion and protection of human rights, democracy and the rule of law would also play similar role. Having in mind the overall objective of the EU the former Article 301 TEC (current Article 215 TFEU) provide for the possible suspension of the development and co-ordination programs therefore provide the legal basis for the *conditionality* widely used in the European external policies. In conjunction with Article 133 TEC (current Article 207) stating that the common commercial policy shall be conducted in accordance with the objectives of EU's external action, the *human rights clauses and conditionality* in the trade agreements can also play a role in the structural prevention (the Cotonou Agreement and similar instruments related to EU's neighbourhood present an example of these policies)[310].

[304] See Chapter 4.3. The European Consensus on Development marked also the milestone in the area of development policy referring to link between development activity and the conflict prevention with the particular focus on the need to tackle the root causes of the conflict. See European Consensus 2006/C 46/01, 24 February 2006.

[305] TEC (Nice Treaty, as amended), Articles 177-181.

[306] TFEU (Lisbon Treaty, as amended), Articles 211-213.

[307] TEC (Nice Treaty, as amended), Articles 177(2) and 181a(1).

[308] COM(2001)211final, 11 April 2001; EUROPEAID/122888/C/SER/Multi, July 2009.

[309] *Ibidem*.

[310] Cotonou Agreement, 23 June 2000. Turkey presents the example of such policies since its human rights record improved significantly after it has become a party to EU co-operation and integration policies (Helsinki European Council, Presidency Conclusions, 10 and 11

Drawing upon EU's perception of the RtoP, the structural prevention plays an important role. The crucial element remains its effective use having in mind the vulnerability of the proposed measures to the political considerations[311]. As it has been mentioned in the previous chapter, the decision-making falling rather under the former Community pillar is not vulnerable to the national interests of the individual member states, which makes the mechanism to be deployed easier. The EU must however use the available instruments coherently (and coordinate with the CFSP/CSDP pillar) otherwise the possibility of the systematic use of the RtoP in its external action becomes limited. The issue will be discussed later in the chapter.

The structural prevention, however, cannot always tackle the root causes of the problem completely effectively, especially if the ethnic division plays a main role. It can be demonstrated in the case of Bosnia and Herzegovina that currently faces one of the most serious crises since the war[312]. If the country becomes likely to fall into the conflict, would the EU be able to undertake an appropriate action?

7.1.2. Reaction to the Nascent Conflicts: Rapid Reaction Mechanism - Instrument for Stability

The Helsinki European Council stressed the need for the establishment of a rapid financial mechanism to make response to the sudden crises possible in case the structural prevention fails demonstrating EU's willingness to uphold the conflict prevention – and therefore a possibility to uphold the RtoP[313]. The Council Regulation No. 381/2001 later created in 2001 the *Rapid-Reaction Mechanism (RRM)* allowing for the short-term, quick reaction in case of the nascent conflict providing for the quick mobilisation of the existing Community instruments such as the fast financial support[314].

In November 2006 reflecting the developments in EU institutions

December 1999, Article 13). Obviously, the prospect of EU membership would play the strongest role. International Crises Group, EU Crises Response Capability Revisited, Europe Briefing No. 160, 17 January 2005, available at http://www.crisisgroup.org/~/media/Files/europe/160_eu_crisis_response_capability_revisited_edit.ashx (consulted on 20 June 2011).

[311] EU's unwillingness to go beyond the mild political dialogue when human rights violator is the large strategic partner – China, demonstrates the case. Fraser, 2007.

[312] See International Crises Group, Bosnia: The State Institutions under Attack, Europe Briefing No. 62, 6 May 2011, at http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/b062-bosnia-state-institutions-under-attack.aspx (consulted on 20 March 2011).

[313] Helsinki European Council, Presidency Conclusions, 10 and 11 December 1999, Annex II-VI.

[314] Council Regulation EC (No.) 381/2001 creating a rapid reaction mechanism [2001] OJ L 57/5.

and the overall step forward as regards linking the development, human rights and security, the RRM has been superseded by the *Instrument for Stability (IfS)*[315]. The mechanism has undertaken the RRM functions, while adopting the *Exceptional Assistance Measures and the Interim Response Program* in order to rapidly re-establish the conditions favourable for EU activities such as the development aid or the co-operation programs[316].

The IfS can be used for the conflict prevention, the crises management and post-conflict reconstruction and reconciliation in situations threatening the stable conditions for co-operation such as threats to the law and order and the safety and security of person[317]. Therefore, from the point of view of the RtoP, the IfS would now be able to carry out the whole concept as regards the possible intervention of the civilian nature since the complex set of possible reactions to the crises are under its «roof.» The possibilities range from the technical and financial support, economic, political and juridical assistance and food supply to the efforts to strengthen the capacity of international, regional and sub-regional organisations, state and non-state actors, promotion of the early warning, capacity and confidence building as well as mediation and reconciliation[318].

In relation to the RtoP, the IfS must be activated in case of the emerging RtoP situation. Being placed under the former Community pillar the IfS becomes quite flexible and more easily deployable stipulating the possibility of the EU to invoke such an instrument in its foreign policies.

7.1.3. Special Instruments Relative to the Post-conflict Re-building

The Community has also at its disposal specific instruments relative directly to the post-conflict building aiming primarily to contribute to the consolidation of peace, prevention of the future conflicts and support the reconciliation processes. The programs under the First pillar more or less consist of the *targeted assistance and the funding of reconstruction and rehabilitation projects*[319] *and Disarmament, demobili-*

[315] Regulation (EC) No. 1717/2006 of the European Parliament and of the Council establishing an Instrument for Stability [2006] OJ L 327/1.

[316] *Ibidem*, Article 6.

[317] *Ibidem*, Article 4.

[318] See International Crises Group, Bosnia: The State Institutions under Attack, Europe Briefing No. 62, 6 May 2011, at http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/b062-bosnia-state-institutions-under-attack.aspx (consulted on 20 March 2011), for detailed analyses of the mechanism.

[319] See COM(2001)211final, 11 April 2001; European Security Strategy, 12 December 2003,

sation and Reintegration programs (DDR) focusing on the linking relief, rehabilitation and the development strategy[320]. Such link therefore put together the strategies under the structural prevention and the post-conflict building.

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To sum up, excluding some exceptions such as the association agreements, the mechanisms are deployed following the Community decision-making referred to in the previous chapter. The Commission further implements agreed policies using the EC financial instrument[321]. The mentioned instruments are the most effective from all EU's mechanisms and can usually be deployed without major problems. They can therefore be considered very relevant for the prevention of the RtoP crimes. However, before turning to the relation between the EU mechanisms and RtoP available instruments must be addressed.

7.2. MECHANISMS REFLECTING THE INTERACTION BETWEEN THE FIRST AND SECOND PILLARS

The instruments under this chapter (the election observation and assistance, humanitarian aid, sanctions and the political dialogue) transcend/have transcended the pillars and are now deployable under the TFEU[322]. This presents the considerable step confirming EU's willingness to become more effective in the area of conflict prevention. Such a change has obviously an indirect impact on the RtoP. As it will be demonstrated, similarly to the previous mechanisms the proposed ones can be used in order to prevent the RtoP crimes or to some extent react to their occurrence. As the previous chapter explained, the deployment of the Second pillar instruments remains more difficult, therefore having more mechanisms under the First pillar decision-

available at http://www.consilium.europa.eu/ uedocs/cmsUpload/78367.pdf (consulted on 20 March 2011); European Commission, Country Strategic Papers 2007-2013, Georgia, available at http://ec.europa.eu/world/enp/pdf/country/ enpi_csp_georgia_en.pdf (consulted on 25 June 2011).

[320] See *inter alia* COM(2001)211final, 11 April 2001, and République du Burundi - Union Européenne, Strategie de Cooperation et Programme Indicatif National, 2003, 2007, available at http://ec.europa.eu/development/icenter/repository/print_bi_csp_fr.pdf (consulted on 25 June 2011).

[321] International Crises Group, EU Crises Response Capability Revisited, Europe Briefing No. 160, 17 January 2005, available at http://www.crisisgroup.org/~/media/Files/ europe/160_eu_crisis_response_capability_revisited_edit.ashx (consulted on 20 June 2011).

[322] TFEU (Lisbon Treaty, as amended).

making makes the EU policy in relation to the RtoP more operational[323]. We shall now present the instruments and assess their use in relation to the RtoP concept.

7.2.1. Election Observation, Electoral Assistance and Humanitarian Aid

The election observation, electoral assistance and the humanitarian aid present the Second pillar instruments, however, in both cases, the decision-making relative to their deployment has been moved under the First pillar following the relevant Council decisions[324]. The analysis becomes important because such transfer of the competence makes the deployment of the mechanisms much easier, which will be one of the important criteria regarding the question of the possible implementation of these instruments in a relation to the emergence of the RtoP crises.

The election observation and assistance present an important instrument in the area of the conflict prevention (structural or immediate) and the post conflict building[325]. The elections play an important role in the democratisation processes, which become crucial for the societies emerging from the conflict[326]. The responsibility to rebuild does not cease when the conflict gets relatively under the control. The long-term commitment in the form of peace-building and peace consolidation becomes necessary. Wide range of the political, developmental, human rights, humanitarian programs in the form of a short-term or long-term commitment must be deployed[327]. The responsibility to rebuild gradually yields back to the responsibility to prevent[328].

The legal basis for the election observation lied originally within Title V CFSP in Article J.3 TEU[329] and remained currently in the TEU as one objective of the EU CFSP/CSDP[330]. The electoral assistance has however been codified also as part of the democratic support in such instruments

[323] Refer to Chapter 6.

[324] Portela & Raube, 2009, pp. 15-16.

[325] Meyer-Resende, 2006, pp. 1-2; Homolkova, 2010, pp. 1-10. Liberia presents an example of the country where the EU election observation plays a post-conflict building role, while in Nigeria, the observers were many times deployed in order to contribute to the stability of the country and prevent the conflict. The author has participated in the EU Election Observation Mission to Nigeria in 2011 – the given information is based on author's own observations.

[326] Meyer-Resende, 2006, pp. 1-2; Homolkova, 2010, pp. 1-10.

[327] EUROPEAID/122888/C/SER/Multi, July 2009, pp. 8-9.

[328] See Meyer-Resende, 2006, pp. 1-2; Homolkova, 2010, pp. 1-10; COM(2001)211final, 11 April 2001. The issue will further be discussed in the next chapter.

[329] See Council Decision 94/403/CFSP concerning the observation of the elections to the Palestinian Council and the coordination of the international operation for observing the elections [1995] OJ L 238/4.

[330] TEU (Lisbon Treaty, as amended), Title V.

as the Cotonou Agreement and Regulations dealing with the relations with the countries having the elections in place (First pillar)[331]. The EU election observation or assistance mission could have been deployed under the EC pillar or similarly under the CFSP/CSDP pillar that could lead to the incoherence and possible tension between EU institutions.

In 1999 the provision has been put in place for the electoral observation and assistance allowing for the rapid deployment for the electoral experts to the emergency situations[332]. Further, the 1999 provisions conferred the implementing powers in both areas to the Commission providing for their flexible deployment under the First pillar procedures again making the action to be launched easier[333].

Humanitarian aid relates rather to the RtoP's Second and Third pillar when the population is already affected by the conflict[334]. The humanitarian assistance may firstly prevent the situation deteriorating into the crises. As regards the Third RtoP pillar, the humanitarian assistance is among other instruments such as capacity building, development aid and diplomatic measures, one of the primary means to be used in reaction to the crises[335]. The targeted humanitarian assistance would again be an important element that may curtail the suffering of the victims of the conflict. It could be in the form of the assistance to the government concerned in case it is unable to protect its own population or deployed without the consent of the government concerned in case of the RtoP's Third pillar[336].

The humanitarian aid has also found its place in the Primary legislation under Title V in Article 17 CFSP. Similarly, the humanitarian aid, however, has also been codified in the 1996 Council Regulation provided for the procedure that allows the Commission to decide on an

[331] See Cotonou Agreement, 23 June 2000, Article 9, mentioning the pledge of the EC to assist the democratic processes. For the overall assessment see COM(2001)211final, 11 April 2001.

[332] Council Regulation (EC) No. 975/1999 laying down the requirements for the implementation of development cooperation operations [1999] OJ L 120/1.

[333] Council Regulation (EC) No. 976/1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation [1999] OJ L 120/8; Council Decision 1999/468/EC laying down the procedure for the exercise of implementing powers conferred to the Commission [1999] OJ L 184/23.

[334] ICISS, 2001 (2), p. 27.

[335] European Union Presidency Statement, UNGA: Debate on the Responsibility to Protect, 23 July 2009, available at http://www.eu-un.europa.eu/articles/en/article_8901_en.htm (consulted on 12 March 2011); Council Regulation (EC) No. 1257/1996 concerning humanitarian aid [1996] OJ L 163/1.

[336] EU Presidency Statement, UN GA: Debate on the Responsibility to Protect, 23 July 2009, at http://www.eu-un.europa.eu/articles/en/article_8901_en.htm (consulted on 12 March 2011), Council Regulation (EC) No. 1257/1996 concerning humanitarian aid [1996] OJ L163/1.

emergency action in case of the situation of the urgent and unforeseeable humanitarian needs[337]. The similar 1999 provisions conferred the decision-making powers in the area of the humanitarian aid to the Commission[338]. With the entrance into the force of the Lisbon Treaty the humanitarian aid has been included into the TFEU that codified it as a First pillar instrument (without prejudice to the activities of EU member states in this area)[339].

The presented cases of the codification of the instruments within EU's First pillar decision-making demonstrate EU's willingness to make its mechanisms rapidly deployable, which becomes crucial for the RtoP's operationalisation. Similar case concerns the sanctions and political dialogues that have been now made more coherent within EU's pillars and provide for more effective and flexible use of sanctions along the emergence of the RtoP situation. We shall now assess closely these mechanisms.

7.2.2. Sanctions and Political Dialogues

The political dialogue is more moderate playing already an important role during the structural prevention under former Community legislation[340]. It should be deployed throughout the phase of the conflict deterioration as part of the responsibility to prevent and react playing also its role in the conflict management, mediation and post-conflict rebuilding[341].

Similarly, the legal basis for the sanctions and political dialogues can be found in both, in existing First pillar legal practice, such as the Cotonou Agreement[342] and also under the Second pillar in the Primary law[343], which may cause the incoherence and actually lead to the concurrent adoption of sanction and tension between the institutions[344]. The possibility to overcome the problem has however been demonstrated by the better co-ordination of EU institutions and so-called

[337] *Ibidem*.

[338] Council Regulation (EC) No. 976/1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation [1999] OJ L 120/8; Council Decision 1999/468/EC laying down the procedure for the exercise of implementing powers conferred to the Commission [1999] OJ L184/23.

[339] TFEU (Lisbon Treaty, as amended), Article 214.

[340] Cotonou Agreement, 23 June 2000.

[341] ICISS, 2001 (1), pp. 19-27.

[342] See Cotonou Agreement, 23 June 2000, Article 8 for provisions relative to political dialogue and Article 96 for sanctions.

[343] See Article 26 TEU on political dialogue and Article 25 TEU on possible measures under the Second pillar. TEU (Nice Treaty, as amended).

[344] Portela & Raube, 2009, pp. 15-16.

«two-step» approach as demonstrated on the case of Zimbabwe where the Regulation under the First pillar initially disconnected the development aid and subsequently the Council common position imposed the visa-ban and arms embargo on the Zimbabwean authorities[345]. The EU concern regarding the coherence of the mechanisms demonstrates again its willingness to effectively shape its reaction to the problems at the international scene. Focusing on the RtoP, the two-step approach can effectively contribute to the conflict prevention in case of the possibility of occurrence of the RtoP situation and the conflict management in case the RtoP crimes are already taking place.

