THE UNITED NATIONS GUIDING PRINCIPLES ON SANCTIONS, BUSINESS AND HUMAN RIGHTS

COMMENTARY
(DRAFT)

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Mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights

2024

CONTENTS

ABBREVIATION

CESCR	UN Committee on Economic, Social and Cultural Rights
DARIO	Draft Articles on the Responsibility of International Organisations
DARS	Draft Articles on Responsibility of States for Internationally Wrongful Acts
GC	General comment
GPBHR	UN Guiding Principles on Business and Human Rights
GPSBHR	UN Guiding Principles on Sanctions, Business and Human Rights
HR Council	UN Human Rights Council
HRC	UNHuman Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ITLOS	International Tribunal for the Law of the Sea
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OFAC	Office of Foreign Assets Control
SDGs	Sustainable Development Goals
UCMs	Unilateral Coercive Measures
UDHR	Universal Declaration of Human Rights
UNHCR	UN Refugee Agency
UNSC	UN Security Council
VCLT	The Vienna Convention on the Law of Treaties 1969

COMMENTARY

The Guiding Principles on sanctions, business and human rights (hereinafter the Guiding Principles) are developed to establish guidelines and benchmarks for States, international, universal, and regional organizations and businesses to ensure the promotion, protection and respect for human rights and to fulfill obligations under international law in the sanctions' environment, to eliminate and/or minimize over-compliance with unilateral sanctions in accordance with para. 27 of the Human Rights Council resolution 55/7. The Guiding Principles also apply to businesses where businesses are practically compelled to comply with unilateral coercive measures by States or regional organizations. The Guiding Principles are accompanied with the Commentary that aims to provide a factual and legal framework for every provision of the principles.

Approaching the 80th Anniversary of the UN Charter, which sets forth the objective "*to reaffirm faith in fundamental human rights, in the dignity and worth of the human person*" [1], with due respect to the request of the Universal Declaration of Human Rights to recognize the "*inherent dignity and the equal and inalienable rights of all members of the human family*", we all need to uphold these human rights principles as "*the foundation of freedom, justice, and peace in the world*" [2].

The Guiding Principles are drafted within the mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights in the period of 2022 – 2024 with active support, consultations and contributions of UN organs, states, civil society actors, including businesses, legal professionals, scholars, and non-governmental organizations. The Special Rapporteur organized two expert consultations to discuss the draft in November 2023 and June 2024 with scholars, humanitarian organizations and legal professionals, and a number of side events and panel discussions.

The Special Rapporteur is grateful to all actors, who have contributed to the development of the Guiding principles and this Commentary. Her special gratitude is to civil society actors and especially the experts who assisted in the drafting and finalization of both documents.

I. FRAMEWORK

1. Objective

1.1 The Guiding Principles on sanctions, business and human rights (hereinafter the

2 Charter of the United Nations, preamble. Available at: https://treaties.un.org/doc/publication/ctc/uncharter.pdf.

2 Universal Declaration of Human Rights (UDHR), Preamble. Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights.

Guiding Principles) are developed to establish guidelines and benchmarks for States, international, universal, and regional organizations and businesses to ensure the promotion, protection and respect for human rights and to fulfill obligations under international law in the sanctions' environment, to eliminate and/or minimize over-compliance with unilateral sanctions in accordance with para. 27 of the Human Rights Council resolution 55/7. The Guiding Principles also apply to businesses where businesses are practically compelled to comply with unilateral coercive measures by States or regional organizations. The Guiding Principles are accompanied with the Commentary that aims to provide a factual and legal framework for every provision of the principles.

1.2 The Guiding Principles also set forth the minimum standards of human rights precaution and protection in the course of the implementation and enforcement of UN Security Council sanctions.

1.3 The Guiding Principles set out principles and rules that businesses must adopt in their compliance policy, which shall not violate internationally recognized human rights and shall in no way interfere in the delivery of essential goods, including medicines and food, as well as on critical infrastructure, the environment, and on other related services.

Commentary

Unilateral sanctions, independently of their mode and announced objectives, have an adverse and indiscriminate impact on the human rights of individuals and peoples, including, but not limited to, the right to life, the right to health, the right to education, the right to food, the right to economic, social and cultural rights, etc. The negative effect is multiplied by the enforcement of unilateral sanctions via secondary sanctions, civil and criminal penalties for circumvention of sanctions' regimes, and over-compliance by multiple actors, including businesses, NGOs, academics, donors and even UN organs. The Guiding Principles therefore emphasise the importance of responsible behavior by all relevant actors in addressing these challenges.

While taking into account the illegality of unilateral coercive measures and means of their enforcement (as elaborated in the commentary to para. 7), the growing over-compliance with unilateral sanctions from the side of states, international organizations, banks, financial institutions, businesses, humanitarian actors, donors of humanitarian assistance, and other actors, the Guiding Principles are developed to ensure, based on the fundamental principles of international law, international treaty and customary norms (Commentary to para. 6), minimum standards of precaution, promotion and protection of human rights in the unilateral sanctions environment, to ensure access to critical essential goods and to address humanitarian needs.

The United Nations Guiding Principles on Business and Human Rights emphasize the importance of due diligence for businesses, ensuring that their compliance practices do not infringe

on human rights[3]. At the same time the growing practice of over-compliance by businesses, including financial institutions and corporations has compounded the negative impact of sanctions, leading to situations where essential goods and services are blocked or delayed. Quite often businesses are compelled to apply sanctions regimes or over-comply due to the fear to be designated under secondary sanctions regimes, even if those are not relevant to the countries of their registration, and face civil, administrative and/ or criminal charges for circumvention/ assistance in circumvention of sanctions regimes.

The Guiding principles intend to clarify basic rules to be applied by all states as well as regional organizations and businesses, to prevent compliance and over-compliance by businesses, to minimize the risk of penalties for business communities in the sanctions' environment, to establish the clear frameworks and accountability mechanisms to ensure that sanctions do not unduly impact human rights.

The UN Security Council seeks to ensure the proper delivery of humanitarian assistance and protection of humanitarian workers in a number of resolutions, including those on DPRK[4], Somalia[5], DRC[6], Western Sahara[7], and many others. These resolutions however, refer to the obligations of the governments and other parties of the conflict, to invite donors, to provide humanitarian support or to identify mechanisms for getting humanitarian exemptions within the UN sanctions committees[8]. Resolution 2615 (2021) provides for the instructions to facilitate the delivery of humanitarian assistance to Afghanistan[9] and Resolution 2664 (2022)[10] lays down a limited, standing humanitarian-related carve-out. Later reports on the implementation of sanctions regimes refer to the mechanisms provided for in resolution 2664[11].

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3 The UN Guiding Principles on Business and Human Rights, paras. 1, 11 – 13. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

4 UNSC, Resolution 2680(2023), preamble. Available at: https://documents.un.org/doc/undoc/gen/n23/085/11/pdf/n2308511.pdf.

5 UNSC,Resolution 2551(2020), para. 22. Available at: https://digitallibrary.un.org/record/3891148/files/S_RES_2551_%282020%29-EN.pdf?ln=ru.

6 UNSC, Resolution 2717(2023), para. 40 – 41. Available at: https://documents.un.org/doc/undoc/gen/n23/412/66/pdf/n2341266.pdf.

7 UNSC, Resolution 2703(2023), para. 15. Available at: https://digitallibrary.un.org/record/4025694/files/S_RES_2703_%282023%29-EN.pdf?ln=ru.

8 Implementation Assistance Notice No. 7: Guidelines for Obtaining Exemptions to Deliver Humanitarian Assistance to the Democratic People's Republic of Korea. Available at: https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/ian7_updated_2jun23_rev_9may24_e.pdf.

9 UNSC, Resolution 2651(2021), paras. 1 – 3. Available at: https://documents.un.org/doc/undoc/gen/n22/594/15/pdf/n2259415.pdf.

10 UNSC, Resolution 2664(2022).Available at:https://documents.un.org/doc/undoc/gen/n22/736/72/pdf/n2273672.pdf?token=VzoBuz3MscVId2eIUe&fe=true.

11 UNSC, Final report S/2023/171, paras.174, 189.Available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2023_171.pdf.

Documents adopted by sanctioning states[12] declare adherence to the rule of law and international law and formally provide for unfreezing assets blocked under UN Security Council resolutions in accordance with the requirements of Resolution 2664 (2022). At the same time they do not change national unilateral sanctions policies but rather claim that this does not prevent the delivery of humanitarian assistance[13]. The international community's commitment to alleviate human suffering through multilateral actions may not in the end suffice in the current context of generalized uncertainty around competing and overlapping unilateral sanctions regimes and the prevalence of unilateral actions. Initiatives such as UNSC Resolution 2664, with their limited scope (freezing of assets only), may not ultimately contribute towards an enabling environment for humanitarian actors to freely undertake their humanitarian activities, even for the procurement and delivery of sanctions-exempted goods, such as food and medicine.

