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Approaches to National Implementation of the Responsibility to Protect

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Abstract

The article seeks to examine the approaches of states, namely the UK, Germany, France, the USA, South Africa, to the domestic implementation of the responsibility to protect, particularly the responsibility of the state as a member of the international community to protect. It contains an analysis of the position of states on the legal nature of the responsibility to protect concept, foreign policy of states and their activities in international organizations towards the implementation of the responsibility to protect, as well as the position on the military intervention. Author argues that there are two approaches to the implementation of the responsibility to protect: formalistic and institutional. The formalistic approach can be described as the implementation of the responsibility to protect in the foreign policy of the state without a corresponding reinforcement of the mechanisms on its implementation. The institutional approach stipulates the implementation of the responsibility to protect both in the foreign policy doctrine of the state and in the internal state structure, which allows to coordinate policies and to identify an integrated approach of the state to the implementation of the responsibility to protect.

Keywords: responsibility to protect, implementation, contemporary responsibility to protect, military intervention, national defence.

Introduction

The responsibility to protect is the most debated international legal phenomenon at the present time. The normative formulation of this principle was given in 2005 World Summit Outcome Document (UN General Assembly Resolution 60/1) and henceforward the responsibility to protect was considered score of times by the United Nations' institutions. 10 years after, the responsibility to protect remains on the international agenda and helps to draw attention to the worst cases of human rights abuse – defined by the 'mass atrocities' concept. Nowadays the UN Security Council has formulated frequently resolutions using responsibility to protect language in spite of factual collisions on the map.

The responsibility to protect is a significant part of the UN's and its institutions' activity; despite that fact, equally important question in this respect is the implementation of the concept (either principle or emerging norm) into national legislative corpus a fortiori the states as the members of the international community formulate and actualize realization of responsibility to protect to particular situation. Furthermore, it's the domestic implementation of the responsibility

to protect, which allows us to speak about the concept as a legal (not political) principle. It is, therefore, the issue of different approaches of states to implementation of the responsibility to protect is urgent and useful at present.

Materials and methods
The main sources used for writing this article are foreign policy of states and legal acts with international focus, which are directly applied to the responsibility to protect. This article is also based on the recent researches on this issue (by Jason Ralph, Theresa Reinold, Philipp Rotmann, Gerrit Kurtz, Sarah Brockmeier, Samuel Andrew John Jarwis, Stewart Patrick, Malte Brosig, Harry Verhoeven, Sandy Africa, Rentia Pretorius, Philip Nel, Julian Junk, Dmytro Koval); but the lack of comparative studies on the subject is striking.
The primary method of this research is the comparative one. The study also uses the basic methods of cognition: historical, normative-logical, systemic, and method of legal technics etc. with their various conjunctions.

Discussion
The responsibility to protect consists of three components, so called 'pillars': (I) responsibility of the state to protect its own population from genocide, ethnic cleansings, war crimes and crimes against humanity; (II) responsibility of the international community to encourage and assist states in fulfilling this responsibility; and (III) responsibility of the international community to respond with all available means, including military action, in case of nonfeasance with this obligation by the state. This article analyses implementation of the second and the third pillars of the responsibility to protect, i.e. the implementation of the responsibility to protect by states as members of the international community. This will identify the potential for the application of the concept in different situations on a case-by-case basis, and also will determine the understanding and the interpretation of the responsibility to protect by particular states. The objective of this study is to identify mechanisms of domestic implementation towards the second and the third pillars of the responsibility to protect, then to compare them and to structure the legal approaches to the implementation of the responsibility to protect.
The responsibility to protect uses successively a large range of international legal and political tools, the most controversial of which is the military intervention. Thereat the analysis of the responsibility to protect implementation is combined with analysis of official national positions on military intervention – that will assist in determining place of military action (within the framework of the responsibility to protect) in overall national spectrum of military intervention.
Initially, it should be observed that neither all countries implement responsibility to protect in national policy nor they are supporters of it. The outstanding example is the Russian Federation, whose Concept of Foreign Policy (approved by the President of the Russian Federation on 02.12.2013) stipulates an exclusion of the military intervention (in the sense of forms of outside interference that undermine the foundations of international law) under the pretext of responsibility to protect. Russia's position in the UN confirms the negative perception of the responsibility to protect as international legal norm. However, it is noteworthy that in the UN context, Russia claims to express general support for the responsibility to protect while working to create safeguards, including international legal safeguards, to prevent obvious violations of the concept [1, p. 497]. During 2009 GA Debates on the responsibility to protect, Russian representative set that Russia will approve the responsibility to protect with the prerequisite "...that the proposed strategy for implementation of the responsibility to protect should focus on broad recognition of that concept in clear and understandable terms" [2]. As opposed to it, subsequent GA debates on responsibility to protect (provided annually since 2009) show the denial of the responsibility to protect by Russian officials. This study explores the mechanisms of the implementation of the responsibility to protect by states, which are proponents or supporters of the concept on global level.
Firstly, there is a need to consider the responsibility to protect implementation mechanisms in Great Britain.
The United Kingdom is the prominent proponent towards the promotion of the responsibility to protect on global level. The responsibility to protect arose in the British legal policy before the 2005 World Summit: the International Development Committee at the House of Commons on the