In the end it is worth mentioning that the EU applies the restrictive measures not only autonomously, but also and more often within the framework of the UN imposed sanctions confirming EU's commitment to the multilateral solution articulated in EU law[346]. Similarly, the restrictive measures and the political dialogue can be at the same time conducted by EU member states, while the Lisbon Treaty aimed to include the provisions ensuring the complementary of their individual policies with those of the EU[347]. Coordinated response to the emerging RtoP situation through the deployment of the sanctions by the UN, EU and also its member states presents an important tool to uphold the RtoP. The carefully tailored decision-making in this matter remains of crucial importance and therefore the case of the two-step approach moves the EU again closer to the possible upholding of the RtoP.

7.3. MECHANISMS AVAILABLE TO THE EU UNDER THE SECOND PILLAR

The EU also possesses mechanisms under its Second pillar crucial to the possible RtoP action. As stated, their deployment may be limited due to the intergovernmental way of decision-making and different national interests of the individual EU member states[348]. The Second pillar mechanisms, however, remain crucial to the possible operationalisation of the RtoP and must be examined, especially because they provide for the possible military intervention, the most difficult element of the RtoP concept. Due to the complexity of the Second pillar

[345] See Council Regulation (EC) No. 310/2002 concerning certain restrictive measures in respect of Zimbabwe [2002] OJ L 50/4; Council Common Position 2002/145/CFSP concerning restrictive measures against Zimbabwe [2002] OJ L 50/1; for deeper analysis consult Portela & Raube, 2009.

[346] Refer to Chapter 4.

[347] However, as explained in the Chapter 6 the reality often differs.

[348] Consult Chapter 6.

mechanisms the analyses move along the structures created under the European Council emphasising the operations launched in the CSDP framework – the most relevant to the RtoP's operationalisation[349].

7.3.1. Political and Security Committee

Article 25 TEU[350] (current Article 38)[351] created the Political and Security Committee (PSC) and mandated it with civilian and military crises management[352]. The decision-making reflects the inter-governmental structure since the PSC is composed of ambassadorial level diplomats of every EU member states. The PSC is advised by the EUMC and the Committee for Civilian Aspects of Crises Management (CIVCOM).

The CIVCOM[353] focuses on civilian aspects of the crises bringing together the contributions from the Commission and the Council[354]. Since the Community instruments presented in the previous part are only of the civilian character, the CIVCOM plays important role in their coordination[355].

The EUMC[356] complements the CIVCOM focusing on entire military activities. It becomes the forum for the military consultation mandated to deal with current and potential crises, suggesting the military strategic options and planning the operation after its approval by the Council. It assesses financial implications of the operation and monitors its proper execution[357]. EUMC presents the forum where the military action – the RtoP element can be approved.

Reflecting Article 17 TEU[358] (current Article 42), the Council established the EU Military Staff (EUMS), the only permanent military structure within the EU with the mandate to provide early warning, situation assessment and the strategic planning as well as to provide the

[349] EUROPEAID/122888/C/SER/Multi, July 2009, p. 53.
[350] TEU (Nice Treaty, as amended), Article 25.
[351] TEU (Lisbon Treaty, as amended), Article 38.
[352] Council Decision 2001/78/CFSP setting up the Political and Security Committee [2001] OJ L 27/1.
[353] Council Decision 2000/354/CFSP setting up the Committee for Civilian Aspects of crises management [2000] OJ L 127/1.
[354] International Crises Group, EU Crises Response Capability Revisited, Europe Briefing No. 160, 17 January 2005, available at http://www.crisisgroup.org/~/media/Files/ europe/160_eu_crisis_response_capability_revisited_edit.ashx (consulted on 20 June 2011), pp. 19-20.
[355] *Ibidem*.
[356] Council Decision 2001/79/CFSP setting up the Military Committee of the European Union [2001] OJ L 27/4.
[357] *Ibidem*.
[358] TEU (Lisbon Treaty, as amended), Article 17.

High Representative with the military expertise[359]. The Early Warning Mechanism presents one of the most important parts of the RtoP concept, therefore existence of such a system within the EU further support the argument that the EU can uphold the RtoP.

Moreover, the structures explained already stipulate the possible military action. The EU may therefore be able to carry out even the last responsibility under the RtoP – responsibility to react. On their advice, the Council may unanimously provide for the deployment of the *CSDP operation* exercised through the Council Joint Action (JA) operationalising EU's policies[360]. If adopted under Title V, they have direct legally binding effect[361].

The JA organises the CSDP operation. It defines the mission, designates its structure and the chain of command that often very much differs[362]. The JA could relate to the police, military or civilian operation[363] deploying missions for the disarmament, humanitarian and rescue tasks, conflict prevention, peacekeeping, post-conflict stabilisation and the fight against terrorism[364]. Not only the wide range of activities possible, but also more importantly, the CSDP mission presents the only possibility to be deployed by the EU as a military intervention envisaged the responsibility to react, therefore play a crucial role for the RtoP concept and its entire realisation.

7.3.2. Special Representatives and the Fact Finding Missions

The JA also provides for the establishment of the EU Special Representative[365] that plays an important role within the CSDP structure promoting EU's interest in the troubled regions. Therefore the Special Representative contribute to the structural prevention, may play an active role in peace consolidation, promotion of stability, rule of law,

[359] Council Decision 2001/80/CFSP setting up the Military Staff of the European Union [2001] OJ L 27/7.

[360] TEU (Lisbon Treaty, as amended), Article 14(1).

[361] Piris, 2010, p. 93; Wyatt & Dashwood, 2006, pp. 54-55.

[362] Wyatt & Dashwood, 2006, p. 61.

[363] See mandate of the Council Joint Action 2005/190/CFSP on European Integrated Rule of Law Mission for Iraq, 7 March 2005 [2005] OJ L 62/37; Council Joint Action 2005/824/CFSP on the EU Police Mission for the Palestinian Territories, 14 November 2005 [2005] OJ L 300/65; Council Joint Action 2006/319/CFSP on EU military operation in support of the UN Organisation Mission in the Democratic Republic of Congo, 27 April 2006 [2006] OJ L 116/98. For the further assessment see Wyatt & Dashwood, 2006, pp. 60-62.

[364] TEU (Lisbon Treaty, as amended), Article 43.

[365] Legal basis lies in Article 33 of the TEU, see Wyatt & Dashwood, 2006, pp. 60-62. See also example of the Council Joint Action 2005/724/CFSP establishing the EU Special Representative in Former Yugoslavian Republic of Macedonia, 17 October 2005 [2005] OJ L 272/26.

human rights and democratisation[366]. Further, similarly to the EU election missions, the activities of Special Representative lead to the gathering and assessment of the information contributing significantly to the EWM, conflict prevention and post-conflict strategies. Under the CFSP/CSDP structure, the Special Representative advises the High Representative and the EU Council[367]. Similarly, the Fact Finding Missions that could be deployed under the CFSP/CSDP through the JA play such a role[368].

The rationale behind mentioning these mechanisms together with the previously discussed election observation and assistance becomes primarily their contribution to the EWM assessed in the following paragraph. EWM plays a crucial part of the RtoP concept[369]. The role in moderating conflict cannot be doubted, however, the information gathering still remains crucial for the RtoP prevention, the first and foremost RtoP pillar. Existence of these mechanisms provide the EU with the possibility to carry in accordance with the ICC, the most crucial task relative to the conflict prevention and therefore to the RtoP[370].

7.3.3. Early Warning Unit (EWU)

The EWM represents the complex mechanism that must bring together all possible policy instruments that can contribute to the diagnose of the situation, alert the decision-makers and operational centres about the emerging situation, analyse it and design the timely and effective response[371].

The EWU is composed of the eight task forces with the split competences into the particular thematic and geographic sections[372]. It

[366] See mandate of the EU Special Representative. Council Joint Action 2005/724/CFSP establishing the EU Special Representative in Former Yugoslavian Republic of Macedonia, 17 October 2005 [2005] OJ L 272/26.

[367] International Crises Group, EU Crises Response Capability Revisited, Europe Briefing No. 160, 17 January 2005, available at http://www.crisisgroup.org/~/media/Files/ europe/160_eu_crisis_response_capability_revisited_edit.ashx (consulted on 20 June 2011).

[368] 14513/02, 19 November 2002, pp. 7-10.

[369] ICISS, 2001 (1), pp. 21-22.

[370] *Ibidem*.

[371] International Crisis Group, EU Crisis Response Capability Revisited, Europe Briefing No. 160, 17 January 2005, pp. 16-21, available at http://www.crisisgroup.org/~/media/Files/europe/160_eu_crisis_response_capability_revisited_edit.ashx (consulted on 22 June 2011); ICISS, 2001 (1), pp. 35-37.

[372] The task forces are: European Security and Defence Policy, Western Balkans/Central Europe; Early Warning/Conflict Prevention/Terrorism; Horizontal Questions; Latin America; Russia/Ukraine/Transatlantic/Baltic States; Asia; Mediterranean/Middle East/Africa; and Administration/Security and Situation Centre/Crisis Cell. See International Crisis Group, EU Crisis Response Capability Revisited, Europe Briefing No. 160, 17 January 2005, pp. 16-21,

has been placed under the Council Secretariat together with other Second pillar instruments reporting directly to the High Representative[373]. The Joint Situation Centre supports its work bringing together the expertise from the policy unit and the military situation centre monitoring and assessing crises worldwide twenty-four hours a day[374]. The EWU further maintains close co-operation with other actors and entities coordinated within the Council Secretariat such as CFSP working groups, European correspondents and member states[375].

However, the critics pinpointed that the EWU focuses solely on the situations under the Second pillar often overlooking instruments and activities under the Community pillar that can also bring crucial data[376]. The EWM should work as an umbrella concept bringing together the information not only from the entire EU system, but also from the systems at the disposal of EU member states and institutions. The existing mechanisms and legal basis together with the newly created post of the High Representative provide chances for the overcoming of the existing gaps and creation of the complex EWM, crucial RtoP element.

*

The chapter presented the instruments under the entire EU's external policy. As it has been shown, the mechanisms exist to prevent the conflict, including the long-term structural prevention largely emphasised by the EU. In case of the emergence of the conflict, the EU has tools to react rapidly not only through the diplomatic means but also militarily under the framework of the actions of another organisation or autonomously. The specific mechanisms are also at EU's disposal for an immediate as well as successive long-term post conflict reconstruction.

To sum up briefly the previous findings, the existing Primary EU law already provides basis to uphold the RtoP. Even though there are no legal texts yet explicitly mentioning the RtoP, the EU at least invokes it

available at http://www.crisisgroup.org/~/media/Files/europe/160_eu_crisis_response_capability_revisited_edit.ashx (consulted on 22 June 2011).

[373] Gegout, 2010, p. 52.

[374] International Crisis Group, EU Crisis Response Capability Revisited, Europe Briefing No. 160, 17 January 2005, pp. 16-21, available at http://www.crisisgroup.org/~/media/Files/europe/160_eu_crisis_response_capability_revisited_edit.ashx (consulted on 22 June 2011), pp. 16-18; Gegout, 2010, p. 52.

[375] International Crisis Group, EU Crisis Response Capability Revisited, Europe Briefing No. 160, 17 January 2005, pp. 16-21, available at http://www.crisisgroup.org/~/media/Files/europe/160_eu_crisis_response_capability_revisited_edit.ashx (consulted on 22 June 2011).

[376] *Ibidem*.

in its documents that have the considerable political value. Therefore based on the previous explanations, it can be assumed that these documents express EU's consent with all parts of the RtoP concept. Similarly, in spite of the fact that the existing mechanisms have not been explicitly designed to carry out the RtoP, but deal rather with the conflict situations, they are available to the EU to respond to the RtoP situations in accordance with the RtoP guidelines therefore providing for their possible inclusion into EU foreign policy.

It seems that there is no need to create neither new EU law nor new instruments, the coherent strategy designed exactly to carry out the RtoP is needed in the first place. The next part of the chapter examines whether the EU can use its well-equipped external action toolbox within the RtoP framework. In case it would be possible to design such a strategy, the argument can be developed that the EU may be able to use the RtoP in its external action.

CHAPTER 8

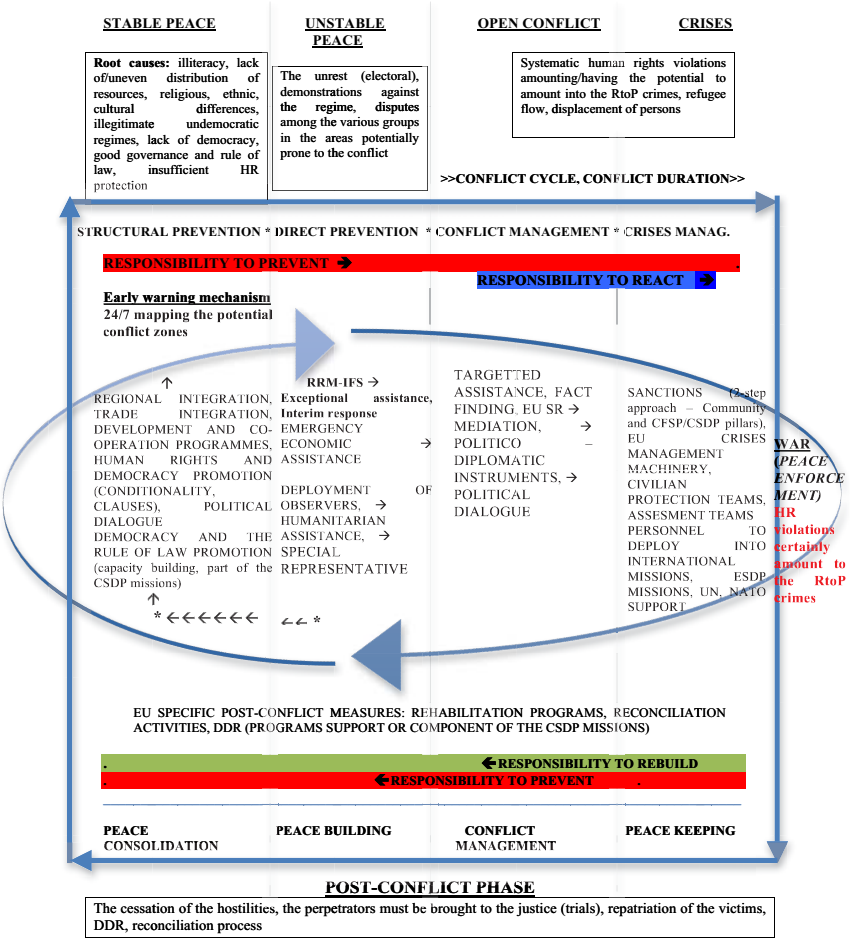
PROPOSED GUIDELINES FOR AN EU ACTION IN THE FACE OF THE RTOP SITUATION: THE CONFLICT CYCLE, THE EMERGENCE OF THE RTOP SITUATION AND THE APPROPRIATE RESPONSE

Since EU's mechanisms have been designed in relation to the conflict, it becomes crucial to draw the guidelines for an action based on the link between the individual parts of the conflict cycle, the emergence of the RtoP situation and the appropriate response. The analysis is based in the model of the conflict cycle designed by Swanström and Weissmann[377]. Going beyond their analyses the complex model is proposed showing during which phase of the conflict may the RtoP situation arise and what anticipates such an emergence, what strategy and simultaneously which of the RtoP responsibilities become relevant and which of the previously examined mechanisms should be employed. Figure 1 shows in detail the relationship between the conflict cycle, the RtoP and the phase when the particular EU mechanisms shall be deployed and will be explained throughout the chapter.

According to Swanström and Weissmann, the conflict can be described as cyclical regarding its intensity emerging from a relative stability with the possible escalation into an open conflict, crises and war, while the de-escalating phase leads again to the relatively stable peace[378]. The cycle usually recurs until the durable peace has been achieved and conflict therefore resolved[379].

[377] Swanström & Weissmann, 2005, p. 11.
[378] *Ibidem*, p. 10.
[379] *Ibidem*.