Unfortunately, documents of sanctioning states aimed to implement Resolution 2664 resolution do not introduce any guarantees of its implementation and are similar to the Guidances on the delivery of humanitarian assistance in the respective countries. Particularly humanitarian actors stay unprotected and bear the burden of proof of the purely humanitarian nature of their deliveries; they are under an obligation to control and report about the distribution that undermines the humanitarian principles of humanitarian work, including humanity, impartiality and non-discrimination; these documents do not provide any guarantees preventing over-compliance including the blocking of bank transfers, and challenges to delivery and insurance. As a result, the proper implementation of the UN Security Council resolutions on the unimpeded delivery of humanitarian assistance is challenged in view of the existing unilateral sanctions and regimes and over-compliance.

The inefficiency and ineffectiveness of humanitarian carve-outs has been felt by humanitarian actors even in **emergency situations.** For example, following the catastrophic earthquakes of February 2023 in Turkey and Syria, humanitarian deliveries to Syria were hampered by sanctions-induced financial and other restrictions, despite efforts by sanctioning states (US, EU,

12 1105. What actions did OFAC take to implement the United Nations Security Council Resolution (UNSCR) 2664 of December 9, 2022 relating to a new UN sanctions exception for humanitarian assistance?. Availableat:https://ofac.treasury.gov/faqs/1105; Addition of General Licenses to OFAC Sanctions Regulations for Certain Transactions of Nongovernmental Organizations and Related to Agricultural Commodities, Medicine, Medical Devices, Replacement Parts and Components, or Software Updates for Medical Devices. Available at: https://ofac.treasury.gov/media/930151/download?inline; Humanitarian action: EU introduces exemptions to sanctions to facilitate the delivery of assistance, 31/03/2023. Available at: https://www.consilium.europa.eu/en/press/press-releases/2023/03/31/humanitarian-action-eu-introduces-exemptions-to-sanctions-to-facilitate-the-delivery-of-assistance/pdf/.

13 Humanitarian action: EU introduces further exceptions to sanctions to facilitate the delivery of assistance, 23 November 2023. Available at:https://www.consilium.europa.eu/en/press/press-releases/2023/11/27/humanitarian-action-eu-introduces-further-exceptions-to-sanctions-to-facilitate-the-delivery-of-assistance/.

and the UK) to ease the sanctions regulations by issuing time-bound general licenses, which ,however, did not help to effectively facilitate humanitarian work and address instances of over-compliance.[14]

Humanitarian carve-outs provide for a very narrow understanding of humanitarian assistance and needs, limiting them to food and medicine and some types of medical equipment only, opposing therefore humanitarian and development or reconstruction projects.[15] The so-called Syria Caesar Syrian Civilian Protection Act[16] and the Syria Anti-normalization Act[17] directly request all stakeholders to refrain from involvement in any reconstruction and re-building projects. As a result, public sector activities, including the work of school teachers, university professors, doctors in public hospitals, water-pump or electricity stations, transportation, etc, are consistently excluded from any project that has a direct impact on the enjoyment of all basic human rights.

In view of the interdependent nature of all human rights, and of the basic obligation of businesses and states to ensure promotion and protection of at least fundamental human rights[18], including above all the right to life, the critical infrastructure relevant to healthcare, food, agriculture, electricity, water supply, irrigation, sanitation, spare parts, reagents and healthcare, seeds and fertilizers, all of which are necessary for the survival and well-being of populations, shall never be affected by unilateral sanctions, and deliveries shall neither be limited nor impeded because of the detrimental impact on the rights of the most vulnerable groups[19].

2. Sanctions environment and enforcement

The world faces an enormous expansion in the use of unilateral sanctions applied by individ-

14 See communications Nos. OL USA 7/2023, OL GBR 6/2023 and OL OTH 21/2023 of 3 April 2023.

15 European Commission, Commission Guidance Note on the provision of humanitarian aid in compliance with EU restrictive measures (sanctions), 30 June 2022. Available at: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/220630-humanitarian-aid-guidance-note_en.pdf.

16 AL USA 30/2020 of 21 December 2020. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25785.

17 H.R.3202 - Assad Regime Anti-Normalization Act of 2023, 22 September 2024. Available at:https://www.congress.gov/bill/118th-congress/house-bill/3202/text; AL USA 4/2024 of 16.02.2024. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28740.

18 UN Guiding principles on business and human rights, para. 12.

19 *Impact of unilateral coercive measures on the right to health*,15 September 2023, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/HRC/54/23, para. 99. Available at: www.ohchr.org/en/documents/thematic-reports/ahrc5423-impact-unilateral-coercive-measures-right-health-report-special.

ual states or regional organizations against states, economic sectors, companies or individuals, without or beyond authorization of the UN Security Council (primary sanctions). Another tendency reflects an active use of different means of unilateral sanctions enforcement via secondary sanctions, civil and criminal penalties applied to entities and individuals allegedly circumventing, or assisting in the circumvention of, primary sanctions regimes, resulting in de-risking and over-compliance.

Unilateral sanctions affect the human rights of directly designated individuals, employees and partners of designated companies, family members of affected individuals, people involved in the sectors of the economy under sanctions, and the population of the countries under sanctions in general. Secondary sanctions, civil and criminal penalties for the circumvention of sanctions' regimes force States, businesses, humanitarian organizations and individuals to look for alternative ways to procure necessary goods and services, resulting in rising costs, delays in delivery, growing risks of corruption and other types of transboundary crimes, and endangering the status of humanitarian organizations and humanitarian deliveries even when it involves the implementation of UN Security Council humanitarian carve-outs.

Over-compliance exacerbates this harm, while extraterritorial enforcement expands the geographic scope, and consequently the number of individuals whose rights are affected around the world. People in vulnerable situations, including women, children, persons with disabilities, the poorest, migrants and the elderly, among others, are affected the most.

Commentary

Today the world is facing a rapid expansion of unilateral sanctions. In 2024, 54 countries (27 % of all states), constituting 29 per cent of the world economy, are under sanctions, in comparison to 4 % in the 1960s.[20] The use of unilateral sanctions has expanded significantly in recent years, with a 75% increase in the number of sanctions imposed globally from 2005 to 2020[21] and it multiplied after 2022 even without taking into account sectoral or financial sanctions [22]. Unilateral financial, economic, sectoral, delivery, cyber and insurance sanctions[23], means of their enforcement in all forms (secondary sanctions, civil, administrative and criminal charges for circumvention / alleged circumvention / assistance in circumvention of sanctions regimes), as well

20 R. Rodriguez, "The Political Economy of Sanctions: The Case of Cuba", in K. Kirkham(ed.), *The Routledge Handbook of the Political Economy of Sanctions*(London: Routledge, 2024), pp. 187 – 196.

21 J.Gutmann&M.Neuenkirch,F.Neumeier, "Do China and Russia Undermine US Sanctions? Evidence from DiD and Event Study Estimation," *Research Papers in Economics 2022-08*, University of Trier, Department of Economics.

22 See https://www.statista.com/search/?q=sanctions&Search=&p=1.

23 *Unilateral coercive measures: notion, types and qualification*, 8 July 2021, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, AlenaDouhan, A/HRC/48/59. Available at:https://documents.un.org/doc/undoc/gen/g21/248/36/pdf/g2124836.pdf.

as requirements to monitor supply chains, and all partners regarded as having any nexus to the designated companies and/or individuals, have a spillover effect and outstretch economic and humanitarian effects all over the world, affecting *inter alia* nationals and businesses resident in the sanctioning countries.

Sanctioning states use the broad scope of means to enforce primary sanctions regimes via secondary sanctions imposed against perpetrators/ alleged perpetrators/ assistance in circumvention of primary sanctions regimes with civil and criminal penalties for the same activity. Civil and criminal penalties are usually rather high. Criminal charges may reach up to "at least 5 years imprisonment" in the European Union[24], up to 7 years in the UK[25], up to 20 years in the US[26]. The number of civil charges is usually not limited, providing for general fines of 250.000 USD or up to 1.000.000 USD[27] or up to 1.000.000 pounds[28] as an average penalty fine. For huge corporations even settlement agreements run into billions of dollars[29], which might result in the bankruptcy of companies after the lengthy and costly settlement procedure. Individuals designated for circumvention of sanctions regimes might be publicly presented as terrorists and even included in the Reward for Justice programs[30]. All delisting and settlement procedures are extremely expensive and quite often ineffective.

Given the enormous expansion in the use of primary sanctions in recent years, the use of secondary sanctions has grown considerably, and the fear of being targeted by them has reinforced a global trend of over-compliance with primary sanctions.[31] The growing use of secondary sanctions raises the prospect for over-compliance with them, and the potential for tertiary sanctions

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24 Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673, art. 5. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401226.

25 Policing and Crime Act 2017, (as for 2024), para. 145.Availableat:https://www.legislation.gov.uk/ukpga/2017/3/contents.

26 OFAC and DOJ sanctions enforcement in the United States.Available at:https://globalinvestigationsreview.com/guide/the-guide-sanctions/fifth-edition/article/ofac-and-doj-sanctions-enforcement-in-the-united-states.

27 Enforcement of economic sanctions: an overview.Availableat:https://crsreports.congress.gov/product/pdf/IF/IF12063.

28 UNGA, Resolution, A/RES/78/196, 22 December 2023, paras. 20 – 21. Available at:https://documents.un.org/doc/undoc/gen/n23/424/10/pdf/n2342410.pdf;Policing and Crime Act 2017 (as for 2024), para. 145. Available at:https://www.legislation.gov.uk/ukpga/2017/3/contents.