30th of March 2005 issued the Report "Darfur, Sudan: The Responsibility to Protect" [3], which for the first time referred to the responsibility to protect. Henceforth Great Britain became a strong proponent of the concept and was actively promoting it in the UN, EU and other international organizations. Moreover, Great Britain (together with France and Lebanon) had developed and initiated the adoption of the UN SC Resolution 1973 (2011), which authorized the use of military force in Libya [4, p. 9]. The representatives of the United Kingdom repeatedly note that the responsibility to protect "… should be an important governing principle of all countries' work across the conflict spectrum, as well as on human rights and development" [5]. Therefore, it would be fair to say that the responsibility to protect is inter alia an important benchmark of the British foreign policy.

Furthermore, the government of Great Britain finances numerous projects and initiatives regarding prevention of genocide, ethnic cleansings, war crimes and crimes against humanity all around the world: the UN Peacebuilding Commission, the Global Centre for the Responsibility to Protect, the Auschwitz Institute for Peace and Reconciliation, the Latin American Network for Genocide and Mass Atrocity Prevention etc.

It is noteworthy that issue about military intervention has been making a significant aspect of the British foreign policy. It's important that the responsibility to protect in the wording of the 2005 World Summit Outcome Document allows military action, but only authorized by the UN SC. In contrast, the UK Defence Doctrine recognizes "intervention to prevent an overwhelming humanitarian catastrophe" [6, p. 54], i.e. humanitarian intervention without authorization by the UN SC, to be corresponding to the existing international law (together with self-defense and authorized by the UN SC intervention). Moreover, after the use of chemical weapon in Syria in August 2013 the government of the United Kingdom expressed its willingness to launch a humanitarian intervention in Syria without the UN SC approval [7]. Abovementioned practice allows us to notice an important aspect: according to the position of the UK government the responsibility to protect is an alternative among other instruments (or concepts), and first of all is the concept of humanitarian intervention (that issue is quite controversial among scholars and states' positions). Therefore, if the military intervention within the framework of the responsibility to protect does not find support in the UN SC, the UK government may launch military humanitarian intervention without the authorization depending on political priorities of the United Kingdom. The House of Lords confirmed such position in the autumn 2015 debate: "The United Kingdom and its allies … are adaptable and ready to intervene or to support peacekeeping operations as the situation demands…" [8].

National implementation of the responsibility to protect in Great Britain is practiced within the framework of common national security system. The 2011 Building Stability Overseas Strategy does not name the responsibility to protect, though it concerns relevant issues: early warning, rapid crisis prevention and response, investing in upstream prevention [9, p. 4-5]. The responsibility to protect was included into the National Security Strategy at the end of 2015: "5.109 We will use the UN mechanisms such as the Responsibility to Protect, the Rights Up Front, the Human Rights Council, and the Children in Armed Conflict agenda to drive global change, in line with British values" [10, p. 63]. Establishment of new public bodies for the implementation of the responsibility to protect is not mentioned in the document mainly because the United Kingdom has already developed the conflict prevention mechanisms – such as the Building Stability Overseas Strategy, the early warning, the National Security Risk Assessment, the Stabilization Unit, the Conflict, Stability and Security Fund. Nevertheless, it is worth emphasizing that this system seeks to prevent conflicts; this is not similar to the prevention of genocide, ethnic cleansing, war crimes and crimes against humanity – categories, which the responsibility to protect operates with. Moreover, the conflict prevention mechanisms are directly related to the category of national interest in the 2013 Conflict Pool Strategic Guidance, which limits their use to the situation where political priorities of the United Kingdom are in danger. The emergence and the spread of ISIL gives us a vivid example of situation where conflict prevention mechanisms have not played appropriate role.