*Figure 1. Conflict cycle, RtoP and the deployment of the available EU mechanisms**



** The diagram has been inspired by the conflict cycle proposed by Swanström and Weissmann.*

8.1. STABLE AND UNSTABLE PEACE

Undoubtedly, to launch the conflict prevention, the perception of the potential or already actual conflict must be detected[380]. As Figure 1 shows, the baseline situation could already be the relatively stable peace showing factors indicating the vulnerability of the society to the warfare – the root causes[381].

The conflict always causes a large human suffering, which can later amount to the RtoP crimes. The responsibility to prevent then starts already during the stable peace encompassing the necessary long-term and structural prevention – the initial step, the EU must *conduct thorough structural prevention without being afraid to push for the agreed commitments*.

If the prevention fails and the country concerned moves into the stage of the unstable peace the immediate short-term conflict prevention becomes necessary[382]. The EWM paying attention to any dispute in the potentially conflict area presents the crucial instrument[383]. The EWM must further play a role during the whole conflict phase starting from the period of the stable peace. *The first pre-requisite for the effective response in relation to the RtoP is the working EWM to monitor and warn about potential instability/emerging conflict that should be followed by the rapid reaction to the first sight of instability*[384].

Considering the instruments the EU possesses as explained in the previous chapter, the *humanitarian assistance* can be provided if deemed necessary at this early stage of an emerging conflict[385].

The suggested preventive measures represent the civilian measures, which can only be deployed with the government of the state concerned and according to the RtoP's Second pillar, when the government becomes unable to uphold its RtoP[386]. Having in mind the analysis in

[380] *Ibidem*, p. 8.
[381] ICISS, 2001 (2), p. 33; COM(2001)211final, 11 April 2001.
[382] Swanström & Weissmann, 2005, p. 8.
[383] ICISS, 2001 (2), p. 32.
[384] See Figure 1. As regards the co-ordination within the EU the studies, reports and assessments by the Commission must be taken into account next to the sole analysis of the CFSP/CSDP issues. The Commission prepares under the IfS the Multi-country Strategy Papers, Thematic Strategy Papers, Multi-annual Indicative Programmes and Annual Action programs relative to its implementation. The papers could also be used as an important source of the information. EUROPEAID/122888/C/SER/Multi, July 2009, pp. 4-7.
[385] See Chapter 7.2.
[386] For example, using TIM during the Palestinian crises. The Commission launched the initiative through the Temporary International Mechanism and through the financial aid averted the crises. See Fuel for Palestinian Hospitals: First Commission Action through the International Mechanism (TIM), 11 July 2006, available at http://www.eu-un.europa.eu/articles/en/article_6102_en.htm (consulted on 12 June 2011).

previous two chapters, the mentioned action seems not that difficult to be launched and therefore creates a baseline for one of EU's first actions in the face of an emerging RtoP situation. Similarly to EU law and rhetoric[387] the prevention would be the least difficult RtoP element for the EU.

8.2. THE STAGE OF OPEN CONFLICT AND CRISES

The situation may deteriorate into an open conflict and later to the crises. The large-scale and systematic human rights violations already amounting or having a potential to amount into the four RtoP crimes are typical for this part of the conflict cycle[388]. The displacement of persons and the refugee flow becomes massive. Prevention continues playing the role of the crises diplomacy (conflict management) aiming to prevent the situation from deteriorating into the war[389]. Notwithstanding the EU would be able to uphold the responsibility to prevent, does not mean that it can carry out the whole concept. More severe measures and possibility to intervene must exist if the government concerned is unwilling to uphold its RtoP in the time of crises, the coercion in the form of sanctions should already take place (part of the crises management). The responsibility to prevent yields into the responsibility to react that continues through the situation of war, where the peace enforcement operations become possible.

The deterioration of the situation into an open conflict already requires a *targeted response effectively using the soft power and employing all possible financial and political mechanisms*. The EU Special Representative shall exercise its mandate to contribute to the mediation of the situation as well as the political dialogue (under the CFSP/CSDP pillar) must be launched, while the measures from the previous step continue. The EU can also launch the fact-finding mission in order to gather as many informations as possible on the situation and the nature of the conflict in order to respond adequately, timely and effectively.

In case the conflict escalates to the crises, the responsibility to react of the international community becomes even more relevant than in the previous case. Emphasising the multilateral solution of the problems, the EU should in the first place *speak loud at the international forums*

[387] Refer to Chapters 4 and 5.
[388] Swanström & Weissmann, 2005, p. 8; ICISS, 2001 (2), p. 32.
[389] *Ibidem*.

and call for adequate measures. The *«name and shame policy» and the diplomatic demarchés* within other international organisations or a deterrent in the form of a *possible suspension of the trade agreements* or the development cooperation can be effective at the stage of an open conflict.

Sanctions against the country concerned must without doubts be launched at this stage. If the sanctions have been placed under the UNSC Resolution, the EU must ensure that the organisation and its member states comply with the measures. The EU can also decide to place additional sanctions[390]. The possible hesitance of the UNSC to place sanction shall not prevent the EU from the autonomous measures[391].

The EU emphasises the possibility to launch the intervention in order to prevent the situation from the escalation into the war[392]. The CSDP mission either to support the existing crises-management activities ongoing under the UNSC Resolution or autonomously intervene should be then deployed at this stage. *Protection and assessment teams* would be well positioned to manage the conflict. Taking into account the effective multilateral engagement approach, the EU should not launch the military intervention at this stage[393].

8.3. THE WAR

The escalation of the conflict into the war signalises that all peaceful, diplomatic and humanitarian means failed and therefore the international community is in accordance with the RtoP entitled to exercise its responsibility to react. In case the UNSC with the contribution of EU lobbying, decides to act and launches the military intervention the *EU must be ready to contribute the civilian and military capacities* and work along with the partners (the UN, NATO, the African Union, the coalition of willing) to execute the UNSC Resolution.

In case the UNSC fails to act the EU may think about the possible initiative in accordance with the ICISS proposal[394]. However, the EU has rather accepted the RtoP as endorsed at the 2005 World Summit and remains silent on the possibility to find the alternatives to the UNSC emphasising its primary responsibility for maintaining the

[390] ICISS, 2001 (1), pp. 29-30.
[391] Portela & Raube, 2009, pp. 15-16.
[392] See Chapter 5.
[393] See Chapters 4.3, 5.2 and Annex.
[394] ICISS, 2001 (1), pp. XII-XIII.

international peace and security. On the other hand, EU law does not explicitly prohibit the possible EU mandated humanitarian intervention[395]. Therefore, the EU should remain open-minded as regards the possible alternatives as it stated in one of its speeches[396]. One way could be to launch the mission through the NATO as happened in 1999 in Kosovo[397]. Establishment of the coalition of willing explicitly under the EU mandate could also be possible and justifiable under EU law[398].

8.3.1. The Post-conflict Phase

During the conflict, the peace agreement is usually negotiated or measures are put in place to cease the violations, however, the peace and stability, especially immediately after the cessation of the conflict, remain extremely fragile. Swanström and Weissmann suggest that the conflict exists in the cycle and until the peace is really consolidated and the root causes are effectively tackled, the situation may repeat[399].

In the first place, the *EU must ensure that the peacekeeping mission is in place*. Such a role is in the most cases played by the UN, therefore the EU must be ready to support its activities either by providing capacity or personnel. It can also deploy the CSDP mission to support the existing peacekeeping operation[400]. It is highly unlikely that after the military engagement by the UN or other international organisation such as NATO, there would be no peacekeeping mission. Such possibility could hypothetically arise in the future in case the EU would launch its own peace enforcement mission surpassing the paralysed UNSC. In that case, the obligation to mandate the CSDP peacekeeping mission arises explicitly for the EU.

It is worth recalling that during the post-conflict period we deal with the responsibility to rebuild. Taking into account the conflict cycle, the rebuilding actually means prevention from the recurrence of the conflict[401]. In line with Figure 1, the mechanisms deployed during the

[395] Refer to Chapter 4.

[396] EU Priorities for the 65th UNGA, 25 May 2010, available at http://www.eu-un.europa.eu/articles/en/article_10094_en.htm (consulted on 22 June 2011).

[397] Euractiv Network, EU Nations Remain Divided over Kosovo, 9 February 2008, available at http://www.euractiv.com/en/enlargement/eu-nations-remain-divided-kosovo/ article-170383 (consulted on 19 March 2010); Fraser, 2007, pp. 172-174.

[398] It goes beyond the scope of the thesis to discuss the legality of an intervention under the international law.

[399] Swanström & Weissmann, 2005, pp. 15-17.

[400] See for example Council Joint Action 2006/319/CFSP on EU military operation in support of the UN Organisation Mission in the Democratic Republic of Congo, 27 April 2006 [2006] OJ L 116/98.

[401] ICISS, 2001 (2), p. 32. The example could be drawn on the conflict in Sierra Leone

escalation of the conflict shall take place also after the conflict. Next to the activities relative directly to the end of the conflict, such as *DDR activities, reconciliation and the punishment of the war related (RtoP) crimes*, the structural prevention including the support for the democratic elections emphasised by the EU comes again to the play as demonstrated in Figure I. The EU has at its disposal similar mechanism for the prevention of the conflict as well as post-conflict phase[402].

One extra component remains the capacity building. Post-conflict societies would demonstrate significant signs of badly managed, corrupted and not working law enforcement organs such as police or judicial organs[403]. The EU shall therefore support the civilian capacity-building activities or launch its own mission to train police, judges and other state officials. Capacity building must also be directed to the civil society since it presents the viable role in the democratisation processes[404]. Fundamental freedoms and human rights must also be supported and therefore be the component of every mission, office or activity deployed to the region[405].

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The proposed guidelines represent the ideal case. However, since they are based on the existing laws, tools and practice, they show that there is a way the EU has capacity to uphold the RtoP in its external action. The nature of the organisation and the way of the decision-making can play a role in the deployment of some of the mechanisms and lower EU's ability as an external actor, which has been demonstrated in the previous chapter. However, one important conclusion seems to be arising at this stage: basing the guidelines in existing cases, it has been shown that the EU generally acts in the line with the RtoP – or its parts. The major problem seems a lack of the RtoP inclusion into

between 1991 and 2000, when the coup d'état and crises reoccurred a couple of times even despite two negotiated peace agreements in 1996 (Abidjan Peace Agreement) and 1999 (Lomé Peace Agreement). Despite the currently relatively stable peace, the situation in Sierra Leone remains fragile and the country therefore needs the continuous peace-building that in the same time represents the conflict prevention. Structural conflict prevention plays the crucial role. See UNAMSIL, Sierra Leone: Background, 2005, available at http://www.un.org/en/peacekeeping/missions/past/unamsil/background.html (consulted on 3 May 2011).

[402] Swanström & Weissmann, 2005, pp. 5-20.

[403] International Crises Group, EU Crises Response Capability Revisited, Europe Briefing No. 160, 17 January 2005, available at http://www.crisisgroup.org/~/media/Files/europe/160_eu_crisis_response_capability_revisited_edit.ashx (consulted on 20 June 2011).

[404] See the EuropeAid study dealing with the post-conflict building, EUROPEAID/122888/C/SER/Multi, July 2009.

[405] Moeckli & Nowak, 2007, pp. 88-90.

EU legally binding documents. The EU includes the RtoP into its statements, however, not always in relation to the specific situation or in relation to the deployement of the particular mechanisms. Further, no legally binding act that would mention the RtoP exists within the EU[406].

We shall now move towards the application of the guidelines on the real case examining whether they could be operational and whether the EU can to some extend be able to invoke the RtoP in its external action. Secondly, it shall be assessed, whether the EU, in case it acts in accordance with the RtoP concept, uses the appropriate wording. These two considerations would play an important role while assessing to what extent will the EU be able to invoke the RtoP in its foreign policies in the future.

[406] Consult the Annex in this thesis.

CHAPTER 9

FOCUS ON THE IMPLEMENTATION: CASE STUDY - LIBYA

The last chapter of the thesis moves to the practical level focusing on the implementation of the findings and proposed guidelines to the real situation. It has been shown that based on EU law and its understanding by the organisation (EU) itself as well as the existing mechanisms, the EU would be able to carry out the RtoP. The guidelines proposed the ideal way of such action. However, the research question to what extent will the EU be able to use the RtoP in its external action, cannot be answered without the examination of the particular case. As one of the co-founders of the RtoP concept Gareth Evans pointed out, the international response to the crises in Libya follows precisely how the RtoP principle should be applied[407]. With the exception of the couple of states that expressed concerns about the military intervention for humanitarian purposes into Libya, the international community remained surprisingly united in condemning the events in the country as well as in its response recalling the RtoP concept[408]. Libya presents the textbook case for the RtoP and therefore the ideal case to examine EU's reaction to the emerging RtoP situation.

The chapter is divided into three parts. Firstly, the conflict, its origin, nature and phases are examined followed by the international response. EU's reaction is drawn in the last part of the chapter.

[407] Evans, 2011.

[408] The UNGA adopted unanimously the UNSC Resolution 1970/2011 on sanctions against Libya and the referral of the case to the ICC. The UNGA subsequently suspended Libya from the Human Rights Council. See United Nations Department of Public Information, News and Media Division, New York, General Assembly Suspends Libya from the Human Rights Council, GA 11050, 1 March 2011, available at http://www.un.org/News/Press/docs/2011/ga11050.doc.htm (consulted on 29 June 2011). Brazil, China, Germany, India, Russian Federation abstained during the voting on the authorisation of the «use of all necessary means» to protect the civilian population of Libya. See United Nations Department of Public Information, News and Media Division, New York, Security Council Approves «No-fly Zones» over Libya, Authorising «All Necessary Means» to Protect Civilians, SC 10200, 17 March 2011, available at http://www.un.org/News/Press/docs/2011/sc10200.doc.htm (consulted on 29 June 2011).

9.1. THE CONFLICT OVERVIEW AND THE EMERGENCE OF THE RTOP SITUATION

In the assessment of the Libyan conflict and the international reaction, the chapter moves along the lines of the proposed conflict cycle. The rationale behind is to adequately evaluate EU' response in the light of the issues analyzed throughout the thesis. Has the EU deployed effectively all the mechanisms at its disposal relevant to the particular phase of the conflict and based on related RtoP responsibility as examined in the previous chapter?

The conflict in Libya started in mid-February 2011. During the so-called «Arab spring» marked by the uproars in the Arab world emerging primarily in Tunisia and Egypt, the number of peaceful anti-governmental demonstrations happening in Libya has been violently suppressed by the forces of the Libyan regime. Contrary to the events in the neighbouring Tunisia and Egypt, the situation in Libya soon escalated into the civil war dividing the country between the opposition-led East and the West controlled by the regime[409]. The ongoing conflict, leaving behind thousands of dead and wounded, is the consequence of the history of more than 40 years of the Gaddafi's regime and the persistent problem of the constant widespread violations of civil and political rights[410]. The problem of corruption, the abuse of power and the undemocratic government have not been tackled either, which contributed to the escalation of the conflict[411]. We shall now turn to the conflict in more detail.

9.1.1. From Stability to the Conflict

Assuming from the UN action that lifted the embargo on Libya in 2003, the situation in the country has been stable and relatively peaceful until mid-February[412]. However, considering the root causes that can possibly escalate into the RtoP situation, the problems could have been anticipated. First problem can therefore be named «the nature of the regime».

[409] International Crises Group, Libya: Achieving a Ceasefire, Moving Toward Legitimate Government, 13 May 2011, available at http://www.crisisgroup.org/en/publication-type/media-releases/2011/libya-achieving-a-ceasefire-moving-toward-legitimate-government.aspx (consulted on 29 June 2011).

[410] Human Rights Watch, Fourth Periodic Review of the Libya Arab Jamahiriya, 3 October 2007, available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/hrwlibya91.pdf (consulted on 29 June 2011).

[411] *Ibidem*.

[412] EuropeAid: Libya, available at http://ec.europa.eu/europeaid/where/neighbourhood/country-cooperation/libya/libya_en.htm (consulted on 1 July 2011).

