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(eds.)

The Limits of Responsibility to Protect

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The Limits of Responsibility to Protect

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NON-UN SANCTIONS AND THE "RESPONSIBILITY TO PROTECT": LEGALITY, LEGITIMACY AND THEIR SIGNIFICANCE FOR R2P

Ljupcho Stojkovski[1]

1. INTRODUCTION

The Russian aggression on Ukraine brought to the fore two things – the ineffectiveness of the UN Security Council (UNSC) when a permanent member is engaged in war and/or mass atrocities, and the unprecedented amount of non-UN sanctions against Russia for its grave violation of international law. The adoption and imposition of sanctions – that is, coercive measures without the use of force, such as travel bans, assets freeze, or restrictions on trade, that aim to express displeasure and/or to pressure the entity against which they are imposed to change a behavior that is unwelcomed and/or a violation of international law – are a controversial topic in international law and international relations. Though they have been often labeled as an "invaluable middle ground between war and words,"[2] both, sanctions' legality and their legitimacy as a measure, considering the potential grave harm they can cause to States as well as individuals and their human rights, are disputed. This is particularly the case when these measures are not adopted by the UN Security Council in accordance with article 41 of the UN Charter, meaning when they are unilateral, autonomous, or non-UN sanctions.

With regard to the Responsibility to Protect (R2P), sanctions are part of its third Pillar since "collective action" in the name of R2P is a broad term that is

1 Assistant Professor, Faculty of Law "Iustinianus Primus" Skopje, Ss. Cyril and Methodius University, lj.stojkovski@pf.ukim.edu.mk.

2 Erica Moret, *Unilateral and Extraterritorial Sanctions in Crisis: Implications of Their Rising Use and Misuse in Contemporary World Politics,* in Charlotte Beaucillon (ed), *Research Handbook on Unilateral Extraterritorial Sanctions*, Edward Elgar 2021, p.34.

not limited only to military intervention but can include other measures with or without the use of force.[3] Under the accepted R2P version of 2005, however, collective action should be undertaken only through the UN Security Council.[4] What remains unanswered is what should be the international community's response under Pillar 3 in cases when the UN Security Council is ineffective because it is passive or blocked, and especially when one of the perpetrators of R2P crimes is a permanent member of the Council, as it is the case today, for example, with Russia in the war on Ukraine[5] or with China in the treatment of its Uyghur population.[6] Are sanctions, especially those adopted outside of the UN Security Council, a legal and warranted response for R2P? What does the answer to this question, in turn, say about R2P's potential (especially regarding Pillar 3) as a norm? This contribution deals with these questions and argues that non-UN sanctions are a legal and legitimate R2P response that should be undertaken by the international community – States and international organisations – on a case-by-case basis, especially when the Security Council is failing to uphold its responsibility to protect the populations in need, and that their adoption contributes to the strengthening of R2P as a norm with respect to its third Pillar. Accordingly, the chapter unfolds in three parts. The first one is dedicated to the legality of non-UN sanctions in general and R2P's legal status. The next section addresses the question of the legitimacy of non-UN sanctions, their

3 UN Doc. A/63/677, *Implementing the Responsibility to Protect,* Report of the Secretary-General, 12 January 2009; UN Doc. A/66/874-S/2012/578, *Responsibility to Protect: timely and decisive response,* Report of the Secretary-General, 25 July 2012.

4 World Summit Outcome Document, UN Doc. A/Res/60/1, 24 October 2005, par. 139.

5 According to the Report of the Independent International Commission of Inquiry on Ukraine, Russian armed forces have been committing war crimes in the war in Ukraine. UN Doc. A/77/533, 18 October 2022.

6 The UN Office of the High Commissioner for Human Rights has said that the human rights violations of the Uyghur population may constitute crimes against humanity, whereas several countries have labeled them as genocide. UN Office of the High Commissioner for Human Rights 'OHCHR Assessment of Human rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China', 31 August 2022, <https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf > accessed 5.3.2023; Lindsay Maizland, 'China's Repression of Uyghur in Xinjiang', Council on Foreign Relations <https://www.cfr.org/backgrounder/china-xinjiang-uyghurs-muslims-repression-genocide-human-rights#chapter-title-0-8 > accessed 5.3.2023. Both types of crimes are R2P crimes, so there is no point, as Ryan suggests, in spending much time on the precise legal label in this particular case, and risk obscuring the most important thing – the protection of the Uyghurs. Sophie Ryan, 'Atrocity Crimes in Xinjiang: Moving beyond Legal Labels', 13 Global Responsibility to Protect (2021), pp. 20-23.

appropriateness as a measure for R2P and their effects. The final part deals with the importance of these sanctions for R2P.

2. LEGALITY OF NON-UN SANCTIONS

In order to determine whether non-UN sanctions adopted in the name of R2P are legal, two separate but related questions need to be answered – whether non-UN sanctions are permissible under international law, and whether R2P, as it was adopted at the 2005 World Summit, is a legal norm.