29 A/RES/78/196, paras. 22 – 23.

30 JUA USA 29/2021; AL USA 24/2020.

31 See https://media.un.org/en/asset/k1o/k1olchwcxg; https://www.ohchr.org/en/pressreleases/2021/10/over-compliance-us-sanctions-harms-iranians-right-health.

against parties that trade with the targets of secondary sanctions has already been reported.[32]The above reasons combined with uncertainty of legislation, unclear and over-lapping sanctions regimes, extraterritorial application of secondary sanctions and even civil and criminal charges and many other, result in growing over-compliance, deterring even permitted interactions with targeted countries, sectors, entities and individuals by entities that lack the expertise or resources to ensure full compliance, or fear the consequences of inadvertent breaches.

The extraterritorial enforcement of unilateral sanctions is widely deemed as infringing on the sovereignty of other States by violating the legal principles of jurisdiction and non-intervention in the internal affairs of States.[33]

In view of the multiplicity of sanctions regimes, sanctions enforcement and over-compliance, the lists of targets are very broad and include directly designated individuals and companies, the population of the country under sanctions as a whole, inhabitants of neighboring countries due to the spillover effect on the region, trade partners of companies under sanctions or from the countries under sanctions, third country and even sanctioning states nationals and companies and lawyers, subject to secondary sanctions, civil, criminal or other penalties[34]. The most vulnerable groups (elderly, persons with disabilities, people suffering from rare and severe deceases, children, marginalized groups, women) are affected the most as reflected in the country visit

32 J. D. Stalls, "Economic sanctions", *University of Miami International and Comparative Law Review* 11 (2) (2003): 142 – 143; M. A. da Silveira, "Economic sanctions, force majeure and hardship", Hardship and Force Majeure in International Commercial Contracts, Fabio Bortolotti and Dorothy Ufot (eds.) (Paris, International Chamber of Commerce, 2018).

33 J. Schmidt, "The legality of unilateral extra-territorial sanctions under international law", *Journal of Conflict and Security Law* 27 (1) (2022): 53 – 81; S. Lohmann, "Extraterritorial U.S. sanctions", Stiftung Wissenschaft und Politik, SWP Comment 2019/C 05 (2019). Available at: https://www.swp-berlin.org/10.18449/2019C05/; EU Explanation of Vote: UN General Assembly Resolution on the embargo imposed by the USA against Cuba. Available at:https://www.eeas.europa.eu/delegations/un-new-york/eu-explanation-vote-un-general-assembly-resolution-embargo-imposed-usa_en?s=63.

34 *Targets of unilateral coercive measures: notion, categories and vulnerable groups,* Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena F. Douhan, A/76/174/Rev.1, 13 September 2021. Available at: https://www.ohchr.org/en/documents/thematic-reports/a76174rev1-report-targets-unilateral-coercive-measures-notion-categories.

reports to Zimbabwe[35], Iran[36], Syria[37], Venezuela[38], and communications of the mandate on the most urgent and calling cases[39].

The consequences for all targeted can be very serious. Those subject to primary sanctions can have their liberty curtailed by travel bans, their bank accounts blocked and their assets seized. Foreign companies can be subjected to secondary sanctions for doing business with people or entities under primary sanctions. They can be blocked from doing any business in or with or through the sanctioning State. They can be banned from using its financial markets and excluded from transactions involving its currency, or be subjected to the seizure of goods by customs or other officials or face travel bans and have their assets frozen or expropriated. In tandem with this expansion of unilateral coercive measures, there has been a huge growth in the assertion of extra-territorial jurisdiction to impose civil and criminal penalties for breach, including against third country nationals.

This situation is so severe that international organizations and some countries imposing sanctions have raised concerns about the impact of the practice on their own businesses.[40] In response, the EU is actively seeking to amend its regulations (Blocking statute) to shield businesses from the risk of US sanctions, particularly on over-compliance issues. While EU guidelines explicitly state that companies are not expected to be subjected to US sanctions, the reality is that the European Union has yet to effectively protect its own companies from such risks.

Over-compliance with unilateral sanctions prevents, delays or makes more costly the purchase

35 *Visit to Zimbabve*, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/HRC/51/33/Add.2, 12 August 2022. Available at: https://www.ohchr.org/en/documents/country-reports/ahrc5133add2-visit-zimbabwe-report-special-rapporteur-negative-impact.

36 *Visit to the Islamic Republic of Iran*, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/HRC/51/33/Add.1, 17 August 2022. Available at: https://www.ohchr.org/en/documents/country-reports/ahrc5133add1-visit-islamic-republic-iran-report-special-rapporteur.

37 *Visit to the Syrian Arab Republic*, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/HRC/54/23/Add.1, 03 July 2023. Available at: https://www.ohchr.org/en/documents/country-reports/ahrc5423add1-visit-syrian-arab-republic-report-special-rapporteur.

38 *Visit to the Bolivarian Republic of Venezuela*, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/HRC/48/59/Add.2, 6 September 2021.Available at: https://www.ohchr.org/en/documents/country-reports/ahrc4859add2-visit-bolivarian-republic-venezuela-report-special.

39 See https://spcommreports.ohchr.org/TmSearch/Mandates?m=263

40 T. Ruys, C.Ryngaert, "Secondary sanctions: a weapon out of control? The international legality of, and European responses to, US secondary sanctions", British Yearbook of International Law, 2020.Available at https://academic.oup.com/bybil/advancearticle/doi/10.1093/bybil/braa007/5909823; A.Shalal, "IMF sees no 'bounce back' in Russian economy, warns of further damage if sanctions expanded", Euronews, 19 April 2022. Available at: https://www.euronews.com/next/2022/04/19/imf-worldbank-russia.

and shipment to sanctioned countries of many types of goods, including humanitarian goods, and services such as essential food, medicine, medical equipment and spare parts for such equipment, or software even when the need is urgent and they are of a life-saving nature[41]. Humanitarian exemptions are hard to implement, because they need multiple licenses, delivery is lengthy, costly and often impossible, even with regard to food and medicine, due to over-compliance. The comprehensive impact of unilateral sanctions, means of their enforcement and over-compliance are very severe and might be devastating for countries and regions, affecting the whole population of the targeted country including their right to decent life, right to food, housing, education, decent healthcare, economic, labor and social rights, right to life etc. with special impact in the sphere of nutrition and health.[42]

The business culture of over-compliance created in this way becomes generalized in approaches and fears, and this brings similar problems to the application of U.N. sanctions – the only ones with clear legitimacy. The result is that even humanitarian carve-outs backed by the UN Security Council can be difficult to implement because of the reluctance of banks, exporters and service providers to assist.

3. Tendencies and challenges of sanctions regulations

Legal uncertainty around the scope and legal status of the sanctions regulations, which are often based on *"clarifications"*, Q&As and other recommendatory instruments, framing incompatible conduct with vague wording like *"red flags"*, *"expectations"* and other restrictive terms, as well as the seriousness of the liability imposed, *"frozen"* accounts, civil and criminal penalties and reputational costs, create a feeling of fear and result in *"zero risk"* or de-risking policies, encouraging businesses to break contracts in violation of their terms, and leaving markets and regions without any assessment of their humanitarian and human rights impact.

Commentary

Legal uncertainty becomes a central point of sanctions' policy that undermines the rule of law in its very essence[43]. Confusing non-legal terms such as *"expectations"*, *"interpretations"*,

41 See AL USA 25/ 2023. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28386; SWE 3/2023. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28385; OTH 108/ 2023. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28382; AL OTH 134/2022. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27800; AL OTH 135/2022. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27801.

42 See A/HRC/54/23.

43 According to the Venice Commission of the Council of Europe, "Legal certainty involves the

"*behavioral red flags*" and "*potential red flags indicators*" are used by the sanctioning organs and institutions.[44] For instance, in the European Union, sanctions-related regulations (legal acts) are supplemented with a wide range of interpretative and recommendatory "*documents and tools*", which "*must be read in combination*"[45]. The European Commission's "Guidance note on the provision of humanitarian aid in compliance with European Union restrictive measures (sanctions)" of 30 June 2022 lists "*the most relevant guidance documents*", including guidance, questions and answers, frequently asked questions, etc. The Guidance note includes a non-exhaustive checklist concerning points that humanitarian operators should consider when carrying out due diligence for sanctions compliance, involving binding and non-binding sources, which are ultimately all recommended to be followed in combination, without offering any advice about the approach.

The U.S. OFAC published a guidance on compliance with sanctions to entities subject to United States jurisdiction, as well as foreign entities that conduct business in or with the United States or its citizens, or that use goods or services exported from the United States.[46] In addition to this framework, the Office issued compliance communiqu é s, which are recommendatory in nature[47] but refer to businesses' obligations to comply with "[the Office's] baseline expectations". Further complexity on business conduct is added through the United States Department of Justice's guidance to federal prosecutors in their criminal actions against corporations and their assessment of corporate compliance.[48] In addition, similar documents have been developed and adopted by other US institutions in the form of alerts, readouts, questions and answers and others.[49] Certain regulations are reissued with "*additional interpretive guidance and defini-*

accessibility of the law. The law must be certain, foreseeable and easy to understand". Available at: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=DE.