Overthrowing the monarchy in power, Gaddafi came into force in 1969. On the basis of his own role he established the Jamahiriya («the state of masses») creating the Constitution that generally prohibits the state representation as well as liberties similar to the democratic freedom of expression[413]. The radical refusal of the political representation together with the institutionalisation through the reliance of the regime on the family and the tribal solidarities to support its power, has not allowed for the creation of any kind of civil society[414]. To maintain such an order in a contemporary world became simply impossible on one hand, on the other, the Gaddafi's unwillingness to leave something of his own creation should have been expected.

The second reason leading to the uprisings was Gaddafi's undemocratic ruling and persistent violations of human rights. Already during the period of stability Libya has demonstrated failure to comply with the IHRL refusing the whole range of civil and political rights to its population[415]. Arbitrary and unlawful detentions have been widespread. The regime has violated the right to fair trial and held prisoners of consciousness, while the torture and other cruel and inhumane treatment or punishment, forced disappearances, extrajudicial, summary and arbitrary executions have been reported as well as the violations of the freedom of expression[416]. The 1969 Constitution already limits the freedom of speech to «within the limits of the public interest and the principles of the Revolution[417],» however, in practice the free speech has been much more restricted and those discussing sensitive political topics faced the reprisals[418]. The Publication Act of 1972 Articles 18, 19, 21, 22 and 25 has further severely limited the freedom of opinion and expression[419]. The law has also prohibited the

[413] International Crises Group, Libya: Achieving a Ceasefire, Moving Toward Legitimate Government, 13 May 2011, at http://www.crisisgroup.org/en/publication-type/media-releases/2011/libya-achieving-a-ceasefire-moving-toward-legitimate-government.aspx (consulted on 29 June 2011); The Constitution of the Great Socialist People's Libyan Arab Jamahiriya, 11 December 1969.

[414] The Constitution of the Great Socialist People's Libyan Arab Jamahiriya, 11 December 1969; Gaddafi, 1975.

[415] Libya is part to the major human rights treaties including the ICCPR (ratified on 15 May 1970) and the Convention against Torture (ratified on 16 May 1992). Moreover, many human rights that are repeatedly violated in Libya has been attributed the status of the customary international law (see Chapter 3.2). For more information about the Libyan human rights record see CPR/C/LBY/CO/4, 15 November 2007; US Department of State, Human Rights Report: Libya, 8 April 2001, available at http://www.state.gov/g/drl/rls/hrrpt/2010/nea/154467.htm (consulted on 7 June 2011); Human Rights Watch, Fourth Periodic Review of the Libya Arab Jamahiriya, 3 October 2007, available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/hrwlibya91.pdf (consulted on 29 June 2011).

[416] See CPR/C/LBY/CO/4, 15 November 2007, paras. 14, 15 and 19.

[417] The Constitution of the Great Socialist People's Libyan Arab Jamahiriya, 11 December 1969, Article 13.

[418] CPR/C/LBY/CO/4, 15 November 2007, para. 23.

[419] *Ibidem*; Freedom House, Freedom of the Press 2010 - Libya, 30 September 2010, at http:

foundation of the political parties, the membership in them or any other kind of political affiliation. Law 71 of the 1975 Penal Code condemned all political activity as treason and the 1969 Revolutionary Council Decision explicitly abolished all forms of political opposition[420]. Many individuals have also been imprisoned or sentenced to death on the basis of the Law 80 of the 1975 Penal Code for the offences against the security of state[421]. The denial of the economic and social rights also lasted over years[422].

The mentioned consequences of Gaddafi's regime became the reason for an ongoing civil war. First protests were held already in January reflecting the discontent of the population with the governmental corruption and housing and development provisions followed by calls for a larger freedom[423]. The Amnesty International and other organisations claim that the initiators, human rights activists, journalists and others have been arrested, while some reported the beating, torture, rape or other sexual harassment while in detention[424].

In the conditions similar to those, any such kind of action endangers the stability of the country as it exactly happened in this particular case. Over 500 protesters stepped against the imprisonment of the activists in mid-February in Benghazi, but were violently repressed by the police. That led into other series of the subsequent peaceful anti-governmental demonstrations suppressed by the forces of the Libyan regime[425]. The

//www.unhcr.org/refworld/docid/4ca44d8e18.html (consulted on 30 June 2011).

[420] CPR/C/LBY/CO/4, 15 November 2007, para. 23.

[421] The «security of state law» is well known for being misused by many repressive regimes to eliminate the political opposition. See US Department of State, Human Rights Report: Libya, 8 April 2001, available at http://www.state.gov/g/drl/rls/hrrpt/2010/ nea/154467.htm (consulted on 7 June 2011).

[422] Statement delivered on behalf of all Special Procedures mandate holders of the United Nations Human Rights Council at the Fifteenth Special Session of the Human Rights Council on the human rights situation in the Libyan Arab Jamahiriya, 25 February 2011, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10763&LangI=E (consulted on 30 June 2011).

[423] Abdel-Baky, 2011; Al Jazeerah, *Cross Cultural Understanding, News*, February 2011, available at http://www.aljazeerah.info/News/2011/February/16%20n/Libya%20Hit%20by%20Arab%20Revolution%20Against%20Dictatorship%20and%20Corruption.htm (consulted on 29 June 2011).

[424] *Ibidem*; Amnesty International, *Libyan Writer Detained Following Protest Call*, 8 February 2011, available at http://www.amnesty.org/en/news-and-updates/libyan-writer-detained-following-protest-call-2011-02-08 (consulted on 29 July 2011); Human Rights Watch, Libya: Arrests, Assaults in Advance of Planned Protests, 16 February 2011, available at http://www.hrw.org/en/news/2011/02/16/libya-arrests-assaults-advance-planned-protests (consulted on 29 June 2011); *African Commission of Human and People's Rights v. Great Socialist People's Libyan Arab Jamahiriya* (Order for provisional measures) [2011] ACHPR App. No. 004/2011.

[425] FIDH, Libya Towards a Bloody Revolution, 18 February 2011, available at http://www.fidh.org/Libya-Towards-a-bloody-revolution (consulted on 29 June 2011); *African Commission of Human and People's Rights v. Great Socialist People's Libyan Arab Jamahiriya* (Order for provisional measures) [2011] ACHPR App. No. 004/2011.

instability caused by the protests and the subsequent response of the government escalated quickly into the open conflict with relevant humanitarian implications.

The detentions of the demonstrators and the use of force against the peaceful assembly after the beginning of the protest have violated the IHRL, more specifically, the use of lethal force against the protester signalise the violation of the obligation established under the right to life. Therefore those responsible can be prosecuted by the international criminal justice or the universal jurisdiction mechanism[426].

9.1.2. From Conflict to the War

February clashes of the protesters in Tripoli, Tobruk, Misurata and Benghazi with the armed government forces extremely quickly escalated into the crises[427] causing the emergence of the RtoP situation, signalised already during the previous phases of the conflict. Gaddafi launched the counter offensive on 6 March with the army of his supporters and the hired mercenaries from Africa and Europe dividing the country into the above-mentioned opposition-led East and the regime-controlled West[428]. Since then, following the conflict cycle, the country fell into the civil war, which is still ongoing. The systematic and widespread violations of international law, IHRL and IHL by the Gaddafi's forces became one of the sad everyday realities marking current situation in Libya.

Human rights violations typical for the early stages of the conflict became widespread and systematic and amounted to the RtoP crimes. Libya reached early the stage of war of the non-international character (the stage classified as a crisis and in its later stage a war in accordance with Figure 1)[429], therefore the Additional Protocol II to the Geneva Conventions[430], together with the Common Article 3[431] and the provisions

[426] Bahrain / Libya: UN Experts Urge Authorities to Guarantee Right to Protest Without Fear of Being Injured or Killed, 18 February 2011, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10737&LangID=E (consulted on 30 June 2011).

[427] FIDH, Libya Towards a Bloody Revolution, 18 February 2011, available at http://www.fidh.org/Libya-Towards-a-bloody-revolution (consulted on 29 June 2011); *African Commission of Human and People's Rights v. Great Socialist People's Libyan Arab Jamahiriya* (Order for provisional measures) [2011] ACHPR App. No. 004/2011.

[428] International Crises Group, Libya: Achieving a Ceasefire, Moving Toward Legitimate Government, 13 May 2011, available at http://www.crisisgroup.org/en/publication-type/media-releases/2011/libya-achieving-a-ceasefire-moving-toward-legitimate-government.aspx (consulted on 29 June 2011).

[429] Consult Figure 1 in Chapter 8.

[430] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, at http://www.icrc.org/ihl.nsf/INTRO/475?OpenDocument (consulted on 28 June 2011).

[431] *Ibidem*, Preamble.

of the customary international law apply. The Human Rights Council has found that Libyan authorities have systematically violated the right to life, liberty and security of person and the human dignity[432], which in the course of the conflict amount to the breach of the international humanitarian law and therefore to the war crimes[433]. Further, the attacks directed indiscriminately on the civilian targets and even to the protected persons such as medical units, transports using the Geneva Conventions emblems as well as the humanitarian workers[434].

Using of the rape systematically as a method of warfare by the regime, torture and the use of mercenaries to systematically commit massive violations of human rights of the people of Libya amounted to the crimes against humanity[435].

Based on these criteria, the situation clearly falls into the category of the RtoP case, therefore requires adequate international response and of course that of the EU.

9.2. THE INTERNATIONAL RESPONSE

Before turning particularly to the subject of the EU's reaction, the international response under the UN, especially in the phase of the open conflict, crises and war, must be examined. As it has been shown, EU law, rhetoric and action rather imply that the EU would exercise its responsibility to react in the framework of the international action[436]. The mechanisms also exist rather to support the international community in action[437]. The assessment of the international reaction in the phases of the conflict where the responsibility to prevent yields into the responsibility to react becomes therefore very relevant for the examination of EU's action and is discussed in the following paragraphs.

The first international action that came already during earlier stages – the late open conflict stage/early crises stage, was the Arab League's suspension of the Libyan membership on the 22 February due to the assault of the civilian population[438]. Following this act, the HRC decided

[432] A/HRC/17/44, 1 June 2011, p. 7.

[433] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, at http://www.icrc.org/ihl.nsf/INTRO/475?OpenDocument (consulted on 28 June 2011), Article 2(a).

[434] *Ibidem*.

[435] See A/HRC/17/44, 1 June 2011, for detailed list of crimes committed in Libya. For the definition of the crimes against humanity refer to Chapter 3.2.2 of the thesis.

[436] See Chapters 4 and 5 of the thesis.

[437] Consult Chapter 7.

[438] S/2011/393 - A/65/877, 27 June 2011, para. 34.

to urgently dispatch the independent international Commission of Inquiry mandated to investigate violations of the IHRL[439] and the UNGA unanimously suspended Libya's membership in the Human Rights Council[440].

During this time even the UNSC unanimously adopted the Resolution 1970[441] that explicitly recalls the RtoP of the Libyan authorities, mechanism typical for the crises phase of the conflict[442]. Acting under Chapter VII UN Charter the UNSC used the measures included in Article 41[443]. Calling for an immediate ceasefire and respect for the IHRL and IHL it imposed the arms embargo and travel ban on Libya and order to freeze the accounts and possible financial resources of the regime officials[444]. The Resolution has also allowed for the referral of Libya to the ICC[445]. As it has been shown in the previous parts, the punishment under the international criminal law can work as a deterrent, however, can also play a role later during the post-conflict building, therefore such a step is definitely reasonable at this stage of the conflict. The UN has further engaged in the political and humanitarian dialogue dispatching the Special Envoy to Libya[446].

The mentioned measures have been implied already in the situation of an open conflict/crisis, therefore they are of a forcible nature, but have no military implications. The responsibility to prevent still prevails trying to eliminate the possibility of the further escalation of the conflict on one hand, on the other, they present a form of the international reaction to the atrocities committed in Libya. As regards the sanctions, the instrument of a more coercive nature, their use usually comes to the play when the situation escalates to the crisis. As it has been said, the process of the escalation of the situation into the crisis has been very fast in Libya therefore it becomes difficult to draw the clear line between the individual stages. The approximate division remains however necessary to later link EU's action to the different phases of the conflict and to the international response.

[439] See A/HRC/RES/S-15/1, 1 March 2011, para. 11. The Resolution was adopted without vote on 25 February 2001.

[440] A/RES/65/265, 1 March 2011, para. 1.

[441] S/RES/1970/2011, 26 February 2011.

[442] *Ibidem*, Preamble.

[443] Article 41 UN Charter allows the UNSC to decide on the coercive measures except the use of force. UN Charter, 24 October 1945, Article 41.

[444] S/RES/1970/2011, 26 February 2011, paras. 9-21.

[445] *Ibidem*, paras. 4-8.

[446] United Nations Department of Public Information, News and Media Division, New York, Concerned about Civilian Casualties in Libya, Secretary-General Urges End to Disproportionate Use of Force, 7 March 2011, available at http://www.un.org/News/Press/docs//2011/sgsm13429.doc.htm (consulted on 30 June 2011).

The crisis escalated even more rapidly into the war. Therefore, the UNSC adopted another Resolution assuming the responsibility of international community in reaction to Libya's unwillingness to carry out its RtoP[447]. The Resolution established the non-fly zones aiming at protecting the population and authorised UN member states and regional organisations to enforce it through «all the necessary means[448].» The international operation started on 23 March 2011 led originally by France and the UK sharing the command with the US[449]. The NATO took first control over the arms embargo, later the enforcement of the non-fly zones has been transferred to the organisation and on 27 March it undertook control over all the operations in Libya[450]. Such an action shows that the RtoP has actually been followed to the most extreme extent since the military intervention can be applied only as a last resort and only if other means proves not to work[451], which has been the case of Libya.

The conflict stopped currently at this stage therefore the responsibility to rebuild can only be estimated, which is important in order to discuss possible reaction of the EU. The assumptions can be based on the up-to-date practice since the peacekeeping and the engagement of the international community in the post-conflict rebuilding became quite common. As the contemporary practice shows[452], the international community is willing to engage in the country rebuilding processes, while the contemporary peacekeeping missions include the component aiming at tackle the root causes of the conflict and consolidate the peace. Taking into account the causes of the conflict in Libya, the human rights and rule of law component must definitely be included. Since the country is without the real democratic experience, the capacity building, training of judges, police and other organs will be necessary as well as the assistance with the organisation of the country's first elections. The arrest warrant issued by the ICC following Resolution 1970 against three prominent regime figures (including the president Muammar Gaddafi) holding them responsible for crimes against

[447] S/RES/1973/2011, 17 March 2011.

[448] *Ibidem*, paras. 4-12.

[449] Europe's Libya Intervention: A Special Report, 25 March 2011, available at http://app.response.stratfor.com/e/es.aspx?s=1483&e=253656&elq=54aea6a2df1f440b8055ff71c6e670db (consulted on 30 June 2011).

[450] NATO, NATO and Libya: Operation Unified Protector, available at http://www.nato.int/cps/en/SID-C656A20B-2E37C0C6/natolive/topics_71652.htm? (consulted on 30 June 2011).

[451] See Chapter 3; ICISS, 2001 (1), pp. XII-XIII.

[452] See for example S/RES/1291/2000, 24 February 2000, S/RES/1289/2000, 7 February 2000, S/RES/1925/2010, 20 June 2010.

humanity on the Libyan territory[453] implies necessity to punish the perpetrators and the willingness of the international community to do so, therefore, the establishment of some kind of a truth and reconciliation commission can be anticipated.

The analysis shows that the international community moves truly in accordance with the RtoP concept and it can be estimated that it will further continue since the most difficult and controversial part of the action (the possibility of the military intervention) has been passed. Based on the international community's action and the background of the conflict, we can now assume, whether the EU also follows the guidelines based on the RtoP concept and its law and expressed will.

9.3. THE EU AND LIBYA: EU'S RESPONSE TO THE CRISIS

As regards the EU, the long-term structural prevention will also be briefly analysed. This dimension has not been discussed in the case of the international community because the EU has its own policies to deal with the structural prevention and is not at all dependent on the international community action. Such an analysis would not be of relevance for the topic studied.