Close examination of the French foreign policy is crucial for the issue of the implementation of the responsibility to protect.

France along with other European and African countries initiates and strongly supports an adoption of the responsibility to protect at the 2005 World Summit. Later on the French representatives have closely participated in the development of the responsibility to protect.

Moreover, in 2008 the French Minister of Foreign Affairs Bernard Kouchner proposed the responsibility to protect for the use with regards to the humanitarian catastrophe in Burma (that was not positively accepted by the international community). The French representatives in the UN have repeatedly stressed the normative nature of the responsibility to protect (in contrast to initiative or concept): "the responsibility to protect is a working principle" [11]. France, as a permanent member, has been presenting this coherent position in the UN SC; for instance, in 2012, France has initiated an adoption of the UN SC resolution 2085, which authorized military intervention within the framework of the responsibility to protect.

At the French domestic level, the responsibility to protect is implemented in series of acts. The French 2013 White Paper on Defense and National Security defines the responsibility to protect as a priority of foreign affairs: "... France intends to make the consolidation of this principle a priority of its external action" [12, p. 24]. Other acts refer to the responsibility to protect as well. For instance, the 2012 Humanitarian Strategy defines the responsibility to protect as an integral part of the human rights policy. Noteworthy that changes in French structure of public bodies as to the implementation of the responsibility to protect did not happen.

The French foreign policy is characterized by approving approach with regards to a military intervention. France was one of the initiators of the military intervention in Libya and it strongly supports the UN military actions. The 2013 White Paper on Defense and National Security defines the objectives of the military intervention: "... ensuring the protection of French nationals abroad; defending our strategic interests and those of our partners and allies and exercising our international responsibilities" [12, p. 79]. Considering forms of military intervention the White Paper distinguishes two types: coercive operations and crisis management operations [12, p. 128]. At the same time, the White Paper does not distinguish military operations within the framework of the responsibility to protect among other forms of crisis management operations. Nay the document named "Contribution of the armed force to the prevention of the external crises" (2013) considers several elements of military action and permits the possibility of military operations without approval of the UN SC; although it is mentioned that such approval is desirable [13, p. 17]. Thus, according to the position of the French government, the responsibility to protect can be a cause for the military action, but it is not evolved into a separate category of a military operation.

It is also important to analyze the position of the Federal Republic of Germany.

Germany was one of the advocates for the adoption of the responsibility to protect at the 2005 World Summit. However, in the one year after adopted German Security Policy and the Future of the Bundeswehr the responsibility to protect is mentioned only as a doctrine. The act highlights the necessity of improvement and pursuing the concept as well as importance of obtaining of a recognition from the international community. "Germany is committed to share the responsibility for the maintenance of world peace and international security in the context of the United Nations" [14]. Later on Germany was actively involved in the conception's development. Upon that the German representative refrained from voting for the 1973 Resolution in the UN General Assembly (regarding the military intervention into Libya). Nevertheless, the representative expressed his support in favor of the principle of the responsibility to protect: "Germany firmly supports the principle of the responsibility to protect, including the responsibility of the international community, through the Council, to take appropriate action... Now is not the time for us to begin to step back from or compromise on the commitments that all of us have undertaken by endorsing the principle of the responsibility to protect" [15]. Therefore, the responsibility to protect may be considered as one of the priorities of the German foreign policy.

It is worth noting that in contrast to the position of France and Great Britain who deem the responsibility to protect as outlined in the 2005 World Summit Outcome Document as a policy tool, the German government considers the responsibility to protect as a reference point for further building of the legal norm. [16, p. 439].

Germany considers the responsibility to protect within the framework of the conflict prevention based on the human rights policy and policy in the field of development by strengthening regional and international organizations as well as financial and political support of the UN Secretary General and his special advisors. The Federal Government confirmed such position in the Bundestag [17, p. 3-4]. On the German national level for the purposes of performance of the responsibility to protect, an inter-ministerial working group for civil crisis prevention and early warning and an adjunct advisory council were established [18].

Nevertheless, the German Federal Government currently does not intend to establish a body identical to the US Atrocities Prevention Board [27, p. 65]. It may be stated that Germany implements responsibility to protect not only with regards to its conception of foreign affairs but also institutionally to the Federal Government's activity.

It is worth mentioning that Norwegian and Danish legal acts in case of examining of European countries contain references regarding the responsibility to protect [19, p. 19].