44 United States, Financial Crimes Enforcement Network, "FinCEN and the United States Department of Commerce's Bureau of Industry and Security urge increased vigilance for potential Russian and Belarusian export control evasion attempts", 28 June 2022.

45 European Commission, "Commission guidance note on the provision of humanitarian aid in compliance with EU restrictive measures (sanctions)" (Brussels, 2022); "Commission frequently asked questions on EU restrictive measures in Syria" (September 2017); "Commission publishes guidance on key provisions of EU Global Human Rights Sanctions Regime", press release, 18 December 2020; "Guidance on the implementation of specific provisions of Council regulation (EU) No. 401/2013 concerning restrictive measures in view of the situation in Myanmar/Burma", press release, 11 May 2021; European Commission, "Commission opinion, of 8 June 2021, on article 2 (2) of Council regulation (EU) No. 269/2014" (Brussels, 2021); "Frequently asked questions concerning sanctions adopted following Russia's military aggression against Ukraine and Belarus' involvement in it". Available at https://finance.ec.europa.eu/eu-and-world/; and European Commission, "Q&A due diligence on restrictive measures for EU businesses dealing with Iran". Available at: https://finance.ec.europa.eu/.

46 See https://ofac.treasury.gov/media/931556/download?inline.

47 See https://ofac.treasury.gov/media/928316/download?inline.

48 United States, Department of Justice, Criminal Division, "Evaluation of corporate compliance programs", 1 June 2020 (updated March 2023).

49 United States, Department of Treasury, Financial Crimes Enforcement Network, "Supplemental

tions … and other regulatory provisions that provide further guidance to the public”[50].

The increasing number of non-binding “explanatory” documents developed and disseminated by competent authorities of sanctioning States may influence decisions and policies. Despite their *de jure* non-binding nature, their provisions are applied as binding and normative.[51] The Xinjiang Supply Chain Business advisory, being of non-binding nature, is used as an compulsory document by US Customs and other authorities, when seizing goods or listing companies with reference to their alleged violations. In view of the presumption of the use of forced labor introduced by this document in cases with any nexus to Xinjiang, even Chinese companies become reluctant to recruit Uyghurs.[52]

In a criminal case against a United States citizen who transferred $10 million in cryptocurrency from an American crypto exchange to a user account in a country sanctioned by the United States, the court acknowledged absence of any ties with the US jurisdiction in this case, but based its verdict on the request of OFAC “to find otherwise”.[53] The use of non-binding documents in the sanctions environment undermines the rule of law, considering the potential human rights violations emanating from inconsistencies in the interpretation of these documents.

Uncertain and extensive compliance requirements, non-transparency of decision-making on designations and seizure of property by U.S. customs, the lengthy, expensive and inefficient process of appeals for de-listing or administrative processes in the U.S., make any mechanism unaffordable for small and medium-size businesses, while challenges to get access to any form of protection in other sanctioning and third countries, the non-transparency and non-disclosure of information used as a ground for designation, the unwillingness of legal professionals in the sanctioning countries to represent cases of companies and individuals affected by unilateral sanctions, constitute violations of the access to justice and the right to remedy as safeguards of

alert: FinCEN and the U.S. Department of Commerce’s Bureau of Industry and Security urge continued vigilance for potential Russian export control evasion attempts”, FIN-2023-Alert004, 19 May 2023.

50 United States, Department of Justice, Office of Foreign Assets Control, “Sanctions compliance guidance for instant payment systems”.

51 United States, Department of Justice, Office of Foreign Assets Control, “Sanctions compliance guidance for instant payment systems: settlement agreement between OFAC and Tango Card, Inc. – issuance of Libyan sanctions regulations”, 30 September 2022.

52 *Visit to China*, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/HRC/57/55/Add.1, 9 August 2024. Available at: https://documents.un.org/doc/undoc/gen/g24/133/22/pdf/g2413322.pdf; Visit to the Syrian Arab Republic, A/HRC/54/23/Add.

53 S. S. Hsu, “U.S. issues charges in first criminal cryptocurrency sanctions case”, The Washington Post, 16 May 2022. Available at: https://www.washingtonpost.com/dc-md-va/2022/05/16/first-us-criminal-cryptocurrency-sanctions/; F.Alavi, “US Department of Justice can pursue criminal charges for sanctions evasion by cryptocurrency, court rules”, Akrivis, 21 May 2022. Available at:https://akrivislaw.com/us-department-of-justice-can-pursue-criminal-charges-for-sanctions-evasion-by-cryptocurrency-court-rules/.

all other categories of human rights. One of the problems related to the vague character of the sanctions regulations concerns the use of so-called unverified lists, because they make the status of listed entities and individuals even more uncertain, by undermining their activities and the possibility to protect their rights.

4. Actors

The Guiding Principles apply to:

- States, groups of States and international organizations, also when acting to implement sanctions of the UN Security Council,

- All business enterprises and transnational corporations, regardless of their scale, economic sector, place of operation, place of incorporation and headquarters, corporate structure, and applicable jurisdiction,

- The United Nations and its organs and agencies, other international intergovernmental organizations and non-governmental organizations, donors, humanitarian organizations and missions, in order to avoid the adoption or enforcement of unilateral coercive measures, over-compliance, and to mitigate negative effects of sanctions and similar restrictive measures – both those already imposed as well as those planned to be imposed – on the human rights of individuals and peoples.

Commentary

All subjects of international law are under the obligation to act in full respect of their international obligations, including the obligation to promote and protect human rights. The general obligation of states to implement the provisions of the International Bill of Rights, and to safeguard the human rights of all individuals within their territories or under their jurisdiction and control (for economic, social and cultural rights within maximum of available resources) is directly set forth in the covenants. Article 27 of the Vienna Convention on the Law of Treaties states that a State Party *"may not invoke the provisions of its internal law as justification for its failure to perform a treaty"* [54]. And under DARS states are responsible for acts of all its organs[55], including executive, legislative and judicial, and other public or governmental authorities at whatever level - national, regional or local. And states must ensure that the obligation to promote and protect human rights is implemented by all its organs.

Regional obligations shall not interfere with universal human rights obligations; however, they

54 Vienna Convention on the Law of Treaties, 1969.

55 DARS, art. 4(1).

may evolve and propose stronger protection. The human-rights mechanisms are especially important for regional organizations with a supranational competence, such as the European Union (EU), which is entitled by its member-states to take decisions in many economic and political matters in accordance with its constituent treaties. While the Treaty on European Union does not explicitly mention the Universal Declaration of Human Rights (UDHR), it provides for the strict observance of international law, including respect for the principles of the UN Charter. Some of the rights and principles in the EU Charter of Fundamental Rights (2009), such as the freedom to conduct business in accordance with EU law, the requirement to integrate consumer protection in all EU policies, and the right to petition, are specific to the nature of the EU as an internal market and its political structure. However, many EU Charter articles recall similar articles in the UDHR.[56] Whatever the scope of its competence, such a regional organization is bound by universally recognized human rights, and when it takes measures which are binding for its members, it is under an obligation to act in conformity with international human rights standards.

The obligation to promote and protect human rights refers also to acts that implement resolutions of the UN Security Council. States are obliged to remain within the limits of the authorization of the UN Security Council, and to interpret the authorization of the Council in the narrowest possible way as constituting an exemption from the normal course of international relations. Activities of states and regional organizations that go beyond the authorization of the UN Security Council constitute violations of international law and cannot be legitimized or justified by references to the consideration of the situation by the Security Council, the qualification of that situation as constituting a threat to international peace and security or the existence of stricter sanctions of the UN Security Council.

Under the principle of due diligence, states or regional organizations with an exclusive or competing competence and entitled to take binding decisions with direct effect on the territory of member states (e.g. the EU or other regional integration organizations with similar competences), are under the obligation to ensure that activities taken under their jurisdiction or control do not violate human rights, including extraterritorially. States are obliged to take legislative, administrative, judiciary, budgetary and any other type of measures to respect, protect and fulfill human rights, in accordance with General comment 14 of the CESCR. The obligation to respect is the duty *"to refrain from interfering directly or indirectly with the enjoyment of the right to health"*. And the obligation to protect means *"to take measures that prevent third parties from interfering with article 12 guarantees"*. Similarly, the obligation to fulfill requires States *"to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health."* [57]. Similar provisions are included in the

56 The Universal Declaration of Human Rights and the European Union. Available at: https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/757559/EPRS_ATA(2023)757559_EN.pdf.

57 CESCR, General comment No. 14, E/C.12/2000/4, 2000. Available at: https://digitallibrary.un.org/record/425041/files/E_C.12_2000_4-EN.pdf?ln=ru.

General comments on the right to food[58], the right to water[59], and the right to social protection[60]. States therefore are under an obligation to ensure that businesses registered or functioning under their jurisdiction or control fully observe human rights standards[61].