9.3.1. Before the Libyan Crises: The Structural Prevention

The EU has had no political relations with Libya until 2003 when the UN lifted the sanctions[454]. Even though the political contacts opened immediately between both countries after this action, Libya still has not been part to any association agreement[455]. In 2006, the Council Regulation 1638/2006 laid down the provisions for the Neighbourhood and Partnership Instrument for the period between 2007 and 2013 including Libya into its plan[456]. Since 2007, the negotiations started to possibly conclude the EU-Libya framework agreement[457] aiming to

[453] *The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Pre-trial Chamber I) [2011] ICC 01/11-01/11.

[454] EuropeAid: Libya, available at http://ec.europa.eu/europeaid/where/neighbourhood/country-cooperation/libya/libya_en.htm (consulted on 1 July 2011).

[455] *Ibidem*.

[456] Regulation (EC) No. 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument [2006] OJ L 310/1.

[457] EuropeAid: Libya, available at http://ec.europa.eu/europeaid/where/neighbourhood/country-cooperation/libya/libya_en.htm (consulted on 1 July 2011); Negotiation of the EU-Libya framework management: Report on budgetary and financial management - Financial year 2010 [2011], OJ C 167/1.

strengthen the economic integration and political cooperation based on EU values and principles[458].

Lack of structural prevention and the promotion of the human rights, democracy and the rule of law definitely contributed to the escalation of the conflict into such an extent. Tunisia and Egypt were much more involved with the EU and are now ready for the elections – the first step towards the democratic practices. The existence of an agreement with the stronger conditionality rewarding the democratic values and the rule of law could have tackled some of the root causes and prevent the conflict from escalating into such an extent. However, such an agreement was not possible without the political will of the country concerned – Libya. Taking into account the character of the above-mentioned Libyan regime condemning the majority of the democratic principles, the agreement based on European values becomes generally impossible.

That brings us to the limitations of EU's structural prevention. The EU does not have mechanism to do much if the country is unwilling to co-operate and is not interested in the possible advantages of the partnership with the EU. The only way remaining is the «name and shame policy» that the EU applies for example to the Democratic Peoples Republic of Korea or Burma/Myanmar through tabling every year the resolution in the UNGA condemning the human rights situation in the particular country[459]. The Resolution against Libya has not however been tabled. It can be assumed that even though the characteristics of the regime mentioned above indicated possible problems, the structural policy in the RtoP sense that would focus on the possible root causes of the problem in the countries potentially prone to the conflict was incomplete and insufficient and therefore the responsibility to react came to play.

9.3.2. First Signs of Instability: EU's Initial Reaction to the Nascent Conflict

Reacting quickly to the emerging situation of instability, the EU through the Directorate General of the European Commission for Humanitarian Aid (ECHO) dispatched humanitarian aid and the civil protection teams into the Libyan-Tunisian and Libyan-Egyptian borders to assess the overall situation and the humanitarian needs[460]. On 20

[458] Negotiation of the EU-Libya framework management: Report on budgetary and financial management - Financial year 2010 [2011], OJ C 167/1.

[459] A/RES/64/238, 26 March 2010; A/RES/64/175, 26 March 2010.

[460] Developments in Libya: An Overview of the EU's Response (updated 25 March), available at http://eeas.europa.eu/top_stories/2011/250311_en.htm (consulted on 9 July 2011).

February on the request of Italy, it dispatched the border control operation Hermex supported financially and technically by the 14 EU member states[461]. It has also immediately suspended the negotiations of the EU-Libya framework agreement[462].

Taking into account that most of the instruments employed in the early stage of the conflict deal with the emergence of the refugee related problem, it could be assumed that the EU acknowledges the link between the human rights violations and the international security. Therefore it tries to primarily focus on the stability in the region including its own territory. Such an approach reflects the Second pillar of the RtoP. If the state finds itself unable to uphold its RtoP it must seek the international assistance. The EU therefore decided to first help Italy, Egypt and Tunisia taking into account the possible consequence of the massive refugee flow that could often lead to the conflict and also to the emergence of the RtoP situation. The use of the humanitarian aid as a direct conflict prevention exactly reflects the proposed guidelines. The use of conditionality leading to the suspension of the negotiations of the agreement corresponds to another EU tool used for the conflict prevention.

9.3.3. The Conflict and the Crises: Interaction with the Action of the International Community and Other Organisations

As soon as the situation escalated into the conflict and subsequently into the crises and the UN has imposed first restrictive measures through Resolution 1970, the EU has immediately implemented the UNSC sanctions through Council Decision 2011/137 adopted under the Second pillar[463]. To ensure the coherence and the appropriate application of all proposed sanctions, the EU has simultaneously adopted Council Regulation 204/2011 stating that the measures must be applied under both TFEU and TEU[464]. Such a double legislation for one action reflects the mentioned two-step approach during the implementation of the sanctions and leads to the conclusion that the EU in practice managed to overcome the problem of the incoherence between the institutions and achieved the better level of coordination between the Commission and the Council. Unfortunately, the EU proved again its

[461] Hertog, 2011, pp. 7-11.

[462] Developments in Libya: An Overview of the EU's Response (updated 25 March), available at http://eeas.europa.eu/top_stories/2011/250311_en.htm (consulted on 9 July 2011).

[463] Council Decision 2011/137/CFSP concerning restrictive measures in view of the situation in Libya [2011] OJ L 058/53.

[464] Council Regulation (EU) No. 204/2011 concerning restrictive measures in view of the situation in Libya [2011] OJ L 058/1.

reluctance to explicitly include the RtoP into the legally binding text.

Besides the mere following of the action of the international community the EU has mobilised the Humanitarian Assistance Instrument of € 70 million[465] for the medical and food aid, shelter and other necessities and the Civil Protection Mechanism established for the repatriation of the third country nationals wanting to leave Libya[466]. Additional money through the Emergency Aid Reserve has been channelled through the Civil Protection Mechanism[467]. The EU has also coordinated closely with the partners and allocated funds to their operations[468].

The targeted humanitarian aid and economic assistance again reflect the mechanisms to be used for the direct conflict prevention and the conflict management. The Civil Protection Mechanism has not been included in the guidelines, however, reflects the emphasis of the EU of its primary RtoP towards its citizens[469]. As it is reflected in EU law and EU's rhetoric, EU's foreign policy similarly seems primarily to carry out this objective. The cooperation and the funding of the partner's operations support the argument that the EU wants to carry out its conflict management policies within the framework of the other organisations.

In order to receive up-to-date information about the situation and draw the response adequately (including the allocation of funds), the EU has sent the expert from the ECHO department to Libya and also dispatched the fact-finding team[470] again following the mechanisms proposed in the guidelines. The High Representative has also travelled to Libya to negotiate and lead the political dialogue.

To sum up briefly, except of the effective structural prevention, the EU seems to further follow the RtoP concept in this case, even though it does not directly refer to it. We shall now move to the most difficult part of the RtoP – the responsibility to react that in many cases put the EU into the difficult situation and showed its weaknesses stemming

[465] As explained in Chapter 7, the instrument for the humanitarian action is deployed under the Regulation on humanitarian aid, Article 13 Council Regulation (EC) No. 976/1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation [1999] OJ L 120/8.

[466] COM/2011/0303final, 3 March 2003.

[467] Developments in Libya: An Overview of the EU's Response (updated 25 March), available at http://eeas.europa.eu/top_stories/2011/250311_en.htm (consulted on 9 July 2011).

[468] The key partners are the IOM, UNHCR, IFRC, ICRC and the money the funds are used among others to the needs of the emergency humanitarian assistance, evacuation, transport of refugees, distribution of food, aid, shelter and the construction of transit sites and similar. See International Crises Group, EU Crises Response Capability Revisited, Europe Briefing No. 160, 17 January 2005, available at http://www.crisisgroup.org/~/media/Files/ europe/160_eu_crisis_response_capability_revisited_edit.ashx (consulted on 20 June 2011). For more information consult also http://ec.europa.eu/echo/about/actors/partners_en.htm.

[469] See Chapter 5.

[470] Vogel, 2011.

from the different national interests of its member states and related inability of the EU to act unanimously[471]. Do the new provisions in the Lisbon Treaty designed to overcome these problems already have some effects? The next part of the chapter will deal particularly with EU's action under the responsibility to react.

9.3.4. The Phase of the Civil War: Reflecting the UN Action

The EU kept in the first place extending the restrictive measures against Libya following the UN Resolution 1970/2011 and the later UN Resolution 1973/2011. In the recent sanctions it went even further beyond the UNSC Resolutions, however, it remained in its framework[472]. As regards the authorisation of the enforcement of the restrictive measures in the UNSC Resolution 1973/2011, the contribution of EU member states and the way the operations has been carried out was already explained. We shall therefore move to the problems that emerged at EU level.

The similar situation arose again – the EU did not reach unity. Instead of speaking with one voice while adopting the Resolution, Germany together with other four non-European countries abstained from the vote[473] stating that together with the abstention it does not intend to contribute funds, troops or personnel to the operation. However, this time the situation has been to some extent overcome. The argument for that is threefold: Firstly, Germany, even though abstaining, did not use the language condemning the intervention[474]. It rather judged Libya for the atrocities committed against its citizens and expressed support for the sanctions and the involvement of the international community[475]. The cautious language seemed to be used exactly for purpose not to undermine completely EU's unity.

Secondly, despite the Germany's abstention, the EU, precisely the President of the European Council and the EU High Representative, still managed to adopt the common statement[476] acknowledging

[471] See Chapter 6.

[472] Council Decision 2011/178/CFSP of 23 March 2011 amending Council Decision 2011/137/CFSP concerning restrictive measures in view of the situation in Libya [2011] OJ L 78/24, Article 2.

[473] See SC 10200, 17 March 2011.

[474] *Ibidem*.

[475] *Ibidem*.

[476] Joint Statement by the European Council President Van Rompuy and EU High Representative Ashton on UN Security Council Resolution on Libya, 17 March 2011, available at http://www.eu-un.europa.eu/articles/en/article_10837_en.htm (consulted on 2 July 2011).

Resolution 1973 as clear legal basis for protecting Libyan people and expressing EU's commitment to implement the Resolution[477]. The statement has been followed by the new sanctions adopted in the light of Resolution 1973[478].

Thirdly, the EU was able to adopt the decision mandating the stand-by CSDP mission EUFOR deployable upon the possible request of the UN[479].

Due to these reasons, it can be assumed that the EU in this particular case overcame the problem of the national interest of one of the member states. The intergovernmental decision-making did not affect too much the performance of the EU as a whole. The troops from other EU member states exist to contribute to the intervention, while the EU as an entity supports the action in its rhetoric. The intervention is however not carried out as EU intervention. Taking into account the previous consideration, the EU has generally never touch the issue of the possible autonomous EU intervention without the UNSC authorisation and without partners. Therefore, such an approach reflects the previous findings and is led exactly in line with the proposed guidelines.

9.3.5. The Rebuilding Phase: The Expected EU Conduct

Similarly to the international action, the conduct of the EU in the post-conflict phase can only be estimated taking into account the previous cases. Since the EU is directly involved in the conflict resolution in Libya, the territory where the conflict is held lies close to the EU border therefore the instability may negatively influence the peace and security in the EU. For that reason it remains of EU's concern to engage in the peace-building. Similarly to the previous case, the EU will probably support the EU peacekeeping mission in case of its deployment. Further, the fact-finding mission and the Special Representative for Libya may continue their work providing the EU with the necessary information, advice on activities necessary to bring the situation to the stable peace and if necessary contribute to the necessary post-conflict management[480].

[477] *Ibidem*.

[478] Council Decision 2011/178/CFSP of 23 March 2011 amending Council Decision 2011/137/CFSP concerning restrictive measures in view of the situation in Libya [2011] OJ L 78/24; Council Implementing Regulation (EU) No. 288/2011 implementing Article 16(1) and (2) of Council Regulation (EU) No. 204/2011 concerning restrictive measures in view of the situation in Libya extended the visa-ban and asset freezes. The measures show that the EU went beyond the UN sanctions.

[479] European Security Review, CSDP and EU Missions update, June-July 2011, p. 2, available at http://csdpmap.eu/mission-chart (consulted on 5 July 2011).

[480] See Figure 1 in Chapter 8.

Taking into account the nature of the conflict, the democratic training of the police, judges and officials and possible security sector reform will be necessary as well as the assistance with the first possible democratic elections. The assistance to the creation of the civil society will also be necessary taking into account the missing experience with representative democracy and the overall democratic processes. The EU has the long tradition in such an activity[481], therefore it could be estimated that it will conduct its own activities or support the peacebuilding processes of the other international and regional organisations.

From the point of view of the peace consolidation it could be expected that the EU will continue the negotiation of the framework agreement and learning from the previous lessons, it will try to integrate Libya into the EU partnership, aid, trade and development programs and agreements since such policies have proven the most effective in preventing the conflicts in Europe[482].

9.4. CONCLUSIONS STEMMING FROM THE LIBYAN CONFLICT

The case of Libya has shown that the EU is able to conduct its action in accordance with the proposed guidelines, therefore, to follow the RtoP framework. The operationalisation of the Civil Protection Mechanism demonstrates that the EU primary carries out the RtoP towards its citizens, however, it strives to prevent the conflict and therefore uphold its responsibility towards the third country citizens and to prevent the mass atrocities amounting to the RtoP crimes.

In case the RtoP crimes occur as in the case of Libya, the EU plays a role in the responsibility to react, however, at this stage, taking into account the current organisational setting enhanced by the intergovernmental decision making and the self-interests of EU member states, it is highly unlikely that the EU would conduct the action on its own. Such possibility only exists under EU law, however, has not yet been reflected in any practice. Stemming from the previous experience, it could be possible that the UK or France would support the autonomous EU's

[481] See *inter alia* EU contribution to the establishment of the EU Police Mission (EUPM) in Bosnia and Herzegovina to ensure follow up of the UN IPTF, EU Police Mission for the Palestinian territories, EU Police Mission undertaken in the framework of reform of the security sector and its interface with the system of justice in the DRC (EUPOL RD CONGO), Contribution from the EU to the conflict settlement process in South Ossetia, EU Rule of law mission in Georgia (EUJUST THEMIS), etc. EUROPEAID/122888/C/SER/Multi, July 2009, pp. 57-61.

[482] See Chapter 7.1.1.

intervention, but other states such as Germany would not approve[483].

To assume the responsibility to rebuild does not create the problem for the EU since it is its practice for past years, therefore, it can be estimated that the EU will also assume the responsibility to rebuild in the case of Libya that will yield into the structural prevention. However, the political will of the country concerned remains one of the most important aspects to make it successful. The EU has also acknowledged that[484].

On the other hand, one observation that has already emerged throughout the text has been confirmed by the case of Libya. Regardless the EU conducts the RtoP activities, it remains reluctant to abide itself legally by the responsibility stemming from the concept since it has never included the RtoP into any legislative act. Libya represented the chance for the EU to move the RtoP concept it advocates for in its statements to the higher level, which could possibly represent the first step and therefore some prospect for the codification in EU law. But the EU left this opportunity unutilised. The rationale behind may most probably reflect the legacy of the humanitarian intervention and related controversies surrounding the RtoP at the international level as well as still ongoing discussions regarding the RtoP's interpretation and its particular components[485]. It goes further beyond the scope of the thesis to discuss the RtoP problems at the international level. It though remains to recall that the EU as a regional organisation seen as a main RtoP supporter can play the significant role in the overall RtoP implementation. The case of Libya has proven that the EU can carry out the RtoP having sufficient mechanisms as well as not being afraid to advocate the concept in its statements. If the EU is really serious on the RtoP support the codification in EU law should be the crucial thing to do at this stage.

[483] The assumption has been made from an observation that the UK or France are generally more willing to go into the war. On the other hand the case of Germany has proven that for other states, the UNSC authorisation is still not sufficient.