The United States approach to the implementation of the responsibility to protect differs significantly from the approach of European countries. During the presidency of George W. Bush, the Presidential administration limits all obligations arising from the responsibility to protect as such that limits sovereignty [20, p. 66]. The US representative at the 2005 World Summit emphasized that responsibility to protect was not a legal norm [21, p. 365]. This position explains the fact that the United States refrained from the intervention in conflict in Darfur [22, p. 226]. Succeeding administration of the president Barack Obama has considerably changed the position towards the responsibility to protect. The 2010 National Security Strategy (the first one on the presidency of B. Obama) states that "… the United States is committed to working with our allies, and to strengthening our own internal capabilities, in order to ensure that the United States and the international community are proactively engaged in a strategic effort to prevent mass atrocities and genocide" [23, p. 48]. The 2015 National Security Strategy refers to the responsibility to protect highlighting prevention measures: "…options are more extensive and less costly when we act preventively before situations reach crisis proportions" [24, p. 22]. It is particularly important that "prevent mass atrocities" is not included in chapter devoted to the international order but is included in "Chapter VI. Values". All of the abovementioned allows speaking about the responsibility to protect as of a major value of the US national security and foreign policy.

On the 23rd of April 2010 a special position in the structure of the National Security Council was designed – Director for War Crimes and Atrocities. Later on, in August 2011 President Barack Obama issued the Presidential Study Directive 10, which established the Atrocities Prevention Board. This Board provides a comprehensive national approach to the identification and the prevention of threats, as well as monitors the institutional changes to prevent genocide and mass atrocities. In addition, the President's administration designed "A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities", which includes the allocation of areas towards the implementation of the responsibility to protect, and allocation of functions between the US public authorities. The aforesaid proves that the responsibility to protect is directly implemented at the US national level, and what is especially important – the institutional mechanisms for the implementation of the responsibility to protect were defined, the tasks among public institutions were allocated.

It is well known that the US approach to military intervention does not require authorization from the UN Security Council. B. Obama in his May 2014 speech sets that "international opinion matters, but America should never ask permission to protect our people, our homeland or our way of life" [25]. Noteworthy is that the authorization for military intervention by the international community is desirable and it is one of the principles of military intervention. Nevertheless, "when intervention is warranted but a UN imprimatur is unreachable…" the United States "…should seek to act through regional groupings like NATO or like-minded coalitions" [26]. The important point is also about limiting the prerequisites for military intervention: military "…intervention should be limited to stopping or preventing egregious atrocities…" [26]. Thus, the US approach to the implementation of the responsibility to protect defines the military intervention as one of the tools for the concept of the responsibility to protect and, if it does not correlate with the concept of humanitarian intervention as a right to intervene, it identifies intervention as a separate instrument of the US foreign policy.

There is a need to consider the implementation mechanisms of the responsibility to protect in South African Republic as well.

During the 2005 World Summit, South Africa was one of the countries-proponents of the responsibility to protect. Indeed, approach of South Africa and its position towards the intervention in Libya and Côte d'Ivoire emphasized an accent on measures short of military, foremost through regional organizations, but not except military actions. South African position in the UN SC with regards to Syria in February 2012 demonstrated commitment to the principle of the responsibility to protect and military intervention as its integral part in cases of mass atrocities

commission – South Africa voted in favor of the military intervention to Syria [27, p. 43]. It is worth noting that South African understanding of the responsibility to protect and military intervention as outlined by differs significantly from the understanding of Western countries [28, p. 528].

The implementation of the responsibility to protect on the South African national level has not occurred. The Strategic Plan 2013-2018, just like its predecessor, has not defined the responsibility to protect. Moreover, the Strategic Plan emphasizes on the rejection of military action within international law: "South Africa also upholds the belief that the resolution of international conflicts should be peaceful and in accordance with the centrality of the UN Charter and the principles of international law" [29, p. 4]. Institutional changes in South Africa towards the implementation of the responsibility to protect, did not happen.