The obligation of States to ensure that activities of businesses in their territory or under their jurisdiction or control do not violate human rights, refers to all categories of businesses, which follows from the obligation of due diligence and is explicitly provided for in the General comments of the CESCR with regard to all human rights. All businesses are under the obligation to ensure that their activities, in the state of jurisdiction or control and/or extraterritorially, do not violate human rights[62].

The United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms is of an *erga omnes* character, as stated in General comment No.31 (2004) of the ICCPR[63]. As such it establishes obligations for all subjects of international law, including the United Nations Organization, UN Specialized agencies, any other international organizations, including regional organizations, and their organs and agencies. Under the due diligence obligation, every State must ensure that any entity acting under its jurisdiction or control, including donors, non-governmental organizations, missions and other humanitarian and non-state actors, does not violate human rights.

5. Legal framework

The Guiding Principles are based on the Charter of the United Nations, the International Bill of Human Rights, fundamental principles and other peremptory norms of international law, international treaties and customary rules of international law, and general principles of law recognized by all nations, and seek to draw from and expand on the Guiding Principles on Business and Human Rights (2011)[64], the Articles on Responsibility of States for Internationally Wrong-

58 CESCR, General comment No. 12, E/C.12/1999/5, 1999, para. 15. Available at: https://www.globalhealthrights.org/instrument/cescr-general-comment-no-12-the-right-to-adequate-food/#:~:text=Every%20State%20is%20obliged%20to,ensure%20their%20freedom%20from%20hunger.

59 CESCR, General comment No.15, E/C.12/2002/11, 2002, paras. 20 – 29. Available at: https://digitallibrary.un.org/record/486454/files/E_C-12_2002_11-EN.pdf?ln=ru.

60 CESCR, General comment No.19, E/C.12/GC/19, 2008, paras. 40 – 52. Available at: https://digitallibrary.un.org/record/618890/files/E_C.12_GC_19-EN.pdf?ln=ru.

61 General comment No.15, para. 33; General comment No.19, paras. 53 – 54, General comment No.14, para. 33.

62 UN Guiding Principles on Business and Human Rights, paras. 11 – 13.

63 CCPR, General comment No.31, CCPR/C/21/Rev.1/Add. 13, 2004, para. 2. Available at:https://www.refworld.org/legal/general/hrc/2004/en/52451.

64 https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

ful Acts (2001)[65], the Draft Articles on Responsibility of International Organizations (2011)[66], implementing the United Nations *"Protect, Respect and Remedy"* Framework for business and human rights, the calls for cooperation, humanity, solidarity and inclusion of the *"Our Common Agenda"* report of the UN Secretary General (2021)[67], the principles of humanitarian work set forth in UN General Assembly Resolution 46/182 (1991)[68], as well as, but not limited to, General Assembly Resolutions 2131 (1965), 2625 (1970), 3281 (1974), 38/197 (1983), 69/180 (2014), 70/1 (Agenda for Sustainable Development, 2015), UN Security Council Resolution 2664 (2022), and other relevant documents.

Commentary

The Guiding principles do not create and do not intend to create new legal norms. They elaborate on the application of existing treaty or customary legal norms by states, international organizations and other relevant actors in a sanctions' environment. The legal framework of interaction of states in the international arena is set forth in the Charter of the United Nations, providing for, in particular, the fundamental principles of international law, including the principle of sovereign equality of states, the principle of non-intervention into the domestic affairs of states, the principle of peaceful settlement of international disputes, the principle of promotion and protection of human rights, the obligation to fulfill international obligations, and the principle of cooperation. Fundamental principles of international law are of peremptory character and as such enjoy priority over any other norm of international and domestic law[69], including the law of regional organizations, including the sanctions provisions of the Treaty of the European Union, the Treaty on the Functioning of the EU, and sanctions regulations and Directives.

Many provisions of and conclusions from the Guiding Principles are derivatives from the abovementioned principles, including the impossibility to refer to national law or the exercise of domestic foreign policy as a justification for the non-fulfillment of international obligations[70]; the illegality of extraterritorial application of national law, or the refusal of state immunity based on provisions of domestic law, and many other.

All other obligations from the UN Charter, including provisions in resolutions of the UN Secu-

65 https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

66 https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf

67 Our Common Agenda. Report of the Secretary-General 2021, https://www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Report_English.pdf

68 Strengthening of the coordination of humanitarian emergency assistance of the United Nations, Resolution 46/182 of 19.12.1991 https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/582/70/IMG/NR058270.pdf?OpenElement

69 Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*). Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf.

70 See also Vienna Convention on the Law of Treaties, 1969, art. 27.

rity Council taken under Chapter VII of the UN Charter, prevail over any other obligation in the case of conflict[71].

Principles of law recognized by all nations are also fully applicable, including *ex injuria jus non oritur, bona fide, par in parem non habet imperium*, and they shall be fully respected by all members of the world community, being "generally recognized by states"[72] as constituting a part of customary law at both the international and the national level.

The International Bill of Human Rights is applicable to all members of the international community, despite the fact that the ICESCR is not ratified by the United States as a sanctioning State and by a number of States under sanctions (e.g. Cuba). The provisions in these documents have already long ago been recognized as customary norms of international law, and as such binding for all members of the international community. Customary norms also include the obligation of due diligence in international law, as reflected in decisions of the International Court of Justice in the Corfu Channel case[73], and of ITLOS in its Advisory Opinion on "*Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the Area*" in 2011[74], and many other. The Principle of humanitarian precaution has the same character, although this has been mostly elaborated in more detail in international humanitarian law[75] and international environmental law[76].

Other international treaty and customary obligations as universally recognized sources of international law are reflected in this document, including in particular, the Vienna Convention on the Law of Treaties (1969), the Marrakesh Agreement on the WTO (1994)[77], the UN Convention against Corruption (2004)[78], as well as agreements on amity, mutual assistance in civil and criminal matters,, agreements on mutual enforcement of judicial decisions, and other relevant

71 UN Charter, art. 103.

72 General principles of law, A/74/10. Available at:https://legal.un.org/ilc/reports/2019/english/chp9.pdf.

73 *The Corfu Channel Case* (Albania v. United Kingdom), Merits, I.C.J. Reports 1949 (The Hague: I.C.J., 1949), P. 4 – 170.

74 *Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the Area* (Request for advisory opinion submitted to the Seabed Disputes chamber) list of cases: no. 17, ITLOS, Advisory Opinion of 2011. Available at:https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf.

75 Precautionary obligations under international humanitarian law. Available at:https://cyberlaw.ccdcoe.org/wiki/Principle_of_precautions#Precautionary_obligations_under_international_humanitarian_law.

76 Rio Declaration on Environment and development, 1992, principle 15; The South China Sea Arbitration, Award of 12 July 2016, para. 910. Available at: http://www.pcacases.com/pcadocs/ph-cn%20-%20 20160712%20-%20award.pdf.

77 Marrakesh agreement on the WTO, 1994. Available at: https://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm.

78 UN Convention against corruption, 2004. Available at: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

international treaties and customary norms.

The Guiding Principles also take due account of the provisions of the documents developed within the United Nations, as regards principles of humanitarian work, obligations of businesses in the sphere of human rights, standards of due process; provisions of resolutions of UN organs and bodies, including the UN Security Council, the UN General Assembly, the Human Rights Council, etc. and General comments developed by the UN as sources of authoritative official interpretations of relevant customary and treaty norms.

6. Disclaimer

Nothing in the Guiding Principles shall in any way be taken or interpreted as a direct or implicit recognition of the legality or legitimacy of any form of unilateral coercive measures, compliance or over-compliance with such measures.

Commentary

Unilateral measures taken by states or regional organizations without or beyond authorization of the UN Security Council, which cannot be qualified as retortions (that is, unfriendly but legal measures), or the wrongfulness of which cannot be excluded as countermeasures[79], are illegal and qualify as unilateral coercive measures which are condemned yearly in multiple resolutions of the Human Rights Council[80] and of the UN General Assembly[81]. The "Declaration on the Rule of Law" (2012) urged all states to "*to refrain from promulgating and applying any unilateral economic, financial or trade measures not in accordance with international law*" as part of the implementation of the rule of law concept (para.9)[82]. As primary unilateral coercive measures are illegal under international law, the latter provides no legal ground or justification for the means of their enforcement either in the form of secondary sanctions or of civil or criminal penalties for circumvention of primary unilateral sanctions regimes[83].Unilateral measures and the means

79 *Unilateral coercive measures: notion, types and qualification*, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/HRC/48/59. Available at:https://documents.un.org/doc/undoc/gen/g21/175/86/pdf/g2117586.pdf?token=lqBdqTYr5D9h77tcNg&fe=true.

80 HRC, Resolution 15/24 of 6 October 2010, paras. 1 – 3; HRC, Resolution 45/5 of 6 October 2020, preamble;HRC, Resolution 49/6 of 31March 2022, preamble, paras. 1 – 3; HRC, Resolution 52/13 of 17April 2023, paras. 1 – 6; HRC, Resolution 55/7 of 5 April 2024, paras. 1 – 6.