[484] European Union Presidency Statement on Malaria Decade, NEPAD, Durable Peace and Development in Africa, 12 October 2006, available at http://www.eu-un.europa.eu/articles/en/article_6424_en.htm (consulted on 12 April 2011).

[485] See Chapter 3.

CHAPTER 10

CONCLUSION

The research question asked to what extent will be the EU able to invoke the RtoP in its future external action. The EU has been vocally supportive of the concept from its creation including it into the documents such as the European Consensus on Development[486], the ESS[487], in many resolutions of the European Parliament[488] and as Chapter 5 showed in large number of its statements. However, the systematic invocation of the concept lacks the actual use during EU's action.

On the other hand, the thesis has proven that the basis for the RtoP exists in EU Primary law. The legal developments in favour of human rights and fundamental freedoms create the normative setting for the RtoP, which has been further supported in number of EU statements. Based on EU normative values, the thesis examined the state practice. Surprisingly, even the state practice has shown that the EU has been active in the field of human rights and fundamental freedoms playing the role in the conflict prevention, management as well as reconstruction (leaving aside the possible inconsistencies in EU human rights policies)[489].

Based on laws, state practice and the existing instruments, which the EU has been constantly developing and amending to ensure they better react to the challenges of the contemporary political realities, the ideal

[486] European Consensus 2006/C 46/01, 24 February 2006.

[487] European Security Strategy, 12 December 2003, available at http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf (consulted on 20 March 2011).

[488] See Annex in this thesis.

[489] It can be argued that EU's action is not always consistent and that the EU applies selective approach in relation to its human rights and conflict prevention policies following purely its own interests. This is definitely a valid argument from the point of view of the international relations, however, goes beyond the scope of the thesis. The aim of the thesis was to show that the EU carries out the RtoP-related actions to the extent that such actions can be considered a state practice, which has been proven by the thesis.

practice for the RtoP has been designed in Chapter 8. The fact that the existing mechanisms and laws only have been used to create the potential good practice shows that the EU is undoubtedly well equipped to carry out the RtoP policies. Applying the proposed guidelines for EU's action in the case of Libya, the thesis has proven that the EU may even be able to overcome the problems caused by the system performance, more specifically by the nature of the organisation. The intergovernmental decision-making and the national interest of the individual EU member states may often hamper the prospect for an action. The case of Libya has shown that the EU – seemingly learning from the past failures and shameful situations such as Iraq or Kosovo crises – can be able to overcome these problems. Libya could have become the first step towards the RtoP realisation and possibly prospect for the future similar situations[490]. Unfortunately it is worth recalling that EU's action lacks the effective invocation of the RtoP beyond the non-binding documents.

The reason could be threefold. Firstly, the EU struggles with the controversies surrounding the RtoP stemming from the problems related to the humanitarian intervention. Current situation in Libya will prove the effectiveness/ineffectiveness of the RtoP and possibly opens again the RtoP-related debate[491]. The EU has been supportive, however, its current approach shows reluctance and not a real trust in the RtoP concept. Second reason could be the unclear international RtoP definition and the variety of its possible interpretations. In order to include the new concept into the law, the EU needs to be sure about the RtoP interpretation. Thirdly, EU member states may be afraid that codification of the RtoP would lead to EU's confrontation with the use of force during every emerging RtoP situation. The willingness to act has been proven, but to accept the responsibility seems much harder. As the thesis showed, notwithstanding the responsibilities can be found in the law and state practice, they are not that strongly articulated. The EU can though overcome all these problems.

As explained in Chapter 3, the humanitarian intervention and the RtoP concept differ significantly. It remains true that the RtoP can still be interpreted in many ways. On the other hand, as Chapter 5 showed the EU invokes the RtoP in number of its statements. The way the EU articulates the concept remains generally consistent as regards the RtoP

[490] It goes again beyond the scope of the thesis to assess the effectiveness of any RtoP-related operations – particularly the military intervention, in Libya.

[491] The scholars already discuss whether the use of force in Libya in accordance with the RtoP concept has been justified and not premature and whether the use of military force does not cause more harm than good. See Cakmak, 2011; Bajorija, 2011.

content since the concept has been created. The way forward for the EU would be to create its own RtoP definition based on 2005 World Summit Outcome Document and use it in its own actions and activities as well as codify it in one of the legislative acts under both – Community and the CSFP/CSDP pillars. The possible step may also be to include the structural prevention under the RtoP umbrella. Having in mind the major difference between the RtoP and the humanitarian intervention – the RtoP does not encompass the mere use of force. The concept has many different levels to be passed and the military intervention does not create its necessary component that must always be reached – the case-by-case basis decisions allow deciding in which case the military intervention would be deemed necessary and where sanctions or other means plays sufficient role.

The codification of the RtoP in EU law would present a further important step for the RtoP. It has been nearly six years since the endorsement of the RtoP at the international level, but the EU did not move visibly forward in the RtoP advocacy. The opposite is rather true. As the Annex shows, the number of the RtoP invocations by the EU has lowered since 2006. The thesis shows that the question is not anymore how to transcend the mere rhetoric and start using the RtoP in the real action. The vibrant rhetoric appears on one side, while the viable action in accordance with the RtoP exists on the other. The question remains how to link these two sides. The EU seems to be already able to invoke the RtoP elements in its EU policies, however, since the activities are not complemented by the RtoP rhetoric, it becomes hardly obvious.

If Libyan case would be argued as the RtoP failure, it would become even more difficult to push the RtoP through because the opponents would again link the RtoP with the mere military intervention. Its invocation in different types of action would be good to prove that the RtoP can play a positive role in the promotion and protection of human rights in the world. The most debates focus on the selectivity, effectiveness and consistency of the RtoP forgetting that the RtoP does not only encompass the military action. The concept is linked to many possibilities. If the EU would be able to invoke RtoP in its actions, it could provide the credibility for it and show its real use. The message the EU is currently sending lacks clarity. Does it really believe in RtoP and support it, or the support is only rhetorical but in reality, the EU has doubts?

Most of the analyses focus rather on EU operational capabilities. The thesis showed that the EU has capabilities. The question is, whether it wants to frame them under the RtoP umbrella. The EU possesses everything it needs in order to invoke the RtoP in its foreign

policies. The codification of the RtoP in EU law and its subsequent invocation during its action is the missing step to reach this aim. If the EU really wants the RtoP operationalisation, such particular action becomes crucial at this stage. Starting with inclusion of the primary responsibility of the state concerned during the deployment of the sanctions (through the legally binding Council act) could be a good first step in this direction.

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EU'S PRIMARY LAW AND THE LIBYAN CONSTITUTION

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CASE LAW

African Commission of Human and People's Rights v. Great Socialist People's Libyan Arab Jamahiriya (Order for provisional measures) [2011] ACHPR App. No. 004/2011.
Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*) (Judgment) [2007] ICJ.
Internationale Handelsgesellschaft mbHv Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECJ 1125 E. C. R. 11-70.
Noldt KG v. Commission [1974] ECJ 2 CMLR 338.
Prosecutor v. Delalic (Judgment) ICTY-96-21-A (20 February 2001).
Prosecutor v. Furundzira (Judgment) ICTY-95-17/1 (10 December 1998).
Prosecutor v. Krstic (Judgment) ICTY-98-33-T (2 August 2001).
Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) 28 May 1951, available at http://www.icj-cij.org/docket/files/12/4283.pdf (accessed on 2 June 2011).
Separate Opinion of Judge Lauterpacht (Provisional Measures Order) [1993].
The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Pre-trial Chamber I) [2011] ICC 01/11-01/11.

USEFUL LINKS

The EU-UN: Partenrship in Action: http://www.europa-eu-un.org.
Summaries of EU legislation: http://europa.eu/legislation_summaries/.
Human Rights Council: http://www2.ohchr.org/english/bodies/hrcouncil/.
ECHO: http://ec.europa.eu/echo/about/actors/partners_en.htm.

ANNEX

EUROPEAN COUNCIL	EUROPEAN COMMISSION	EUROPEAN PARLIAMENT	OTHER DOCUMENTS
YEAR 2004 (59th session of the UNGA)			
			EU, Presidency Statement: Report of the UNHCHR, 26 October 2004 (http://www.eu-un.europa.eu/articles/en/article_3948_en.htm) In the light of the commitment to the promotion and protection of human rights as agreed in the Vienna Conference the EU expressed that the international community has the responsibility to protect and need to speak against human rights violations.
YEAR 2005 (60th session of the UNGA)			
GAERC: Council Conclusions on UN Summit, 18 July 2005 http://www.eu-un.europa.eu/articles/en/article_4929_en.htm In relation to the RtoP it is	*Speech by the Commissioner for External Relations and the ENP Benita Ferrero-Waldner, The UN at the Cross Roads - Signposting the Way to the*		*EU, Presidency Statement: High Level Panel Report on Threats, Challenges and Change, 27 January 2005* (http://www.eu-

necessary to strengthen the UN human rights machinery and build capacity for the rapid action.	*Successful Summit, International Peace Academy, 3 June 2005* http://www.eu-un.europa.eu/articles/en/article_4767_en.htm The emergence of the RtoP acceptance seems encouraging. If the states prove themselves unwilling or unable to uphold their RtoP, the international community must step in. Failure to act in Rwanda and Darfur is shameful and caused only by the political implications and the tough action. There is a need to bridge the gap between the post-conflict assistance and long-term stabilisation.		un.europa.eu/articles/en/article_4279_en.htm) The EU welcomed the RtoP concept as an emerging international norm and pinpointed the UNSG's role (preventive) in identifying the possible breaches of international peace and security.
EU priorities for 60th UNGA, 22 July 2005 http://www.eu-un.europa.eu/articles/en/article_4599_en.htm EU emphasises the human rights, good governance and democracy and reaffirms the importance of the RtoP.	*Speech by the Commissioner for External Relations and the ENP Benita Ferrero-Waldner: Notes from UN Press Conference on Eve of UN World Summit, 13 September 2005* http://www.eu-un.europa.eu/articles/en/article_5022_en.htm The adoption of the text on RtoP would be a real achievement.		*EU, Presidency Statement: Plenary of the General Assembly on the Secretary General's Report as a Whole, 6 April 2005* (http://www.eu-un.europa.eu/articles/en/article_4537_en.htm) The EU endorsed the UNSG report stating that state sovereignty must be respected, but violations of human rights and the rule of law threatens the international peace and security. The EU endorsed the RtoP stressing that responsibility to provide security to the citizens primarily

			rests within the nation state. If the state fails to carry this responsibility, the strong response of the international community is needed.
2687th Council Meeting: EU Council Conclusions – UN World Summit, 7 November 2005 http://www.eu-un.europa.eu/articles/en/article_5245_en.htm EU strongly welcomes the endorsement of the Responsibility to Protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. For the first time, UN member states have affirmed their responsibility to protect their own populations, and the international community has acknowledged that it should act collectively, through the UN Security Council, if states fail to protect their populations from these violations. The Responsibility to Protect will be an important tool of the international community for addressing the worst atrocities.	*Speech by the Commissioner for External Relations and the ENP Benita Ferrero-Waldner: Old World, New Order, Europe's Place in the International Architecture of the 21st Century, 15 September 2005* http://www.eu-un.europa.eu/articles/en/article_5029_en.htm Recognition of the RtoP is an important outcome.		*EU, Presidency Statement: General Assembly Consultations on cluster III - Freedom to Live in Dignity, 19 April 2005* (http://www.eu-un.europa.eu/articles/en/article_4591_en.htm) The international community has a responsibility to prevent conflicts. Prevention is the first imperative to justice; therefore it is necessary to fight against impunity. All countries have the responsibility to respect and to implement the RtoP. The EU endorsed the concept of the RtoP. Grave massive violations of human rights call for strong response by the international community. The EU endorsed the important proposal by the UNSG. RtoP should be considered from the broad perspective. Basic principle of sovereignty must remain undisputed, however it should also be recognised that state sovereignty implies rights and responsibilities. The

			responsibility to protect lies primarily on each state. If state is unable or unwilling and the RtoP situation seems to occur, the international community must assume the responsibility and thereby maintain the peace. Primarily through the diplomatic and humanitarian means. If these are not working, the enforcement from the UNSC shall be possible (as a last resort). The EU emphasised the responsibility to prevent.
EU Council Conclusions: EU Strategy for Africa, 22 November 2005 http://www.eu-un.europa.eu/articles/en/article_5345_en.htm Broaden and invigorate the EU-AU political dialogue and co-operation in the field of peace and security, including crisis management, as well as on multilateral issues such as the UN Peace Building Commission, the RtoP, and counter-terrorism. Structure this political dialogue through meetings at the EU or AU, involving EU HOMs. Enhance joint monitoring and reporting on these	*Speech by the Commissioner for External Relations and the ENP Benita Ferrero-Waldner: Non-proliferation and Disarmament, 8 December 2005* http://www.eu-un.europa.eu/articles/en/article_5437_en.htm New concept of human security reaffirmed the responsibility of states for the protection of their own citizens. The acceptance of the RtoP at the World Summit is a growing sign of its international acceptance. We have the RtoP EU citizens as effectively as possible and ensure their security.		*EU, Presidency Statement to the UNSC: Protection of Civilians in the Armed Conflict, 21 June 2005* (http://www.eu-un.europa.eu/articles/en/article_4871_en.htm) The EU has endorsed the UNSG's important proposal concerning the RtoP. Primary responsibility to protect lies inherently in the state sovereignty.

related subjects by EU HOMs for enhanced EU policy response. Reinforce co-operation with the UN, AU and sub-regional organisations in the areas of conflict prevention and peace support, including issues of good governance and human rights. Develop the ESDP/Euromed dialogue in this context.			
			EU Presidency Statement: Role of the UNSC in Humanitarian Crises (UNSC Open Debate), 12 July 2005 http://www.eu-un.europa.eu/articles/en/article_4893_en.htm EU reminds governments on their primary responsibility and stresses that the international community has a legitimate interest if national governments fail to uphold this primary responsibility. EU further emphasises prevention. UNSC plays a key role if the international peace breaks down. Its major role would be to establish multi-dimensional operations ensuring humanitarian considerations are taken into account.

			EU Presidency Statement: UN/Regional Organisation, 25 July 2005 http://www.eu-un.europa.eu/articles/en/article_4948_en.htm With sovereignty comes rights and responsibilities. The EU endorses the concept of the RtoP. The primary responsibility rests with the national state. If state is unwilling or unable to carry out this responsibility, the IC should act properly to maintain international peace and security. Flagrant human rights violations call for a strong action.
			EU Presidency Statement: Draft Outcome Document of the High Level Plenary Meeting of the UNGA, 28 July 2005 http://www.eu-un.europa.eu/articles/en/article_4974_en.htm EU welcomes the paragraphs on the RtoP in the World Summit Outcome Document. The international agreement has finally, with the long overdue, been reached. Primary responsibility stems from the UDHR. If the national state is unable or unwilling the international community should help or take action.

			International community responds to decide or to act through a comprehensive range of measures including collective action through the UNSC. If necessary the use of force would be possible with the UNSC authorisation.
			EU Presidency Statement: UN World Summit 2005, 14 September 2005 http://www.eu-un.europa.eu/articles/en/article_5026_en.htm EU strongly welcomes the agreement on the RtoP. Primary responsibility lies with each individual state. If the state is unable or unwilling the international community should act through the UNSC having at its disposal comprehensive range of measures, collective action... The force could be used in extreme cases.
			European Community Statement: UN High Level Meeting, 16 September 2005 http://www.eu-un.europa.eu/articles/en/article_5030_en.htm The recognition of our collective RtoP is an important outcome.