2.1. Non-UN Sanctions and International Law

The legality of non-UN sanctions is a complex question that involves many aspects and draws many diverse opinions from scholars and States. For some, non-UN sanctions, if they are not counted as reprisals or bilateral countermeasures, are "inherently unlawful".[7] Numerous different arguments are given in support of sanctions' illegality, such as that they are not authorized by the UN Security Council, that they *prima facie* violate the UN Charter as well as other international law norms, such as human rights,[8] the jurisdictional principles in international law (they are considered essentially extraterritorial),[9] or the WTO rules on free trade.[10] While all of these objections are important, they cannot be addressed in detail in the present chapter. Instead, the focus will be (primarily) on their permissiveness under general international law and the alleged violations of the UN Charter, particularly the prerogatives of the UN Security Council and the principle of non-intervention, which are most strongly related to R2P.

7 Nigel D. White, *Shades of Grey: Autonomous Sanctions in the International Legal Order,* in Surya P. Subedi, *Unilateral Sanctions in International Law,* Hart Publishing 2021, p.62.

8 Pierre-Emmanuel Dupont, *Human Rights Implications of Sanctions,* in Masahiko Asada (ed.) *Economic Sanctions in International Law and Practice,* Routledge 2020.

9 Mirko Sossai, *Legality of Extraterritorial Sanctions*, in *Ibid*.

10 James Watson, *The World Trade Organization and Unilateral Sanctions: Prohibited or Possible,* in Surya P. Subedi, *Unilateral Sanctions in International Law,* Hart Publishing 2021.

2.1.1. Legality of Non-UN Sanctions Under General International Law

To begin with, there is no customary law that prevents States from adopting these measures.[11] States can regulate their relations with other States freely and adopt any measure they consider necessary in this regard, provided that, by doing so they do not violate any concrete customary or conventional obligation owed to that State.[12] There is widespread and growing practice of States and regional organizations adopting these measures[13] and even UN General Assembly resolutions calling for the adoption of these measures.[14] True, there are also UNGA resolutions that condemn these practices as illegal,[15] but as Barber points out, a careful analysis of their language leads to the conclusion that they denounce these measures only if they aim at the subordination of the targeted State or its sovereign right to decide about its domestic affairs, and some matters for which sanctions have been adopted are not within domestic competence.[16] Thus, it cannot be concluded that States are prohibited from adopting these measures.

2.1.2. "Collective Action" (for R2P) Outside of the UN Security Council

Adding further to the claim that non-UN sanctions are prohibited under international law, some authors argue that only multilateral sanctions, or sanctions adopted by the UN Security Council, are allowed in international law. The fo-

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11 See, for example, Barry E. Carter, "Economic Sanctions", Max Planck Encyclopedia of International Law, 2011, para.29,30, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1521?rskey=UL7P9V&result=2&prd=OPIL> accessed 5.3.2023; For the opposite view, see, for example, Surya P. Subedi, *The Status of Unilateral Sanctions in International Law,* in Surya P. Subedi, *Unilateral Sanctions in International Law,* Hart Publishing 2021;

12 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14, para 276.

13 Moret, *Unilateral and Extraterritorial Sanctions in Crisis: Implications of Their Rising Use and Misuse in Contemporary World Politics* (n 1), pp.24-27.

14 UNGA Res 36/172 D (17 December 1981); UNGA Res 36/27 (13 November 1981).

15 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States', UNGA Res 2131 (XX) (21 December 1965); 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States', UNGA Res 26/25 (24 October 1970); 'Charter on the Economic Rights and Duties of States', UNGA Res 3281 (XXIX) (12 December 1974);

16 Rebecca Barber, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions', 70, International and Comparative Law Quarterly (2021), pp.361-368.

cus here is on the "competent social organ" that is "legally empowered to act in the name of the society or community",[17] in this case the UN Security Council. The argument then is that non-UN sanctions are illegal because they "undermine the UN's special authority to impose coercive measures, as detailed in Chapter VII of the UN Charter, which covers both military measures and sanctions".[18] The Council's special authority is of course related to the prohibition of the use of force in international law, stipulated in Article 2(4) of the UN Charter, from which there are only two exceptions – self defense and the use of force that is authorized by the Security Council for the maintenance of international peace and security. Two things need to be emphasized here with regard to non-UN sanctions. Firstly, the term "force" used in Article 2(4) does not comprise economic coercion, and the attempts to make the concept broader, made prior to and after the adoption of the UN Charter, have been rejected.[19] Secondly, as Alain Pellet stresses, a "difference of paramount importance" separates coercive measures (under Article 41) and the use of force (under Article 42) of the UN Charter: "whereas the economic sanctions of Art.41 are *intended to coexist with similar unilateral measures taken by States* (or other international organizations), the measures of Art. 42 come within the exclusive competence of the Security Council."[20]

Related to R2P, in the 2005 World Summit Outcome Document (WSOD), States have expressed preparedness to undertake "collective action" in situations of R2P atrocities "in accordance with the Charter including Chapter VII" and (only) "through the Security Council".[21] To be sure, the WSOD is not a legally binding document (it is a UNGA resolution), but there is no doubt that at that Summit the UNSC was conferred the role of the international community's 'right authority' for R2P, meaning the institution responsible for evaluating and

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17 Abi-Saab, cited in White, *Shades of Grey: Autonomous Sanctions in the International Legal Order* (n 6), p.65.

18 Michael Brzoska, 'International Sanctions Before and Beyond UN Sanctions", 91:6 International Affairs 2015, p.1345, 1346.