81 UNGA, Resolution 69/180 of 18 December 2014, paras. 5 – 6; UNGA, Resolution 75/181 of 16.12.2020, paras. 1 – 6; UNGA, Resolution 76/161 of 7January 2022, paras. 1 – 6; UNGA, Resolution 77/214 of 5 January 2023, paras. 1 – 6; UNGA, Resolution 78/202 of 23 December 2023, paras. 1 – 6.

82 Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, A/RES/67/1.

83 *Secondary sanctions, over-compliance and human rights,* Report of the Special Rapporteur on the

of their enforcement have a broad scope, and include: a high risk of penalties for circumvention or alleged circumvention of sanctions regimes; complex administrative and judicial proceedings against any activity that may be perceived as violating sanctions regimes;

- the impossibility of transactions, even with non-sanctioned goods, in the face of financial sanctions, of sanctions on the insurance or delivery, or receipt of any sum of money from the countries under sanctions;

- the ever changing sanctions environment and the strengthening of national and international frameworks for the criminalization of violations and the circumvention of sanctions, as well as the expanding practice of the use of non-legal or quasi-legal interpretative documents;

- the coordination of enforcement measures by the main sanctioning actors;

- the absence of a single mechanism of interpretation of sanctions regulations and provisions, and the dichotomized and often contradictory interpretation by different states or organs even of the same State;

- the coordinated advocacy in favor of the legitimacy of the enforcement of unilateral primary and secondary sanctions as a tool of foreign policy;

- the expanding use of extraterritorial jurisdiction on various grounds, with the introduction of the presumption of wrongfulness of anything with any nexus with targeted states, entities, spheres or individuals;

- maximum pressure campaigns, reputational risks and many other elements create an environment of uncertainty and fear and result in over-compliance with overall humanitarian impact with spill-over effect in the direct neighborhood, the regional and even the international context[84].

The Guiding principles are drafted in full awareness of the illegality of any measures taken in violation of international law. But while acknowledging the expansion of sanctions policies, the Guiding principles seek to demonstrate how existing legal norms shall be applied by States and businesses to ensure the proper implementation and enforcement of UN Security Council resolutions, in order to minimize over-compliance and a negative humanitarian impact correspondingly.

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negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/78/196. Available at: https://documents.un.org/doc/undoc/gen/n23/260/44/pdf/n2326044.pdf?token=D2ZDQ45vCDcHhupUjG&fe=true.

84 Ibid.

7. Coherence

These Guiding Principles constitute a coherent document and shall be read, individually or in aggregate, in terms of their objectives, enhancing standards and practices with regards to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby to also contribute to international and national efforts towards sustainable development, protecting human dignity and safeguarding humanity, and the strengthening of international solidarity and cooperation

Commentary

These Guiding Principles shall be read as a systematic and coherent document. All provisions of the Guiding Principles are interdependent and shall be interpreted with due account of all other norms in good faith, and based on the fundamental principles and norms of international law, and the principles of humanity, non-discrimination, solidarity, and cooperation.

The coherence of these Guiding Principles is based on their incorporation of the best practices and sources that provide for cooperation by and of all actors. The Guiding Principles are aligned to all the latest achievements concerning business and human rights[85], to sustainable development[86] and common goals[87]. A collective commitment "*to leave no one behind*"[88], as well as other effective multilateral measures cannot be properly implemented in the sanctions environment. Therefore, the principles of solidarity and cooperation between all stakeholders and actors are the core of all actions tackling the negative impact of sanctions on human rights, as derived "*from the inherent dignity of the human person*"[89].

International solidarity is a "*fundamental and broad principle of international law, encompassing, but not limited to, sustainability and responsibility in international relations, the peaceful coexistence of all members of the international community, accountability of States to each other and to their respective citizens, organizations, constituents and stakeholders, equal partnerships and the equitable sharing of benefits and burdens*".[90]

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85 GPBHR.

86 Transforming our world: the 2030 Agenda for Sustainable Development.Available at: https://sdgs.un.org/2030agenda.

87 The Report of the Secretary-General "Our Common Agenda" refers to solidarity and comprehensive approach (pp.3－4). Available at https://www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Report_English.pdf.

88 *Negative impact of unilateral coercive measures in the enjoyment of human rights in the coronavirus pandemic*, Report. A/75/209. Available at: https://documents.un.org/doc/undoc/gen/n20/190/03/pdf/n2019003.pdf.

89 The third preambular paragraphs of the ICCPR, ICESCR.

90 Revised draft Declaration on the right to international solidarity, preamble. Available at: https://www.ohchr.org/sites/default/files/documents/issues/solidarity/reviseddraftdeclarationrightInternationalsolidarity.

The principle of cooperation is enshrined in the "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations", which provides that States have a duty to cooperate in the various fields irrespective of differences in their political, economic and social systems, *inter alia*, in the protection and promotion of human rights; as well as in the economic, social and cultural fields[91].

The Guiding Principles are based on and promote the principle of non-discrimination as UCMs, enhanced by the means of their enforcement and over-compliance and de-risking, and by impediments in the delivery of humanitarian assistance to the countries under sanctions, even when this is requested by the humanitarian provisions of the UN Security Council resolutions, result in the growth of non-equality, that constitutes a violation of SDG 10[92], and also results in discrimination of people (nationals and residents of the countries under sanctions) on the ground of their nationality, place of birth, residence, phone or IP address, thus preventing them from benefitting from international (academic, sports, arts, cultural) cooperation[93], from the use of online platforms[94], events and trainings of civil society actors (*inter alia* due to the challenges in getting visas), the procurement of tickets, booking of hotels, the closing of foreign bank accounts[95]; the possibility to have access to humanitarian assistance, to buy necessary medicine and

pdf.

91 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A/RES/2625(XXV), 1971. Available at: https://digitallibrary.un.org/record/202170?v=pdf.

92 Sustainable development goals, our common Agenda.

93 *Visit to the Bolivarian Republic of Venezuela,* Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/HRC/48/59/Add.2, 6 September 2021, para. 78; *Unilateral sanctions in the cyber world: tendencies and challenges*, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, A/77/296, 17 August 2022, paras. 35 – 36. Available at: documents-dds-ny.un.org/doc/UNDOC/GEN/N22/464/10/PDF/N2246410.pdf?OpenElement;*Visit to the Islamic Republic of Iran*, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/HRC/51/33/Add.1, 17 August 2022, para. 55; *Visit to Zimbabve*, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/HRC/51/33/Add.2, 12 August 2022, para. 17; *Visit to the Syrian Arab Republic*, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/HRC/54/23/Add.1, 03 July 2023.

94 *Unilateral sanctions in the cyber world: tendencies and challenges*, A/77/296, paras. 30 – 33.

95 *Visit to the Islamic Republic of Iran*, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/HRC/51/33/Add.1, 17 August 2022, para. 56; *Visit to Zimbabve*, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/HRC/51/33/Add.2, 12 August 2022, paras. 14 – 16.

medical equipment[96], or as a result of negative propaganda or defamation campaigns[97].

These Guiding Principles apply to all States, international organizations, all banks, financial institutions and business enterprises, both transnational and others, and regardless of their size, sector, location, ownership and structure, to UN organs, humanitarian actors, and other civil society actors including private individuals or groups of individuals.

II. USE OF TERMS

8. Use of terms

For the purposes of these Guiding Principles terms shall be understood as follows:

> ***Businesses*** **– any entity undertaking the role of banks and other financial institutions, local, national and transnational corporations, state owned or privately held, regardless of the state of incorporation or the applicable local law designation**
>
> ***Compliance*** **– the scope of steps taken by States, regional organizations, banks, businesses and other institutions and individuals to implement sanctions.**
>
> ***Due diligence (States)*** **– an obligation of conduct under international law to take all measures necessary to ensure that any activity under their jurisdiction and control does not violate international obligations and fundamental human rights.**
>
> ***Due diligence (businesses)*** **– an obligation of businesses to take all measures necessary to ensure that their activity and business policies do not violate human rights.**
>
> ***Essential goods and services*** **– food, seeds, medicine, medical equipment, services, equipment, spare parts, reagents, supplements and soft-ware, and other types of goods, necessary for the maintenance of critical infrastructure and critical services relevant to healthcare, nutrition, agriculture, electricity, water supply, irrigation, sanitation, transportation, and other spheres necessary for the survival and well-being of populations.**

96 *Negative impact of unilateral coercive measures on the enjoyment of human rights*, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/75/209, 21 July 2020, paras. 38 – 39, 49, 52 – 57. Available at: documents-dds-ny.un.org/doc/UNDOC/GEN/N20/190/03/pdf/N2019003.pdf?OpenElement.

97 *UN High Commissioner for Human Rights Bachelet speaks out against Russophobia*, Oops Top, 20 March 2022. Available at: oopstop.com/un-high-commissioner-for-human-rights-bachelet-speaks-out-against-russophobia/; America Shuts Down Amid Russian State-Media Bans, Vulture, 6 March 2022. Available at: www.vulture.com/2022/03/youtube-tiktok-meta-block-russia-owned-rt.html.

Humanitarian carve-outs – exceptions, exemptions and derogations that are specified in unilateral sanctions programs in order to facilitate the continued flow of goods and services of a humanitarian nature. They are often characterized by complex and vague wordings, as well as costly or lengthy approval procedures that deter their use, undermine their effectiveness, while at the same time may exacerbate over-compliance and de-risking.