			EU Presidency Statement: General Debate of the 60th Session of the UNGA, 17 September 2005 http://www.eu-un.europa.eu/articles/en/article_5032_en.htm EU refers to the progress made in the world by the recognition of the RtoP at the 2005 World Summit.
			EU Presidency Statement: UNSC Open Debate, Role of Civil Society in Conflict Prevention, 20 September 2005 http://www.eu-un.europa.eu/articles/en/article_5048_en.htm The interaction between civil society and international community would be vital if we are to implement the RtoP.
		European Parliament: Joint Resolution on the UN Reform, 29 September 2005, http://www.eu-un.europa.eu/articles/en/article_5072_en.htm EU welcomes the recognition of the RtoP of the international community. Clear RtoP of each state and the importance of that of the international community.	*EU Presidency Statement: Report of the UNSG on the Work of the Organisation, 29 September 2005* http://www.eu-un.europa.eu/articles/en/article_5074_en.htm The Secretary General has said that we will achieve neither development nor security without respect for human rights. Over fifty years the UN has had remarkable success. It has built a framework of international human rights law that sets clear standards by which all states are

			judged. As has long been recognised, however, when those standards are breached, we have not always done enough. The EU welcomes the unprecedented recognition of the international community's RtoP populations from genocide, war crimes, ethnic cleansing or crimes against humanity.
			EU Presidency Statement: First Committee UNGA, General Statement, 3 October 2005, http://www.eu-un.europa.eu/articles/en/article_5091_en.htm EU strongly welcomes the agreement on the RtoP. It is an important step toward peace and security. EU is committed to play its role on the ground having currently the military, police and civilian presence in Bosnia, Aceh, Iraq and supports African Union in Darfur.
			EU, Presidency Statement to the UNSC: Protection of Civilians in the Armed Conflict, 9 December 2005 http://www.eu-un.europa.eu/articles/en/article_5463_en.htm At the World Summit three months ago, our Heads of State and Government reached

			a historic agreement on the RtoP populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The European Union regarded this outcome, embracing the concept at the highest level, as one of the most important of the Summit. RtoP is a distinct concept, carefully set out in the World Summit Outcome. But it is clearly relevant to the issue of the protection of civilians in armed conflict.
2006 (61st session UNGA)			
Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting Within the Council, the European Parliament and the Commission on European Union Development Policy: The European Consensus, 2006/C 46/01, 24 February 2006, OJ C 46/37 http://ec.europa.eu/development/icenter/repository/european_consensus_2005_en.pdf Insecurity and violent conflict are amongst the biggest obstacles to achieving the MDGs. Security and development are important and complementary aspects of EU relations with third countries. Within their respective actions, they contribute to creating a secure environment and breaking the vicious cycle of poverty, war, environmental degradation and failing economic, social and political structures. The EU, within the respective competences of the Community and the member states, will strengthen the control of its arms exports, with the aim of avoiding that EU-manufactured weaponry be used against civilian populations or aggravate existing tensions or conflicts in developing countries, and take concrete steps to limit the uncontrolled proliferation of small arms and light weapons, in line with the European strategy against the illicit traffic of small arms and light weapons and their ammunitions. The EU also strongly supports the RtoP. We cannot stand by, as genocide, war crimes, ethnic cleansing or other gross violations of international humanitarian law and human rights are committed. The EU will support a strengthened role for the regional and sub-regional organisations in the process of enhancing international peace and security, including their capacity to coordinate donor support in the area of conflict prevention.			*EU Presidency Statement: UNSC Open Debate – Protection of Civilians in the Armed Conflict, 28 June 2006* http://www.eu-un.europa.eu/articles/en/article_6070_en.htm At the World Summit the UN member states underlined the issue of the protection of civilians. But the most important was the historic agreement on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, which has been reaffirmed by SC Resolution 1674.

EU Priorities for the 61st UNGA, 18 July 2006 http://www.eu-un.europa.eu/articles/en/article_6242_en.htm EU strives that the agreement reached in 2005 will be translated into willingness to act in specific cases.	*Communication from the Commission to the Council and the European Parliament, The 2005 UN Summit: Addressing the global challenges and making a success of the reformed UN, COM/2005/0259final, 15 June 2006* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0259:FIN:EN:HTML Para. 8.1.3. RtoP: The EU should support the concept of the RtoP and make sure that this concept is translated into meaningful commitments and action on the part of states, including making full use of the International Criminal Court. The summit should endorse the concept of the RtoP. If the summit decides to invite the General Assembly to continue the debate on the issue, such an invitation should be accompanied with a clear objective and timeframe (not beyond the 60th General Assembly).	*EP Resolution on the Situation in Darfur, 28 September 2006* http://www.eu-un.europa.eu/articles/en/article_6296_en.htm EP urges Sudanese to accept peacemakers supporting the UNSC resolution on the situation in Darfur under Chapter VII. Sudan has failed its RtoP and therefore is obliged to accept the UN force in line with UNSC Resolution 1706. EP calls upon the EU and other international actors to work especially with the UN to ensure the peacekeeping force in Darfur will have enough capability to react rapidly to cease the violations.	*EU Presidency Statement: UNSC Public Meeting on Sudan, 29 June 2006* http://www.eu-un.europa.eu/articles/en/article_6078_en.htm If the government cannot fulfil its RtoP, it has an obligation to accept the outside help. The EU welcomes the planned UN Assistance Mission in Darfur (UNAMID).
2749th External Relations Council Meeting: EU Council Conclusions on Sudan/Darfur, 15 September 2006, http://www.eu-un.europa.eu/articles	*Fuel for Palestinian Hospitals: First Commission Action Through the International Mechanism (TIM), 11 July 2006* http://www.eu-	*European Parliament Resolution on the Situation in Darfur [15.12.2006] OJ C 306/395*: 1. Whereas the UN RtoP provides that, where «national authorities	*EU Presidency Statement: UNSC Debate on the Prevention of the Armed Conflict, 7 September 2006* http://www.eu-un.europa.eu/articles

/en/article_6251_en.htm Council reminds the Sudanese government of its individual RtoP. In line with the UNSC Resolution 1706 of 11 September 2006 it strongly condemns the policies leading to death and suffering and call for their immediate end.	un.europa.eu/articles/en/article_6102_en.htm In response to the appeal from the Palestinian president stating that there is no electricity in Palestine hospitals, which creates the danger to lives of Palestinian people (Second pillar - RtoP), the Commission first time used TIM. The EU expresses the extreme concern about the situation in Gaza. All parties to the conflict have RtoP towards civilians living there.	manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity,» the UN Security Council can agree to a Chapter VII military force; 2. Underlines that Sudan has failed in its responsibility to protect its own people and is therefore obliged to accept a UN force in line with UN Security Council Resolution 1706; calls on the UN Security Council to bring pressure to bear on the Sudanese authorities to accept the deployment of the already authorised UN Mission to Darfur, with a clear Chapter VII mandate and enhanced capacities given to such a mission through UN Security Council Resolution 1706.	/en/article_6261_en.htm EU reiterates its support to the World Summit Outcome Document 2005. Each individual state has the RtoP.
2770th GAERC: EU Council Conclusions on Implementation of the Human Rights and Democratisation Policy in Third Countries, 11 December 2006 http://www.eu-un.europa.eu/articles/en/article_6578_en.htm EU welcomes the convocation of a special session on Darfur. Government of Sudan has the primary RtoP. EU further condemns the violence in Sri		*European Parliament Resolution on the Outcome of the United Nations World Summit of 14-16 September 2005, 21 September 2006, OJ C 227/582.* The EP welcomes the recognition of the international community's responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, as well as the clear	*EU Presidency Statement: UNGA General Debate - Report of the UNSG on the Work of Organisation, 2 October 2006* http://www.eu-un.europa.eu/articles/en/article_6308_en.htm The EU attaches a great importance to the promotion of the RtoP.

Lanka that led to increased violations of human rights and IHL.		responsibility of each individual state to protect their own citizens from these crimes, including by means of the prevention of such crimes; further underlines the importance of the International Criminal Court as an essential body in the task of prosecuting the perpetrators of any such crimes.	
		European Parliament Resolution on the Criteria for EU Peace Enforcement Operations in the Democratic Republic of Congo, 1 December 2006, OJ C 292/2. The EP uses the RtoP concept while referring to the situation in the Democratic Republic of Congo.	*EU Presidency Statement on Malaria Decade, NEPAD, Durable Peace and Development in Africa, 12 October 2006* http://www.eu-un.europa.eu/articles/en/article_6424_en.htm EU welcomes integrated role in preventive diplomacy and reiterates its support for the World Summit Outcome Document. Each individual state has RtoP. The external help is useless unless the state wills, EU fully engages in post-conflict reconstruction in Africa.
		European Parliament Resolution on the Reform of the United Nations, 15 May 2006, OJ C 124/549. Whereas the RtoP clearly states that the use of force, whenever necessary, should be deployed as a last resort, to be reiterated in a resolution of the	*EU Presidency Statement: Promotion and Protection of Human Rights, 18 October 2006* http://www.eu-un.europa.eu/articles/en/article_6388_en.htm EU reminds Sudan of its collective and individual RtoP citizens.

		Security Council on the principles relating to the use of force, and clearly endorses the «emerging norm» that there is a collective international RtoP in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, which sovereign governments have proved powerless or unwilling to prevent, Para. 4 approves the strict limitation of the notion of self-defence and the use of force and RtoP civilian populations defined by the High-level Panel in accordance with the spirit and wording of the UN Charter, and agrees that such a definition should not prevent the Security Council from acting preventively – and even in a more proactive manner than in the past – since it is the only legitimate body for such action; recalls that there can only be effective crisis protection if the UN has the means to monitor and to observe on a full-time basis the ethnic, linguistic or religious tensions likely to degenerate into a crisis.	

		European Parliament Resolution on the Situation in Kyrgyzstan and Central Asia, 20 April 2006, OJ C 92/1. Whereas the Aarhus Convention serves to enable public authorities and citizens to assume their individual and collective responsibility to protect and improve the environment for the welfare and well being of present and future generations.	*EU Presidency Statement: Strengthening the Coordination of Humanitarian Disaster Relief Assistance of the UN, 13 November 2011* http://www.eu-un.europa.eu/articles/en/article_6480_en.htm EU reaffirms the leadership role in the humanitarian action. Primary responsibility for the protection of civilians lies first within the national governments (as it has been endorsed in the World Summit Outcome Document 2005).
			EU Presidency Statement: UNSC Open Debate - Protection of Civilians in the Armed Conflict, 4 December 2006 http://www.eu-un.europa.eu/articles/en/article_6562_en.htm In the 2005 World Summit the Heads of State and Government recognised that the protection of civilians in armed conflict is a key concern of the international community. The EU reiterates its support for the historic Summit Outcome conclusion that each individual state has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes

			against humanity, conclusion which was reaffirmed by the Security Council Resolution 1674.
2007			
EU Priorities for the 62nd UNGA, 2 October 2007 http://www.eu-un.europa.eu/articles/en/article_7363_en.htm The EU welcomes references made to the relevant paragraphs of the outcome document on the principle RtoP in Security Council Resolutions 1674/2006 and 1706/2006 and stresses the need for the General Assembly and the Security Council to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, bearing in mind the principles of the Charter and international law.	*Communication from the Commission to the European Parliament and the Council - Towards a European Consensus on Humanitarian Aid {SEC(2007) 781} {SEC(2007) 782}/* COM/2007/0317 final */, 13 June 2010.* In developing this Communication, the European Commission reviewed lessons learnt in its responses to crises[3], and conducted an intensive consultation process of its humanitarian partners, which showed considerable consensus on the challenges faced by humanitarians[4], including on the «RtoP» and «human security.» General Assembly Resolution 60/1 of 24 October 2005 stipulates that «Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.» It further provides that «the international community, through the United Nations, also has the	*The EP's Annual Report on Human Rights in the World 2006 and the EU's Policy on the Matter, Index: 2007/2020(INI), 26 April 2006* http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=INI/2007/2020 The EP deplores the fact that the violence in Darfur has continued unchecked, and that the Sudanese government has not been held accountable for its repeated failures to comply with international demands and protect its citizens from violence, while welcoming the recent indictments issued by the ICC; regrets that the EU has not taken more unilateral action regarding the crisis in Darfur and has not tried harder to persuade the government of Sudan to accept an international peacekeeping force; stresses that persistent diplomatic pressure is needed to demonstrate to the government of Sudan that its verbal commitments must be followed by	

	responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapter VI and VII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.» It also makes reference to the use of Chapter VII of the Charter, if peaceful means are inadequate.	comprehensive and sustained efforts aimed at halting the violence in Darfur, and that the international community will not accept further neglect by Sudan of its commitments and its responsibility to protect its citizens; urges the Council to agree a plan of specific, targeted sanctions to be imposed on the Khartoum regime, in accordance with a clear timetable, in the event of non-compliance with the demands of the international community; urges the EU to contribute (and to put pressure on others to also contribute) to an international peacekeeping force and the enforcement of the no-fly zone over Darfur, and to ensure that the African Union is adequately resourced and assisted to fulfil its mandate; asks that the EU push for a UN peacekeeping mission in Chad with a strong civilian protection mandate; implores the member states, the Council and the Commission to assume their responsibilities and to provide effective protection for the people of Darfur from a humanitarian disaster.	

		European Parliament Resolution on the Situation in Darfur [29.11.2007] OJ C 287/542. Whereas the UN «RtoP» doctrine provides that where «national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity,» others have a responsibility to provide the protection needed. Calls on the UN to act in line with its «RtoP» 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.	*EU Presidency Statement: General Debate in UNGA, 25 September 2007* http://www.eu-un.europa.eu/articles/en/article_7338_en.htm The peace depends on the capacity to ensure that the justice knows no frontiers. We shall never fail our defence of the RtoP.
			EU Presidency Statement: UNSC Open Debate - Protection of Civilians in the Armed Conflict, 20 November 2007 http://www.eu-un.europa.eu/articles/en/article_7546_en.htm The primary responsibility lies upon individual and sovereign states that should protect their population from genocide, ethnic cleansing, war crimes and crimes against humanity.

2008			
Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting Within the Council, the European Parliament and the European Commission, 30 January 2008 OJ C 25/1 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:025:0001:0012:EN:PDF Section on International Law: (para. 17) The EU recalls the commitment to the RtoP, in accordance with UN General Assembly Resolution 60/1 of 24 October 2005 (2005 World Summit Outcome). Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The international community, through the United Nations, also has the responsibility to protect populations from those crimes. Where national authorities are manifestly failing to meet the responsibility to protect, the international community has confirmed that it is prepared to take collective action through the UN Security Council.			
EU Priorities for the 63rd UNGA, 16 June 2008 http://www.eu-un.europa.eu/articles/en/article_8160_en.htm EU is fully committed to the effective multilateralism. The EU continues to promote and improve the compliance with the IHRL and IHL placing the great importance to the RtoP. EU welcomes the appointment of the Ed Luck and Francis Deng as UN Special Representatives on RtoP and Genocide Prevention.		*European Parliament Resolution of 21 February 2008 on North Kivu [2008] OJ C 184/18.* Having regard to Resolution 60/1 of the United Nations General Assembly of 24 October 2005 on the 2005 World Summit outcome, and in particular paragraphs 138 to 140 thereof on the responsibility to protect populations, the EP calls on the protection of the affected population.	*EU Presidency Statement, Strengthening the Coordination of Humanitarian and Disaster Relief Assistance, 10 November 2008* http://www.eu-un.europa.eu/articles/en/article_8288_en.htm As stated in the WS OD, the international community must act through the UN if national state is manifestly failing its RtoP. Effective implementation of the RtoP is of the utmost importance for the EU. We owe it to the population in distress.
2914th General Affairs Council Meeting, Conclusions on the 60th Anniversary of the Adoption of the Universal Declaration of Human Rights, 8 December 2008		*Minutes of the Sitting of Thursday [20 March 2008] OJ C 271/04.* In relations to the elections in Kenya, the EP invoked that the response of Kenyan government and that of regional	*Report on Implementation of the ESS, 11 December 2008* http://www.eu-un.europa.eu/articles/en/article_8370_en.htm The lasting solution to the conflict must bring

http://www.eu-un.europa.eu/articles/en/article_8350_en.htm States, acting individually or collectively, have the legitimate and permanent responsibility to promote and safeguard human rights throughout the world, particularly in the context of the RtoP.		organisations reflect the internationally agreed RtoP.	together all regional players. Sovereign governments must take responsibility for consequences of their actions and hold-shared responsibility.
		EP Resolution on the Situation in Chad [24.4.2009] OJ C 259/20. Whereas in view of the current humanitarian and security situation, the deployment of the EUFOR mission authorised by the UN Security Council has become essential, not least because the UN and the EU have a responsibility to protect civilians in this region by all means necessary and to provide humanitarian assistance as well as security for humanitarian personnel.	
		European Parliament Resolution of 22 May 2008 on the Tragic Situation in Burma [2008] OJ C 279/16. Whereas several governments, including those of EU member states, have called for the principle of RtoP, established by the UN to rescue the	

		victims of genocide and crimes against humanity, to be applied in the case of Burma. 1. Reiterates that the sovereignty of a nation cannot be allowed to override the human rights of its people, as enshrined in the UN principle of RtoP; calls on the government of the United Kingdom, which holds the May Presidency of the UN Security Council, to take urgent action to put the situation in Burma on the agenda of the Security Council, and calls on the Council to examine whether aid shipments to Burma can be authorised even without the consent of the Burmese military junta.	
		European Parliament Resolution of 22 May 2008 on Sudan and the International Criminal Court [2008] OJ C 279/23. Whereas the UN RtoP doctrine provides that where national authorities manifestly fail to protect their populations, others have a Responsibility to Provide the protection needed.	