19 Nema Minania, *Jus ad bellum economicum* and *jus in bello economico:* The Limits of Economic Sanctions under the Paradigm of International Humanitarian Law, in Ali Z. Marossi, Marisa R. Bassett (eds.), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy and Consequences,* Asser Press 2015, p.105.

20 Allain Pellet, Alina Miron, 'Sanctions' in Max Planck Encyclopedia of International Law, par.29, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e984?rskey=yYjkJA&result=1&prd=OPIL> accessed, 5.3.2023.

21 World Summit Outcome Document (n 3), par. 139.

authorizing the (potential) use of coercive measures under Chapter VII of the UN Charter when (it assesses that) there are R2P crimes. Yet, non-UN sanctions are not against what was agreed upon at the Summit. The main contentious point leading up to the World Summit concerning Pillar three of R2P was the question of military intervention[22] and not the use of non-forcible (yet coercive) measures, i.e. sanctions. Furthermore, except for war crimes, the three other R2P crimes can be committed not only during armed conflicts but also in peacetime, so they could be not only a threat to international peace but also a violation of international law in themselves. Therefore, non-UN sanctions for R2P do not undermine the Council's authority for the maintenance of international peace and for R2P nor are they incompatible with or in competition with sanctions adopted by the Council pursuant to Article 41 (or with forcible measures under Article 42) of the UN Charter. They are a foreign policy tool, legally available to States, aimed at addressing a legal (or moral-political) violation, such as R2P. Therefore, UN and non-UN sanctions "exist side-by-side" in actual and legal reality,[23] and the latter are not against the 2005 R2P consensus (and the role of the Council) but may be used in support of it.

2.1.3. Non-Intervention

Even though non-UN sanctions are not equivalent to the use of force, and do not touch on the prerogatives of the UNSC, it is often claimed that due to their coercive nature, non-UN sanctions *prima facie* violate the principle of non-intervention.[24] A measure would be regarded as coercive if it aims at subordination of the exercise of the sovereign rights of the targeted State, or if it tries to secure any kind of advantage from the targeted State.[25] So, not every act of "applying pressure by a State can be qualified as an illegal unilateral coercive measure",[26] and even broad measures such as trade embargo might not amount to coer-

22 Alex J. Bellamy, 'Whither the Responsiblity to Protect? Humanitarian Intervention and the 2005 World Summit', 20(2), Ethics & International Affairs (2006).

23 Antonios Tzanakopoulos, *We Who Are Not as Others: Sanctions and (Global) Security Governance,* in Robin Geiß, Nils Melzer (eds.), *The Oxford Handbook of the International Law of Global Security,* Oxford University Press, 2021, p.785.

24 U.N. Charter, Article 2(1), 2(7); Declaration of Friendly Relations (n 14); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (n 14); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States (n 14);

25 Charter of Economic Rights and Duties of States, (n 14) Article 1.; Maziar Jamnejad, Michael Wood, "The Principle of Non-Intervention", 22 (2), Leiden Journal of International Law (2009), p. 348.

26 U.N. Doc A/HRC/48/59, 8 July, 2021, para.70.

cion.[27] Furthermore, in order for a measure to violate the principle of non-intervention, besides being coercive, it should also interfere in the domestic affairs of a State, about which it has the sovereign right to decide freely.[28] However, if the measures against a State are imposed for violations that concern *erga omnes* obligations, or obligations owed to the international community as a whole, all (other) States have a legal interest to protect them,[29] and the targeted State cannot invoke its domestic affairs as a ground for legal protection.[30] Each of the four R2P crimes included in the World Summit Outcome document from 2005 – genocide, war crimes, crimes against humanity and ethnic cleansing – are *erga omnes* obligations that are binding on all States.[31] Therefore, it cannot be claimed that these are domestic matters about which a State can decide freely and that, consequently, sanctions cannot be imposed.

2.1.4. Retorsions, Countermeasures, and Third-Party Countermeasures

Non-UN sanctions are not prohibited by general international law or *prima facie* contrary to the UN Charter, but due to the diverse nature of sanctions and the various (legal) situations in which they are imposed, their legality should

27 Nicaragua, (n 11), para. 245;

28 Nicaragua (n 11), para. 205; Barber, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions' (n 15), p.351.

29 Case Concerning the Barcelona Traction, Light and Power Company, Limited (Judgment) [1970] ICJ Rep 3, par. 33.

30 Geneviève Dufour, Nataliya Vremenko, 'Unilateral Economic Sanctions Adopted to React to an *Erga Omnes* Obligation: Basis for Legality and Legitimacy Analysis? – A Partial Response to Alexandra Hofer's Article', 18 Chinese Journal of International Law (2019), p. 455.

31 See Patrick M. Butchard, *The Responsibility to Protect and the Failures of the United Nations Security Council,* Hart Publishing 2020, pp. 193-197, and the extensive cases and literature listed therein. Ethnic cleansing is the most legally problematic of the four atrocities crimes, since despite the term being "widely accepted" today, it comes along with many "definitional ambiguities" which might affect its legal status. Yet, ethnic cleansing "inherently violates international law" since although it is "not established as a distinct crime", it "includes acts that will regularly amount to one of the aforementioned crimes, in particular genocide and crimes against humanity" – which are *erga omnes* obligations. Robin Geiß, Asil Ozcelik, 'Ethnic Cleansing', Max Planck Encyclopedia of International Law <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e789?rskey=HeKXau&result=1&prd=OPIL≥ accessed 5.3.2023: Jennifer M. Welsh, 'Norm Robustness and the Responsibility to Protect', 4(1) Journal of Global Security Studies (2019), p.53, 54.

be assessed on a case-by-case basis.[32] Whether they will be legal in a particular situation will depend on whether the sanctions violate existing legal obligations owed to the targeted State (or entity) and whether, if they do, States can legally justify this violation.