Over-compliance – going beyond compliance with sanctions, often to minimize the risk of penalties for inadvertent violations, and/or to avoid reputational risks that can arise from dealing, or having any other nexus, with a State, entity or individual under sanctions, or because the complexity and uncertainty of sanctions, and/or high penalties as a form of sanctions enforcement, make effective compliance too costly or risky.

Sanctions of the UN Security Council – enforcement measures adopted upon decision by the UN Security Council acting under Chapter VII of the UN Charter

Secondary sanctions – unilateral sanctions imposed against States, individuals or entities who allegedly violate, circumvent, or assist in circumvention, of primary sanctions regimes as a means of enforcement of primary sanctions against primary targets.

Unilateral coercive measures – any type of measures or activity applied by States, groups of States or regional organizations without or beyond authorization of the UN Security Council, not in conformity with international obligations of the sanctioning actor, or the illegality of which is not excluded on grounds of the law of international responsibility, regardless of the announced purpose or objective. Such measures or activities include, but are not limited to, economic, financial, political or any other sort of State-oriented or targeted measures, applied to another State or an individual, company or other non-governmental entity, in order to induce a change in policy or behavior, to obtain from a State the subordination of the exercise of its sovereign rights to secure advantages of any kind, or to signal, coerce or punish.

Unilateral sanctions – measures taken by a State, group of States or a regional organization without or beyond authorization of the UN Security Council, without prejudice to their legality or illegality.

Zero-risk policy (de-risking) – a policy of the complete or partial disengagement and interruption of any activity with a State, entity or individual under sanctions or under the risk of sanctions, which is adopted by a company or other entity out of fear of possible negative repercussions leading to over-compliance.

Commentary

UN documents do not provide for the definition of businesses or business enterprises. These Guiding Principles follow a broad approach and refer to businesses as to any type of entity involved into industrial, trade or other commercial activity regardless of its nationality, registration, form, corporate structure, status in the national legal system or of ownership.

The term compliance in the Guiding Principles has a neutral connotation and includes the scope of steps taken by States, regional organizations, banks, businesses and other institutions and individuals, to implement any type of sanctions. Provisions on compliance in these Guiding Principles shall not in any way be interpreted or read as a direct or implicit recognition of the legality or legitimacy of any form of unilateral coercive measures, of compliance with UCMs or any other means of enforcement of UCMs, and shall not affect and/or undermine compliance policies aimed to implement UN Security Council resolutions to suppress money-laundering, the financing of terrorism and other legal purposes.

The obligation of due diligence for a State is of a customary nature. It includes from one side an obligation of States to adhere to their international obligations and to ensure that all State organs, officials as well as any other entity the activity of which can be attributable to a State[98], act in accordance with international treaty and customary obligations of States. From the other side, States and regional organizations with exclusive competences are under the obligation to take all possible (legislative, administrative, judiciary, budgetary and of any other type) measures to ensure that any activity of any entity under their jurisdiction or control does not violate human rights (that is, the obligations to prevent, to protect and to fulfill).

The obligation of due diligence of businesses refers to their obligation to take all necessary measures set forth and elaborated in the UN Guiding Principles on Business and Human Rights to ensure that their activity does not violate human rights, both internally and extraterritorially. "Human rights due diligence" is viewed in the Guiding Principles on Business and Human Rights as one of the operational principles and includes "*assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed*", and to provide a remedy via legitimate process in the case of an adverse human rights impact[99].

Essential goods and services in these Guiding Principles refer to the broad scope of goods, software, services and equipment necessary to ensure the survival and well-being of the general population and to cover the special needs of vulnerable groups, including access to food, seeds, medicine, medical equipment, services, equipment, spare parts, reagents, supplements and software, and to other types of goods, necessary for the maintenance of critical infrastructure and

98 DARS.

99 Paras. 17 – 21.

critical services relevant to healthcare, nutrition, agriculture, electricity, water supply, irrigation, sanitation, transportation, and other spheres necessary for survival of the population[100]. They are not limited to food and medical supplies only (thereby excluding all other deliveries as being of developmental rather than of humanitarian nature) as provided for in the humanitarian aid guidance of sanctioning countries[101], as this approach does not ensure addressing the basic needs of the population[102].

Humanitarian carve-outs are understood in these Guiding Principles as any type of humanitarian exemptions, exceptions and derogations from unilateral sanctions' regimes regardless of their name and of the legal justification used.

The implementation of de-risking policies results in increasing fear and over-compliance. The reasons for over-compliance are rather multilevel and diverse, and include, but are not limited to, uncertainty, broadness and non-stability of multiple over-lapping sanctions regimes; the expansion of the presumption of the legitimacy of UCMs and the wrongfulness of the behavior of actors under sanctions; the expansion of the means and use of sanctions enforcement mechanisms, including secondary sanctions, of civil, customs, administrative, and criminal penalties and charges; the severeness of punishment for the circumvention of sanction's regimes; the possible restrictions on or prohibitions of getting access to the financial system, on trade routes and the markets of sanctioning countries and their partners; the absence of uniform application and interpretation of unilateral sanctions; a proliferation of complex non-legal documents, such as guidance documents, of frequently asked questions and of other forms of non-normative legal acts, extensively interpreting legal regulations; the extraterritorial application of sanctions regimes; overlaps among various jurisdictions, thus rendering compliance a very challenging endeavor; the expansion of the grounds for sanctions designations to include facilitation in circumvention of sanctions regimes; and the identification of sanctions as a "*first resort*" foreign policy; the refusal of sanctioning states to operate by legal means, but rather present unilateral sanctions as a part of foreign policy; the requirement to monitor all supply chains or all contacts of any partner, that makes compliance nearly impossible; the challenges to pay, due to financial limitations, to deliver or to ensure due to sanctions against insurance or delivery companies; the higher responsibility of professionals and humanitarian actors; the challenges to access justice in sanctions cases[103].

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100 A/78/196, para. 80(e).

101 Commission Guidance Note on the Provision of Humanitarian Aid in Compliance with EU Restrictive Measures (Sanctions), 2022, paras. 3.9 – 3.10. Available at: https://finance.ec.europa.eu/document/download/9ad399ee-90f8-4a75-afe0-fa58d44cad6a_en?filename=220630-humanitarian-aid-guidance-note_en.pdf.

102 AL USA 21/2021. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27622; AL OTH 106/2021.

103 A/78/196; *Access to justice in the face of unilateral sanctions and overcompliance,* Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights,

Examples are when a company stops all business with a sanctioned country, including humanitarian operations that may be covered by humanitarian exemptions for the delivery of food or medicines; or when banks decide to block transactions with a country under unilateral sanctions and its nationals and companies. Even monopolist producers of medicine and medical equipment refuse to sell unique life-saving medicines, equipment or spare parts[104].

Sanctions of the UN Security Council refer to all types of enforcement measures (both military and non-military) adopted by the UN Security Council acting under Chapter VII of the UN Charter for the maintenance of international peace and security.

Secondary sanctions are viewed in these Guiding principles as one of the means to enforce primary unilateral sanctions against States, foreign companies, organizations or individuals. Secondary sanctions are applied extraterritorially to the nationals or companies of countries subjected to primary sanctions, or of third States for their (presumed) cooperation or association with sanctioned parties, or for helping them to circumvent sanctions. Foreign companies subjected to secondary sanctions can be blocked from doing business in the sanctioning State, be banned from using its financial markets, or be prohibited from transactions involving its currency. Foreign individuals can be refused entry to the sanctioning country and have any assets there frozen[105]. Penalties can reach the level of billions of USD; criminal penalties may reach up to 20 years of imprisonment[106].

Unilateral coercive measures may take different forms and include measures taken against States, the financial system of a State, sectors of the economy of a State in general (e.g. gold, mining, wood, oil, gas, education), or of a specific region of the country (e.g. cotton, textiles, tomatoes, and poly-silicone industries in Xingjian in China), prohibition of trade with specific goods or types of goods, and measures against entities or individuals, including State officials *ex officio*. Unilateral measures that violate the international obligations of States, and therefore cannot be qualified as retorsion, countermeasures or implementation of resolutions of the Security Coun-

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AlenaDouhan, A/79/183, 18 July 2024, paras. 22 – 35, 44 – 50. Available at: https://documents.un.org/doc/undoc/gen/n24/213/84/pdf/n2421384.pdf; *Secondary sanctions, civil and criminal penalties for circumvention of sanctions regimes and overcompliance with sanctions*, A/HRC/51/33.

104 AL USA 25/2023. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28386; Al SWE 3/202.Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28385; AL OTH 108/2023. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28382; AL OTH 109/2023. Available at:https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28384.

105 *Secondary sanctions, civil and criminal penalties for circumvention of sanctions regimes and overcompliance with sanctions,* A/HRC/51/33.

106 *Appendix A to part 501 of the Economic Sanctions Enforcement Guidelines.* Available at: https://www.ecfr.gov/current/title-31/subtitle-B/chapter-V/part-501/appendix-Appendix%20A%20to%20Part%20501;Sanctions Programs and Country Information. Available at: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cyber.pdf.

cil, constitute unilateral coercive measures.