		European Parliament Recommendation of 9 July 2008 to the Council on the EU Priorities for the 63rd Session of the UN General Assembly [2008] OJ C 294/05. The EP urges the EU member states to support efforts by the UN Secretary-General in the process of implementation of the concept of RtoP, as endorsed at the 2005 World Summit; calls on EU member states to participate actively in this process.	
		European Parliament Resolution of 20 November 2008 on the EU Response to the Deteriorating Situation in the East of the Democratic Republic of Congo [2008] OJ C 16/10. Having regard to Resolution 60/1 of the United Nations General Assembly of 24 October 2005 on the 2005 World Summit Outcome, and in particular paragraphs 138 to 140 on the RtoP.	
		European Parliament Resolution of 18 December 2008 on Development Perspectives for Peace Building and Nation Building in Post-conflict Situations [2010] OJ C 45/14. Having	

		regard to UN General Assembly Resolution 60/1 of 24 October 2005 on the 2005 World Summit Outcome, and in particular paragraphs 138-140 thereof on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. *Why the EU is present and has interest in conflict zone* 1. Supports RtoP as affirmed by the UN in order to reinforce rather than undermine state sovereignty and stresses that the EU and its member states should regard themselves as bound by it; stresses that RtoP should be considered as a means to promote human security; by stressing that the primary responsibility for the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity against a population lies with the state itself, reinforces the responsibility of each government towards the protection of its own citizens; considers, however, that where governments are unable or unwilling	

		to provide such protection then the responsibility to take appropriate action becomes the collective responsibility of the wider international community; notes further that such action should be preventive as well as reactive, and should only involve the use of coercive military force as an absolute last resort; recognises this as an important new application of the principle of human security; 2. Demands the implementation of then UN Secretary-General Kofi Annan's declaration made in his report to the 2000 General Assembly: «state sovereignty implies responsibility and the primary responsibility for the protection of its people lies with the state itself; where a population is suffering serious harm as a result of internal war, insurgency, or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.	

		European Parliament Resolution of 18 December 2008 on the Situation in Zimbabwe [2008] OJ C 45/15. Whereas the combination of economic, political and social crises has taken a particular toll on women and girls, and whereas they are particularly at risk of cholera infection because of their responsibility for the home-based care of the sick and whereas Zimbabwe is close to meeting the criteria for invoking the declaration, endorsed at the UN Summit in September 2005, that there is an international responsibility to protect people facing crimes against humanity, the EU shall support the action against Zimbabwe.	
2009			
EU Priorities for 64th UNGA, 9 June 2009 http://www.eu-un.europa.eu/articles/en/article_8967_en.htm The EU is committed to the RtoP concept and fully supports the UNSG's efforts to implement it placing the particular importance on prevention.	*Speech by the EU Commissioner Waldner, Effective Multilateralism: Building for a Better Tomorrow* http://www.eu-un.europa.eu/articles/en/article_8644_en.htm One of the UNSG's proposals was to abstain from the veto in face of the humanitarian crises. The EU should have a permanent seat in the UNSC at some stage. Now it suggests		*EU Presidency Statement: UNSC Open Debate - Protection of Civilians in the Armed Conflict, 14 January 2009* http://www.eu-un.europa.eu/articles/en/article_8416_en.htm The EU welcomes the endorsement of the RtoP.

	the majority voting and the fast track procedure for disasters requiring fast response. To make the RtoP a reality, it must be constantly implemented emphasising the prevention and the capacity building (help for states to support their responsibilities). UN role is however irreplaceable. The EU makes full use of the UN standards, reports in its own human rights policies and is committed to work in order to promote an effective multilateralism.		
2961st General Affairs Council Meeting, Conclusions on Sudan, 15 September 2009 http://www.eu-un.europa.eu/articles/en/article_8991_en.htm EU underlines that the government of Sudan has the responsibility to protect its own citizens.		*European Parliament Resolution of 19 February 2009 on the European Security Strategy and ESDP [2009] OJ C 76/13. General considerations:* Embraces the concept of the RtoP, adopted by the UN in 2005, and the concept of «human security,» which is based on the primacy of the individual and not of the state; underlines that these concepts entail both practical consequences and strong political guidelines for the strategic orientation of European security policy in order to be able to act effectively in crises; highlights, nevertheless, that	*EU Presidency Statement, UNGA: Debate on the Responsibility to Protect, 23 July 2009* http://www.eu-un.europa.eu/articles/en/article_8901_en.htm We collectively recognised the responsibility of each individual state to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We also collectively recognised the responsibility of the international community, through the United Nations, to help to protect populations from such crimes. The EU warmly welcomes that

		there is neither an automatic obligation nor the means available for the EU to deploy ESDP missions, be they civilian or military, in all crisis situations.	important report and this debate, for which our focus should be operationalisation and implementation unless member states decide otherwise, the RtoP only applies to the four specified crimes and violations namely genocide, war crimes, ethnic cleansing and crimes against humanity. Each state assumes the responsibility to protect the populations within its own borders – that comes first – in international law and treaties (First pillar). Turning to the Second pillar, the assistance that should be made available by the international community is not only the humanitarian aid that is crucial once individuals and groups are already affected, but also in this context, very importantly, the assistance available to help prevent manifest risks from developing and build capacities of states to act before risks deteriorate into crises (EU believes more could be done, especially in terms of EW). Third pillar: It must be absolutely clear that this should, first and foremost, be discharged through diplomatic, humanitarian and other measures, such as support to capacity

			building and other development activities. Enforcement measures through the Security Council or approved by the Security Council should be possible – EU and regional organisations to contribute.
2985th Foreign Affairs Council Meeting, Conclusions on Human Rights and Democratisation in the 3rd Countries, 8 December 2009 http://www.eu-un.europa.eu/articles/en/article_9308_en.htm The Council remains committed to the RtoP implementation and strengthening the democracy as an external actor. EU Election observation can contribute to this aim.			*EU Presidency Statement after adoption of Resolution: Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, 23 July 2009* http://www.eu-un.europa.eu/articles/en/article_8917_en.htm Rwanda and Srebrenica demonstrate that Africa and Europe both have an interest in the concept of RtoP. We look forward to the debate on that concept which is to follow. We also look forward to working with Africa on how to strengthen our capacity in this regard.
			EU Presidency Statement, United Nations, Secretary General's Report on the Work of the Organisation, 6 October 2009 http://www.eu-un.europa.eu/articles/en/article_9061_en.htm The EU supports the Report of the UNSG on the implementation of the RtoP.

		Resolution on Aid Effectiveness and Defining Official Development Assistance [16.3.2009] OJ C 61/2. Points out that the principle of non-interference must not lead to toleration of serious crimes such as genocide and mass murder, ethnic cleansing, expulsions and mass rape, but, rather, that in this instance the international community has the responsibility to protect and to take resolute countermeasures, in particular to protect the population in danger and in the process, if possible, to involve regional organisations in overcoming conflicts.	*UN Presidency Statement, UNGA Debate on UN Human Rights Situations and Reports of the Special Representatives, 27 October 2011* http://www.eu-un.europa.eu/articles/en/article_9164_en.htm Not only the responsibility of every state towards anyone within their jurisdiction but also a responsibility and preparedness of the UN to take collective action in accordance with IL and the UN Charter against serious international crimes as endorsed at WS 2005 (RtoP) plays critical role.
		EP Recommendations to the Council of 24 March 2009 on the EU Priorities for the 64th Session of the UN General Assembly Index: (2009/2000(INI) http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=INI/2009/2000 The EP suggests to: – Foster the debate initiated by the UN Secretary-General, Ban Ki-moon, about the implementation of the RtoP principle, so as to achieve strengthened consensus on, and	*EU Presidency Statement: UNSC Open Debate - Protection of Civilians in the Armed Conflict, 11 November 2009* http://www.eu-un.europa.eu/articles/en/article_9214_en.htm In many countries the impunity prevails due to the lack of political will and attention and allow the violations to continue to thrive. The EU calls for the ratification of the ICC and support steps for the RtoP implementation.

		develop a more operational approach to this cornerstone of the UN doctrine whilst resisting attempts to reduce its scope; – Ensure that the preventive character of RtoP is adequately emphasised in the above-mentioned debate and that adequate attention is paid to helping vulnerable and unstable countries develop the capacity to shoulder such responsibility, focussing specifically on regional actors as the most effective interlocutors in unstable situations; – Ensure that the RtoP principle is applied in crisis situations where the state concerned fails to protect its people from genocide, war crimes, ethnic cleansing and crimes against humanity; – Encourage the African Union to further develop its crisis management capabilities, and call on both EU and UN actors to support these efforts and to deepen the cooperation with the African Union in the establishment of peace and security on the African continent.	

		European Parliament Resolution of 26 November 2009 on a Political Solution to the Problem of Piracy off the Somali Coast [2009] OJ C 285/08. The EP recalls that the international community and all parties to the present conflict have a responsibility to protect civilians, to allow delivery of aid and to respect humanitarian space and the safety of humanitarian workers; demands therefore that the right conditions for an adequate response to the humanitarian catastrophe in Somalia be created immediately.	
		European Parliament Resolution of 17 December 2009 on Violence in the Democratic Republic of Congo [2009] OJ C 286/05. Having regard to United Nations General Assembly Resolution 60/1 of 24 October 2005 on the 2005 World Summit Outcome, and in particular paragraphs 138 to 140 thereof on the RtoP.	

2010			
EU Priorities for the 65th UNGA, 25 May 2010 http://www.eu-un.europa.eu/articles/en/article_10094_en.htm The UN plays the central role in peacekeeping and peace-building. With the Lisbon Treaty the EU is now ready to assume its role as a global actor intending to contribute to the crises management in the relevant UN operations (UNSC mandated). EU strives to operationalise the RtoP as agreed in the World Summit Outcome Document, however, the RtoP is opened for negotiation. The EU is for narrow but deep approach and practical focus on the preventive pillar.		*One Year After Lisbon: The EU-Africa Partnership at Work European Parliament Resolution of 24 March 2009 on One Year After Lisbon: The Africa-EU Partnership at Work [2009] OJ C 117/25.* The EP welcomes the progress made on the peace and security partnership; takes note of the AU-EU political dialogue on crisis situations in Africa and beyond; stresses that this dialogue needs to address the whole range of peace and security issues from conflict prevention and conflict resolution to post-conflict reconstruction and peace-building, including in-depth dialogue on the implementation of the RtoP principle.	*EU Statement: The UN Special Cttee on Peacekeeping Operations, 22 February 2010* http://www.eu-un.europa.eu/articles/en/article_9513_en.htm The home states bears the primary RtoP towards its population. The UN peacekeeping operations play only the transitory role.
South Africa-EU Summit: Joint Communique, 28 September 2010 http://www.eu-un.europa.eu/articles/en/article_10130_en.htm. EU-Africa supported the inclusion of the RtoP into the World Summit Outcome Document. They recognise that each state has its RtoP but similarly the international		*The European Parliament Resolution of 10 March 2010 on the Annual Report from the Council to the European Parliament on the Main Aspects and Basic Choices of the Common Foreign and Security Policy (CFSP) in 2008, presented to the European Parliament in application of Part II, Section G, paragraph 43 of the*	*EU Statement on the UN Human Rights Council, UNGA General Debate, 8 June 2010* http://www.eu-un.europa.eu/articles/en/article_10911_en.htm At the 2005 World Summit, the international community solemnly agreed that it is our shared responsibility to protect civilians against serious international crimes.

community through the UNSC. To help protect the population it is necessary to advocate RtoP to make it accepted international norm. Regional organisations have the particular role to play as regards the operationalisation of the RtoP.		*Interinstitutional Agreement of 17 May 2006 (2009/2057(INI)) [2010] OJ C 349/12.* The EP calls on the Vice-President/High Representative and her services to develop – with a view to deepening the Union's collective strategic thinking – a coherent EU foreign policy strategy based on the objectives and principles established in Article 21 TEU; is of the opinion that such a strategy should clearly identify the common security interests of the EU and thereby serve as a reference framework for policy-making as well as for the formulation, financing, implementation and monitoring of the EU's external action; calls on the Vice-President/High Representative to fully associate the European Parliament's relevant bodies in such an endeavour; believes that the concepts of human security as defined by the 2007 Madrid Report of the Human Security Study Group, and RtoP, as defined by the 2005 World Summit Outcome Document, should become two of its guiding principles.	In 2006, we similarly committed ourselves to address gross and systematic human rights violations by adopting GA Resolution 60/251. The exercise of this responsibility requires effective and well-functioning preventive, reactive and rebuilding measures to avert and confront such crises.

		European Parliament Recommendation to the Council of 25 March 2010 on the 65th Session of the United Nations General Assembly [2010] OJ C 4/08. Peace and Security EP stresses the need to fully support the efforts of the UN Secretary General to better define the notion of the principle of the RtoP, to stress its importance in preventing conflicts while encouraging its implementation.	*EU Presidency Statement: UNSC Open Debate - Protection of Civilians in the Armed Conflict, 7 July 2010,* http://www.eu-un.europa.eu/articles/en/article_10192_en.htm Link between the protection of civilians and the RtoP. If the victims are protected they do not fall victims of the international armed conflict.
			EU Statement in the UNSC Debate on the Protection of Civilians in the Armed Conflict, 22 November 2011 http://www.eu-un.europa.eu/articles/en/article_10405_en.htm The link must exist between POC and the RtoP. Since the civilians are protected, they will not become victims of the RtoP crimes. Emphasis on prevention.
2011			
European Council on Libya/Southern Neighbourhood, Conclusions, 25 March 2011 http://www.eu-un.europa.eu/articles/en/article_10869_en.htm The EU recalls the UNSC Resolution 1973 authorising the intervention in Libya.			*EU Declaration by High Representative Ashton on Libya, 23 February 2011* http://www.eu-un.europa.eu/articles/en/article_10704_en.htm The EU calls upon Libya to meet its RtoP.

			EU Statement, Membership of Libya in Human Rights Council, 1 March 2011 http://www.eu-un.europa.eu/articles/en/article_10734_en.htm The EU welcomes the UNGA action calling on Libya to fulfil its RtoP.
			Statement by EU High Representative Ashton - After the Meeting of the Contact Group in Libya, 5 May 2011 http://www.eu-un.europa.eu/articles/en/article_11006_en.htm Under the UN leadership (implementing the UNSC Resolutions 1970 and 1973), the EU will continue to excerpt pressure on Gaddafi as part of our responsibility to protect Libyan population.