If sanctions do not violate any current legal obligations to the targeted State, then they would effectively amount to retorsions, or unfriendly acts that are not inconsistent with any international obligation of the imposing State against the targeted State, such as breaking off diplomatic relations or the withdrawal of an aid programme provided to a State.[33] However, as Ruys, following Giegerich, emphasizes, "the increasing legalization of international relations has multiplied the instances in which an act by one State that would in earlier times have been rated as merely 'unfriendly' now violates international law."[34] Therefore, if sanctions are imposed for some violation of international law by the targeted State, but by doing so the imposing State also violates some legal obligations that it owes to the targeted State, the imposing State can justify these violations as countermeasures, provided that it abides by certain substantive and procedural legal requirements.[35] Moreover, even if the imposing State is not directly injured but the violations it reacts to concern *erga omnes* obligations owed to the inter-

32 Tom Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in Larissa van den Herik (ed.), *Research Handbook on UN Sanctions and International Law*, Edward Elgar Publishing 2017, p.24, 25, 50; Alexandra Hofer, "The 'Curious and the Curiouser' Legal Nature of Non-UN Sanctions: The Case of the US Sanctions against Russia", Journal of Conflict and Security Law (2018), p.2; Masahiko Asada *Definition and Legal Justification of Sanctions,* in in Masahiko Asada (ed.) *Economic Sanctions in International Law and Practice,* Routledge 2020, p10.

33 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, UN, YILC, Vol. II: 2, 2008, p.128.

34 Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework* (n 31) p.31.

35 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, United Nations, A/56/10, 2001, art.49-53; Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (n 32), pp. 128-139.

national community as a whole – like the four R2P crimes – it could justify the non-UN sanctions as 'third-party countermeasures'.[36]

Finally, it should also be mentioned here that sanctions cannot be completely legally justified as either retorsions or (third-party) countermeasures since these measures can be taken by one State (or international organization) against another State. Sanctions, on the other hand, sometimes target, in addition to States, natural (and legal) persons that are not directly responsible for or related to the concrete condemned behavior in question. In this regard, sanctions should also not violate individuals' human rights – especially their procedural rights, like having access to a competent court and a fair trial, as well as having an effective legal remedy and a judicial review, which are most susceptible to be breached when sanctions are imposed[37] – and be proportionate.[38]

In sum, non-UN sanctions are allowed in international law provided that they do not violate, or that they can legally justify the violations of the legal obligations owed to the targeted State and entities.

2.2. R2P's Legal Status

The question of whether R2P is a legal norm or "merely" a moral-political commitment by States is not insignificant since the different normative status has several theoretical and practical implications – the reputational costs for a violation of a legal norm are higher, the powers to enforce the norm are stronger, the form of justification highlights "precedents and practice over national interests and preference", the compliance pull of the legal norm is greater, and it is ac-

36 Draft articles on Responsibility of States for Internationally Wrongful Acts (n 34), art. 54, art.48. Although these measures were not treated as customary law in the 2001 ILC Draft Articles, and the crystallization of customary law to allow these measures is still contested by some authors, many are claiming that even by 2001, and especially today, there is customary international law that allows States to adopt such measures. See Martin Dawidowicz, 'Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council' 77(1) British Yearbook of International Law 2006.

37 Matthew Happold, *Targeted Sanctions and Human Rights*, in Paul Eden, Matthew Happold (eds.), *Economic Sanctions and International Law Volume 62*, Hart Publishing, 2016; Anton Moiseienko, *Due Process and Unilateral Targeted Sanctions,* in Charlotte Beaucillon (ed), *Research Handbook on Unilateral Extraterritorial Sanctions*, Edward Elgar, 2021.

38 Alexandra Hofer*, The Proportionality of Unilateral "Targeted" Sanctions*: *Whose Interests Should Count?*", in Ulf Linderfalk & Eduardo Gill-Pedro (eds.), *Revisiting Proportionality in International and European Law: Interests and Interest-Holders,* Koninklijke Brill NV, 2020.

companied with specific remedies in case of a breach.[39] Moreover, with regard to non-UN sanctions, as it became obvious from the preceding section, the question whether R2P is law is also important for the possible legal justification of sanctions as countermeasures or as third-party countermeasures in cases when their imposition violates some existing legal obligations of the imposing State.