The primary activity of South Africa regarding the responsibility to protect focuses on the framework of the African Union. As a member of AU South Africa maintains the right to intervene, which is set out in article 4 (h) of the AU Constitutive Act [30, p. 403]. In the course of further interpretation of the AU Constitutive Act, South Africa in 2011 has proposed the Common African Position on the Proposed Reform of the United Nations (Ezulwini consensus); it reflects South African position with regards to the responsibility to protect: "it is important to reiterate the obligation of states to protect their citizens, but this should not be used as a pretext to undermine the sovereignty, independence and territorial integrity of states" [31]. It should be stressed that South Africa was an initiator of a construction of the African Peace and Security Architecture. Generally, South African position regarding military intervention corresponds to the position of the African Union, for example, as to the intervention in Kosovo: "unilateral intervention, no matter how noble the pretext, is not acceptable" [32]. This fact emphasized the vital importance of AU actions with regards to the implementation of the responsibility to protect by South Africa. South Africa is also actively promoting the development of the provisions of the responsibility to protect in the AU law; for example, the South African government was an initiator of designing the Pretoria Principles on ending mass atrocities pursuant to article 4 (h) of the Constitutive Act of the African Union.

Conclusion

There is an undoubted need for the implementation of the responsibility to protect in the corpus of domestic national legislation. The analysis of states' practice shows that domestic implementation of the responsibility to protect as the responsibility of state as a member of international community is held in two spheres: foreign policy (literally legal) and institutional.

Depending on this, there are two approaches to the implementation of the responsibility to protect: 1) implementation of the responsibility to protect only into foreign policy of the state – formalistic approach; 2) implementation both into the foreign policy and into the functioning of public authorities of the state –institutional approach.

The formalistic approach is characterized by the implantation of the responsibility to protect into foreign policy of a state without corresponding reinforcement by instruments of its realization. Under this approach, the implementation of the second and the third pillars of the responsibility to protect is completely transferred within the framework of international organizations. A minimal modification in the domestic system of public authorities takes place: the function of execution of the responsibility to protect is added among other functions of the existing public institutions without changing the processes of their functioning (methodology, structure etc.). The formalistic approach to the implementation of the responsibility to protect is fraught with a modification of the goals and objectives of the responsibility to protect, and mixing the concepts of humanitarian intervention and military intervention within the framework of the responsibility to protect. This can reduce the effectiveness of the responsibility to protect practically. The formalistic approach is typical for the United Kingdom and France. Approach of South Africa to the implementation of the responsibility to protect can be named extremely formalistic – the responsibility to protect is not fixed as a foreign policy guideline (or priority); however South Africa implements the responsibility to protect within the framework of international, first of all, regional organizations (AU, Southern African development Community).

The institutional approach can be described as the implementation of the responsibility to protect both into foreign policy of a state and into agenda of national public authorities. This approach allows to coordinate policy and to identify a unified position towards the

responsibility to protect. In contrast to the formalistic, the institutional approach assumes essential modifications in an internal system of the public authorities. These modifications allow a state to implement the responsibility to protect comprehensively. This generates a direct legal-technical link between foreign policy (legal position) and functions of public institutions towards the implementation of the responsibility to protect. The negative aspect of this approach is the formation of a uniformed state approach to the responsibility to protect; it has effect on flexibility of the responsibility to protect to particular situation on case-by-case basis. The institutional approach is inherent to the United States and to a lesser degree to Germany.

The concept of the responsibility to protect is an evolving mechanism and its development largely depends on its application in practice. Significant changes came over in foreign policy of many countries in recent years, which is also associated with the concept of the responsibility to protect and its consideration within the framework of the United Nations. Designated approaches to the implementation of the responsibility to protect can be modified and improved furthermore, with the prerequisites of the development of the responsibility to protect, its application by multi-national structures on the land, and consolidation on a national level.

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Подходы к национальной имплементации «обязанности защищать»

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Аннотация. В статье рассматриваются подходы государств (Великобритании, Германии, Франции, США, ЮАР) к внутригосударственной имплементации «обязанности защищать», в частности, «обязанности защищать» государства как члена международного сообщества. Анализируются позиции государств к юридической природе концепции «обязанности защищать», внешнеполитические доктрины государств, их деятельность в международных организациях в вопросе реализации обязанности защищать, а также позиции государств к военной интервенции как таковой.

На основе проведенного исследования автор выделяет два подхода к имплементации «обязанности защищать»: формалистский и институциональный. Формалистский подход можно охарактеризовать как внедрение «обязанности защищать» во внешнюю политику государства без соответствующего подкрепления механизмами её реализации. Институциональный подход подразумевает имплементацию «обязанности защищать» как во внешнеполитическую доктрину государства, так и во внутренние государственные структуры, что позволяет скоординировать политику и определить единый подход государства к реализации «обязанности защищать».

Ключевые слова: обязанность защищать, ответственность за защиту, имплементация, военная интервенция, национальная безопасность.