Despite all four R2P crimes being *erga omnes* obligations, R2P as a whole does not have a legal status. R2P is a "complex norm" containing multiple elements, and part of this complexity lies in the mixture of moral, political, and legal elements included in it as well as the "different levels of specificity" of these elements.[40] In this regard, the first and even the second pillar of R2P's three-pillar structure set out by the Secretary General,[41] namely each individual State's responsibility to protect the populations on its territory from the four R2P crimes and the international community responsibility to assist States in fulfilling this responsibility – are not legally disputable. However, the third pillar, more specifically the responsibility of the international community to respond to R2P atrocities in a timely and decisive manner with military force – although, as it was already mentioned, the third pillar should not be reduced only to the use of military force – does not create a new legal obligation for States.[42] Neither does it impose on permanent members of the Council a legal duty to behave or to vote in a certain way.[43] As can be seen from the formulation used in the Outcome document, States have agreed that they are only "*prepared* to take collective action" when there are manifest R2P crimes, and they would do this "on a case-by-case basis" only.[44] The preparatory work of the 2005 World Summit "clearly shows that it was not the intention of states to create additional legal

39 Jennifer M. Welsh, Banda Maria, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?',2 Global Responsibility to Protect (2010), p. 228.

40 Jennifer M. Welsh, 'Norm Contestation and the Responsibility to Protect', 5, Global Responsibility to Protect (2013), pp. 386-389.

41 UN Doc. A/63/677 (n 2).

42 Carsten Stahn, 'Responsibility to Protect: Political rhetoric or Emerging Legal Norm?', 101 (1) The American Journal of International Law (2007), pp. 99-120.

43 Karin Oellers-Frahm, *R2P: Any New Obligations for the Secuirty Council and its Members?,* in Peter Hilpold (ed.), *The Responsibility to Protect (R2P): A New Paradigm of International Law?,* Brill Njihoff, 2015, pp.191-200. For an opposite view, especially on the crime of genocide, see John J. Heieck, *RN2V revisited: How the Duty to Prevent Genocide as a jus cogens Norm Imposes a Legal Duty not to Veto on the Five Permanent Members of the Security Council*, at Richard Barnes, Vassilis Tzevelekos (eds.), *Beyond Responsibility to Protect: Generating Change in International Law,* Intersentia, 2016, pp.103-122.

44 World Summit Outcome Document (n 3), par. 139 (emphasis added).

obligations" and that R2P was "deliberately institutionalized…as a *political,* rather than legal principle."[45] Therefore, as a whole, R2P cannot be said to be a legal norm.

The claim that R2P as a whole is not a (new) legal norm, however, is not a fatal blow for the legal use of non-UN sanctions in the name of R2P. The four R2P crimes individually already impose legal duties on States, so while States cannot still invoke the violation of R2P as a whole as a legal norm in the name of which they would justify their sanctions as (third-party) countermeasures, they could still do so for each specific R2P crime. Therefore, as Butchard points out, R2P, "in its current form, is a mechanism of guidelines and tools which help States to identify how and when it is possible or legal to act responsibly, without prescribing a definite course of action for any particular scenario."[46] In this regard, non-UN sanctions can be one such – legally permissible – tool for specific R2P violations.

3. LEGITIMACY OF NON-UN SANCTIONS

Concluding that non-UN sanctions are allowed under international law (if they abide by certain standards) and can be used by States (and regional organizations) in the name of R2P, is still not sufficient to claim that the non-UN sanctions are a justified response for R2P. This is because, as was mentioned in the introduction, sanctions could be quite harmful to States and individuals and are therefore strongly contested by States and scholars. On the other hand, even if they can be considered warranted, many doubt sanctions' effectiveness in achieving their desired goals – in this case, preventing a State/entity from committing R2P atrocities – and thus further question their legitimacy. Therefore, it is necessary in this section to address both of these concerns regarding non-UN sanctions and R2P.

A preliminary consideration should be given to the question of the legitimacy of non-UN sanctions for R2P not taken by the UN Security Council. It was already explained above that it is in accordance with international law for States to adopt sanctions for R2P outside of the UN Security Council. Nevertheless,

45 Welsh, 'Norm Robustness and the Responsibility to Protect'(n 30), p.54. Emphasis in the original.

46 Butchard (n 30), p.3; Similarly Welsh, 'Norm Robustness and the Responsibility to Protect' (n 30), p.54.

while the imposition of non-UN sanctions is legally permissible, it might undermine the Council's legitimacy and is also susceptible to potential great abuse if left to States alone, even when sanctions are adopted for legitimate international concerns and/or violations of international law.[47] So, seen only from the perspective of the "competent social organ" invested with the responsibility to impose such measures, only sanctions authorized by the UNSC would be legitimate.

Yet, this perspective of legitimacy fails to consider the design of the 'right authority' – the Security Council – and the reasons why this body sometimes does not adopt such measures or even does not acknowledge that a situation constitutes an R2P atrocity. So, while it is undisputable that sanctions imposed by the Security Council have the stamp of legitimacy, it must be emphasized that the international community is much broader than the UN Security Council.[48] Furthermore, if we recognize R2P's force as a moral imperative of the international community – and if we also take into account the recent downfall between major powers in the UNSC and the commission of R2P crimes by P5 members – we need to contemplate the supplementary and back-up responsibilities for R2P[49] and to think how to respond in the name of R2P beyond the Security Council.[50] As the UN Secretary-General stated in his 2016 R2P report, a timely response for R2P "falls on each individual member of the international community" and "[while] only the Security Council has the authority to mandate coercive means, deadlock in that body should never be used as an excuse for general inaction.[51] As for the potential for abuse, it is certainly a legitimate concern but so is inaction by the UNSC when mass atrocities are occurring. There is no risk-free, apolitical, or morally unambiguous action in international relations, so each action should be done in good faith and in anticipation, as far as possible, of the consequences it could lead to, and should be assessed accordingly.

47 See for example USA sanctions against Iran.

48 Welsh, 'Norm Robustness and the Responsibility to Protect' (n 31), p.67

49 Toni Erskine, *Moral Agents of Protection and Supplementary Responsibilities to Protect*, in Alex Bellamy and Tim Dunne (eds.), *The Oxford Handbook of The Responsibility to Protect*, Oxford University Press, 2016, p. 174.

50 Samuel Jarvis, 'The Responsibility to Protect in 2020: Thinking Beyond the UN Security Council", E-International Relations, June 2020 <https://www.e-ir.info/2020/06/19/the-responsibility-to-protect-in-2020-thinking-beyond-the-un-security-council/ > accessed 05.03.2023.

51 UN Doc. A/70/999-S/2016/620, *Mobilizing collective action: the next decade of the responsibility to protect*, Report of the Secretary-General, 22 July 2016, p.13, par.46.

The second thing that needs to be addressed when dealing with a legitimacy of a measure is whether it is in itself an appropriate response to uphold R2P. In general, non-UN sanctions do have some advantages over UNSC measures – like being a quicker and more flexible response that is implemented by an effective (State) enforcement apparatus that is missing on a global level - which could make them a (more) suitable response for R2P.[52] This is further supported by the fact that in more than 70% of the cases, non-UN sanctions precede the imposition of UNSC sanctions, and that when imposed alone without being accompanied by non-UN sanctions, UNSC sanctions are rarely considered effective.[53]

Yet, it must be noted here, similar to what was said about their legality, that due to the different types of sanctions and contexts in which they could be imposed, the evaluation and expectation of each sanction would be different.[54] For instance, comprehensive sanctions, like a full-scale embargo on a country, are generally abandoned as a policy today – after the abhorrent consequences of these sanctions were evidenced in the case of Iraq in the 1990s – in favor of targeted sanctions, which are aimed at particular entities (or sectors) in a State.[55] For many, targeted sanctions are a more legitimate measure, particularly some sanctions, like travel bans, assets freeze and arms embargoes, which were

52 Though they do also have some major disadvantages over UNSC sanctions, like the fact that they are easier to be evaded since they do not have complete global (mandatory) coverage like UNSC sanctions, and they are more difficult to be coordinated than UNSC. George A. Lopez, 'Tools, Tasks and Tough Thinking: Sanctions and R2P', Global Centre for the Responsibility to Protect, Policy Brief, 3 October 2013, https://s156658.gridserver.com/media/files/lopez-sanctions-brief-1.pdf> accessed 5.3.2023; David S. Cohen, Zachary K. Goldman, 'Like it or Not, Unilateral Sanctions are Here to Stay', 113 AJIL Unbound, 2019; Moret, *Unilateral and Extraterritorial Sanctions in Crisis: Implications of Their Rising Use and Misuse in Contemporary World Politics* (n 1), p.33,34.

53 Brzoska, 'International Sanctions Before and Beyond UN Sanctions' (n 17), pp.1341 -1348.

54 Francesco Giumelli, *The Purpose of Targeted Sanctions,* in Thomas J. Biersteker, Sue E. Eckert, Marcos Tourinho, *Targeted Sanctions: The Impacts and Effectiveness of United Nation Action,* Cambridge University Press 2016, p.43, 44.

55 Daniel W. Drezner, 'Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice', 13 International Studies Review (2011).

designed with the objective of minimizing the negative humanitarian impacts.[56] Yet, when, for example, R2P atrocities are committed by a permanent member of the Security Council, some authors argue that States should "not be *overly* cautious" when adopting sanctions or assume negative human rights impacts but should design the sanctions with the aim of putting "maximum possible pressure on decision-makers".[57] Others, in a similar direction, claim that in cases of imposition of sanctions for violation of law by a P5 member, States should exceptionally pursue (the legally allowed) comprehensive sanctions because this will enable sanctions to be more effective and it is at the same time less likely to result in massive privation of civilians since these States are developed (and not developing) countries, they are nuclear powers and members of the Security Council.[58] In this regard, but putting aside the instrumental considerations of sanctions (i.e. how effective they are), Pattison argues that (comprehensive) sanctions are not necessarily morally problematic and sometimes may even be "morally preferable to the leading alternatives and, in particular, to war and doing nothing" partly because they are "more likely to distribute fairly the current inevitable harms to innocents of tackling aggression and mass atrocities."[59] On the other hand, some researches have also pointed out that going above a certain threshold with the measures imposed (closer to comprehensive sanctions) could result in "lower level of effectiveness".[60] The point of this whole discussion, nonetheless, is that non-UN sanctions should be individually assessed for their appropriateness as a measure for R2P depending on the type of measure and the concrete circumstance in which they are (considered to be) adopted.

56 Moret, *Unilateral and Extraterritorial Sanctions in Crisis: Implications of Their Rising Use and Misuse in Contemporary World Politics* (n 1), p.29. Some disagree, of course, claiming that usually a combination of targeted and especially sectorial sanctions effectively amounts to comprehensive sanctions. Others, claim that even targeted sanctions in themselves are not a just moral response. For the latter see Bryan R. Early, 'Still Unjust, Just in Different Ways: How Targeted Sanctions Fall Short of Just War Theory's Principles', 0 International Studies Review (2018).

57 Rebecca Barber, 'What Does the 'Responsibility to Protect' Require of States in Ukraine?', 25 Journal of International Peacekeeping (2022), p.167. Emphasis in the original.

58 Richard Humphreys and Lauma Paegkalna, 'Collective Responsibility: Widening the Target for Sanctions Arising from the Russian Invasion of Ukraine' (23 March 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4060962≥, accessed 5.3.2023.

59 James Pattison, 'The Morality of Sanctions', 32(1) Social Philosophy and Policy (2015), pp.192-195.

60 Moret, *Unilateral and Extraterritorial Sanctions in Crisis: Implications of Their Rising Use and Misuse in Contemporary World Politics* (n 1), p. 29, and the researches mentioned there.

The same conclusion also applies to the question of the (expected) effects of non-UN sanctions when they are imposed in relation to R2P atrocities. Different types of sanctions, employed in different contexts, should be expected to produce different results. For example, the imposition of economic sanctions for mass killings, has been found to reduce the duration of the atrocities but not their severity.[61] Conversely, 'naming and shaming' by the international community has been found to reduce the severity of the killings but not their duration.[62]

Related to this and the above discussion on the question whether tougher or more comprehensive sanctions should be imposed on P5 members for R2P violations, several things should be added. Firstly, sanctions take a long time to take effect. This "slow-burn impact" of sanctions makes them a more suitable tool for the prevention of mass atrocities and for the rebuilding phase after the atrocities have finished than as an effective response when an urgent reaction is needed.[63] Secondly, the effectiveness of inflicting harm on a perpetrator of mass atrocities is not the same as the effectiveness of achieving the desired goal of preventing the atrocity, which is why the harmful effects (and the sanctions) were imposed in the first place.[64] Thirdly, several works have shown that "no clear causal link exists between the damage inflicted by a sanctions regime and any observable resulting change in the behavior of its targets",[65] or that sanctions have a very low rate of success in changing the behavior of the target, of only 34%.[66] However, fourthly, the discussion about sanctions that is focused only on the question of "whether sanctions "work" in forcing a change of behavior" fails to take into account the two other purposes of sanctions – the constraining and

61 Krain, p.27, and the researches used in the article.

62 Ibid.

63 Jeremy Farall, *The Use of UN Sanctions to Address Mass Atrocities,* in Alex Bellamy and Tim Dunne (eds.), *The Oxford Handbook of The Responsibility to Protect*, Oxford University Press, 2016; p.666.

64 Daniel H. Joyner, *International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions,* in Ali Z. Marossi, Marisa R. Bassett (eds.), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy and Consequences,* Asser Press 2015, p.84.

65 Moret, *Unilateral and Extraterritorial Sanctions in Crisis: Implications of Their Rising Use and Misuse in Contemporary World Politics* (n 1), p.29, and the works mentioned there.

66 Gary Clyde Hufbauer et al., *Economic Sanctions Reconsidered,* United Book Press 2007.

the signalling purpose.[67] The constraining purpose of sanctions aims to "thwart a target's ability to pursue its policy" by "constraining access to some essential resources such as funds, arms, [or] sensitive goods".[68] The signalling function includes *signalling* support for a certain norm and also *stigmatization* of those who violate this norm.[69] This function operates under a different logic than the other two functions, and although it does not impose "a direct material cost" on the target, it should not be considered a residual effect of sanctions because it contributes to the reinforcement of a norm.[70] All three purposes of sanctions are not mutually exclusive and often intertwine with each other.

Therefore, non-UN sanctions may be a warranted response for R2P, but the discussion about the legitimacy and (expectations of) the effects of sanctions (for R2P) is not a straightforward one and should include many different aspects of the matter, assessed in each particular case.

4. SIGNIFICANCE OF THE USE OF NON-UN SANCTIONS FOR R2P

Two things can be summarized from the previous discussion, which are of importance for R2P. Firstly, non-UN sanctions can be legally employed in the name of R2P and could be a legitimate timely response. Secondly, the sanctions can sometimes be effective in changing the conduct of perpetrators of mass atrocities, and can also limit their means for committing the atrocities. In any case, they are immediately signalling the attitude of the imposer of those sanctions about the proper conduct in the international legal-political domain. Mainly through the signalling function, sanctions "contribute to shape international norms, as the very decision to resort to sanctions reinforces the value of norms that discipline behaviours of actors in the international system."[71] One should not forget, however, that the goal of R2P is to ultimately protect popula-

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67 Sue E. Eckert, *The Role of Sanctions,* in Sebastian von Einsiedel, David M. Malone and Bruno Stagno Ugarte, *The UN Security Council in the 21st Century,* Lynne Rinner Publishers 2016, p.431. Guimelli distinguish between 'purpose' of sanctions which refers to "the way in which sanctions intend to influence targets", whereas 'objective' to "the policy goal senders broadly want to achieve". Francesco Giumelli, *The Purpose of Targeted Sanction* (n 53), p.38

68 *Ibid,* p.45, 46.

69 *Ibid,* p.47.

70 *Ibid.*

71 *ibid,* p.46.

tions from widespread and systematic killings, and not just to 'do something' and that something to fall below this goal. So, while sanctions may certainly be 'doing something' for R2P, the signalling purpose itself is not a sufficient response. Nevertheless, in some cases – especially when R2P crimes are committed by a P5 member of the UN Security Council – sanctions may be the maximum coercive measure that is prudently available to the (rest of the) international community in the name of R2P. The criteria of "reasonable prospects of success" for a measure and "do not harm", although not featured in the 2005 R2P version (unlike in the 2001 version by the ICISS) are integral part of the overall R2P framework.[72] This explains, in part, why "[R2P] outcomes will vary – and should be expected to vary – from case to case".[73] This being said, however, is not a knock on R2P as norm, since the "hard cases" – like reacting against a P5 member – do not show the "real" R2P,[74] even though they do point out, or rather confirm, an inherent limitation of the expectations of 'collective action' on behalf of R2P.

Therefore, one significance of the use of non-UN sanctions for R2P is that it contributes to the stabilization of R2P as a norm with respect to the non-forcible coercive aspect of Pillar 3. One obvious problem here, especially if the goal is for R2P as a whole to become a legal norm, is that when adopting sanctions, States do not often use the language of R2P nor frame their discussion (exclusively) in legal terms. But even though States seem "less convinced of the political utility of the [R2P] terminology" in some cases,[75] the practice of imposing sanctions "cannot be simply dismissed as predominantly politically motivated because States have relied on the rationale of the concept" of sanctions.[76] Even if a practice is politically motivated, it is nevertheless susceptible to normative and legal analysis and evaluation.[77]

Nevertheless, what the discussion about the signalling function of non-UN sanctions and the contribution to R2P's status as a norm also shows is that

72 Welsh, 'Norm Robustness and the Responsibility to Protect' (n 30), 58.

73 *Ibid*.

74 *Ibid,* p.66.

75 *Ibid*.

76 Dawidowicz, 'Public Law Enforcement Without Public Law Safeguards? (n 35), p.418. Dawidowicz uses this point for third-party countermeasures, so to the extent that they are similar, it also applies for sanctions.

77 Martin Dawidowicz, *Third-Party Countermeasures in International Law,* Cambridge University Press 2017, p. 252.

there is a further need of development of R2P with regard to Pillar 3 and of non-forcible coercive action beyond the UN Security Council. Most of the proposals for Pillar 3 focus on the criteria related to military intervention, like the 'Responsibility While Protecting' proposal,[78] and leave the question of sanctions almost completely out. This is especially pertinent since the use of non-UN sanctions, as was elaborated in this work, is not incompatible with the coercive (and forceful) measures undertaken by the Security Council, even though many authors prefer their imposition to be residual to the action of the Council.[79] Additionally, since non-UN sanctions are legally allowed, it should be further analyzed how they can be best used as a tool for R2P when the Council is blocked, especially when a P5 member is responsible for mass atrocities. The ICISS pointed out to alternatives in case the Council is blocked,[80] which is not the case with the 2005 R2P version, and therefore it is an issue left for further discussion.

5. CONCLUSION

It has often been said that sanctions "occupy a special place in the spectrum of options between traditional diplomacy and military action", and that, when considering all the available options to respond to a particular situation, they could often be the preferable course of action.[81] This contribution argued that non-UN sanctions can be legally imposed in the name of R2P since they are not prohibited in international law and may be legally justified, and that they can be a warranted Pillar 3 response for addressing R2P violations. This is especially the case when the UN Security Council is blocked or ineffective in responding or when the R2P violations are committed by a P5 member of the UN Security Council, since non-UN sanctions are the most prudent coercive tool available to the (rest of the) international community to try to induce the perpetrator to stop its policy and comply with its responsibilities. Yet, because of the variety of available sanctions and the different contexts in which they can be imposed, as well as R2P's complex normative structure, the legality and legitimacy of non-UN

78 UN Doc. A/66/551-S/2011/701, 11 November 2011.

79 In Dawidowiczc, 'Public Law Enforcement Without Public Law Safeguards?' (n 35), p.416.

80 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, 2001.

81 Cohen, Goldman, 'Like it or Not, Unilateral Sanctions are Here to Stay' (n 51), p.151.

sanctions should "be judged at a variety of levels and in terms of different kinds of conduct".[82] Furthermore, even though non-UN sanctions might not be very effective in changing the targeted entity's behavior, they may still constrain the targets' resources to continue with the R2P violations, and, in any case, condemn the practice in which the targeted entity is engaged, thus reaffirming the support of the norm in the name of which the sanctions were imposed. Therefore, non-UN sanctions could be of importance for the development and stabilization of R2P as a norm, especially with regard to the third pillar.

Nevertheless, the decision to impose sanctions is only the first and often the easiest step, particularly if it is not accompanied by an effective follow-up of that decision.[83] It is also important to emphasize that sanctions are a tool intended to serve a policy – like preventing mass atrocities – and they should not become *the* policy themselves, as sometimes appears to be the case,[84] especially since it can take a long time before sanctions materialize. In this regard, and having in mind the goal of protecting the populations that are subject to mass atrocities, sanctions should be used in combination with other measures in order to maximize their utility.

82 Welsh, 'Norm Robustness and the Responsibility to Protect' (n 30), p.56.

83 Cohen, Goldman, 'Like it or Not, Unilateral Sanctions are Here to Stay' (n 51), p.148.

84 Lopez, 'Tools, Tasks and Tough Thinking: Sanctions and R2P' (n 51).