The current practice of unilateral sanctions demonstrates their variety: they can be political, sectorial, diplomatic, cultural, economic, trade, financial, cyber, targeted, etc. Compliance companies classify sanctions as unilateral, multilateral and global. Reference is also made to international sanctions, sectorial sanctions, targeted sanctions, counter-sanctions, direct or indirect sanctions, primary or secondary sanctions, and intended or unintended sanctions. Trade embargoes aim to prohibit nationals/residents of the sanctioning country, or any company willing to do business in a sanctioning country, or with partners in the sanctioning county, from trading with the country under sanctions, their nationals or companies. Financial sanctions may include decisions to designate the central bank of the country under sanctions, or public or private banks, to prevent any transfer of money to/from the country under sanctions. The freezing of State and private banks' assets abroad is used to put pressure on States[107]. Trade sanctions often take the form of so-called sectorial sanctions, which apply non-selectively to individuals and organizations in a particular sphere of the economy, without any identifiable reason or violation from their side that differs significantly from those that have prompted traditional targeted sanctions[108]. A special form of sectorial sanctions can be seen in the closing of airspace for flights of airlines registered in targeted States – such as Qatar (2017 – 2020), Venezuela, Belarus and Russia – and prohibiting the targeted State's airlines to enter the airspace of the sanctioning country, thereby affecting the designated state's travel industry. A similar situation exists as concerns trade with Cuba, Iran, Syria and Venezuela[109]. Economic sanctions also include measures of a targeted character, affecting designated individuals or companies. For example, the European Union's financial sanctions include several thousand individuals and companies[110], and even many more are listed by the United States[111]. A number of unilateral measures are taken in, or are relevant to, the cyber area in response to "malicious cyber activity", or via operations in, and access to, software on online platforms, databases and on-line conferences, access to the Internet, information, public announcements of designated individuals as criminals, etc., so-called cyber and cyber-related sanctions.[112]

Unilateral sanctions may comply with international law if they are implemented as retorsions, that is, responding to unfriendly acts but not violating international obligations, or as counter-measures against a State responsible for an internationally wrongful act in full conformity with

107 Ibid, para. 29.

108 Ibid, para. 33.

109 Ibid, para. 32.

110 *European Union Financial sanctions consolidated list (2023)*. Available at: https://webgate.ec.europa.eu/europeaid/fsd/fsf/public/files/pdfFullSanctionsList/content?token=dG9rZW4tMjAxNw

111 OFAC, *Specially Designated Nationals and Blocked Persons List,* 2023. Available at: www.treasury.gov/ofac/downloads/sdnlist.pdf.

112 A/77/296 *Unilateral sanctions in the cyberworld: tendencies and challenges*, Report https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/77/296&Lang=E

the law of international responsibility. The vast majority of unilateral sanctions does not comply with the criteria for retorsion or countermeasures, and therefore qualify as unilateral coercive measures.

Zero-risk (de-risking) policies refer to the behavior of States that goes further than direct compliance with unilateral sanctions. The terminology used also refers to risks-assessment, chilling or spillover effects etc. Zero-risk (de-risking) policy is a formal exercise of over-compliance; therefore both are based on the same reasons. De-risking policies are aimed to protect commercial activities and interests of specific businesses in the face of the complexity and uncertainty of sanctions regimes, the uncertainty of implementation, the risks of high penalties, and complicated, lengthy, expensive and ineffective appeals. In view of the above reasons, as well as newly introduced concepts of *"presumption of legality of unilateral sanctions"*, and *"rebuttable presumption of the presumption of wrongfulness of behavior with any nexus to a specific country, region or designated individuals or companies"*, requests to monitor the whole supply chain or the contacts of all partners, without any guarantee of immunity against responsibility even if they do comply, businesses prefer to take measures to avoid or minimize any risk, which often takes the form of leaving the markets of countries under sanctions, of withdrawing investments, or ending any cooperation with anyone who might be considered/suspected to have any nexus with sanctions (including, the country under sanctions as a place of destination, projects for public schools or hospitals, the place of birth of individuals, their names, which may sound e.g. Russian or Iranian, or when their names appear in any form similar to the name of the country under sanctions, etc.).

9. Principles

The following Principles, combined in three groups, are recommended for adoption by States, businesses and stakeholders, to eliminate and minimize the impact of sanctions, sanctions enforcement and over-compliance on human rights:

General principles:

1) **The principle of humanity**

2) **Accessibility of humanitarian assistance**

3) **Equality of all human rights**

4) **Precautionary principle**

5) **The principle of non-discrimination**

6 The principle of proportionality

7) Accessibility of information

Principles for States

8) The principle of respect for the rule of law

9) The principle of legal certainty

10) The principle of respect for internationally recognized jurisdiction

11) The principle of respect for fair trial and due-process standards

12) Humanitarian carve-outs clarity

13) Licensing minimization and simplification

Principles for businesses

14) Human rights based approach in business activity

15) The principle of due diligence

16) Minimization of humanitarian impact in compliance policies

17) The principle of transparency

III. GENERAL PRINCIPLES

10. The principle of humanity

10.1 States and regional organizations shall ensure that any businesses and other entities under their jurisdiction or control act with due regard to human rights and humanity concerns.

10.2 The principle of humanity shall prevail over any consideration of internal or foreign policy of States and international organizations and business policies of private actors.

10.3 All actors shall respect and treat all persons, individually and in community with oth-

ers, with due respect to their fundamental human rights and dignity, without discrimination or distinction of any kind.

10.4 No "good intentions", "high goals" or "common goods policy" can justify violation of human rights and of the principle of humanity.

10.5 Businesses must ensure the incorporation and implementation of the principles of humanity and non-discrimination in their internal and external documents and policies, with specific reference to humanitarian exemptions/carve-outs and the requirement of a human rights impact assessment, to avoid overcompliance and negative impacts on human rights.

10.6 Failure to respect and observe the principle of humanity may constitute involvement in breaches of public international law (including, without limitation, international criminal law, international human rights law and international humanitarian law), with all criminal and civil consequences that may follow.

Commentary

Although there is no explicit or accepted definition of the term "humanity" in international legal documents, many special provisions in international humanitarian law[113], international criminal law[114], customary law[115], and international caselaw[116] refer to "humanity" and the "principle of humanity". The UN General Assembly requests to provide humanitarian assistance "in accordance with the principles of humanity, neutrality and impartiality"[117]. The same approach is reflected in "Core Humanitarian standards"[118]. The status of humanity as a principle is also affirmed in 2004 by the General Assembly in the Resolution "Strengthening

113 "Martens Clause", whatever the interpretation is, was embedded in all Geneva Conventions 1949 and Additional Protocols 1979 – see, e,g., Geneva Convention Relative To The Protection of Civilian Persons In Time of War of 12 August 1949, para 3 art 5, para 4 art. 158.

114 Draft Articles on Prevention and Punishment of Crimes against Humanity. Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf; Rome Statute of the International Criminal Court. Available at: https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf.

115 See, ICJ's Advisory Opinion on the legality of the threat or use of nuclear weapons of 8 July 1996, paras. 78, 84, where the Court determined that the Martens Clause is a customary rule and is therefore of normative status. Available at: http://www.worldlii.org/int/cases/ICJ/1996/3.html.

116 "Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: *elementary considerations of humanity, even more exacting in peace than in war…*" – *The Corfu Channel Case*, P.22. Available at: https://www.icj-cij.org/sites/default/files/case-related/1/001-19490409-JUD-01-00-EN.pdf.

117 UNGA, Resolution 48/182 of 19 December 1991, para. 2. Available at: https://documents.un.org/doc/resolution/gen/nr0/582/70/img/nr058270.pdf; UNGA, Resolution 58/114 of 5 February 2004, preamble. Available at: https://emergency.unhcr.org/sites/default/files/General%20Assembly%20Resolution%2058-114.pdf.

118 Core Humanitarian standards (2024). Available at: https://www.corehumanitarianstandard.org/_files/ugd/e57c40_f8ca250a7bd04282b4f2e4e810daf5fc.pdf .

of the coordination of emergency humanitarian assistance of the United Nations" [119]. In international humanitarian law the principle of humanity has a long history and can be traced back to the Martens clause, which provides for the requirement that "*the conduct of belligerents remains regulated at a minimum by the principles … of the laws of humanity*", which is currently viewed as a fundamental principle of International humanitarian law[120]. The ICRC refers to the principle of humanity as intending to "*limit suffering, injury and destruction during armed conflict… to protect life and health and ensure respect for the human being*" [121].

The UNHCR also qualifies humanity as one of the fundamental principles in cases of emergencies[122]. Despite the existing academic discourse, even those who deny the existence of "humanity" as a principle, agree about the obligation that all States and other actors have to take humanitarian considerations into account, even in times of war and emergency situations.[123] The use of unilateral sanctions bears the risk of creating emergency situations because of their high humanitarian costs. The level of human suffering is often so high that the delivery of humanitarian assistance is necessary. Already the Naulilaa case viewed humanity as a principle where it referred to the obligation of States to limit any countermeasures by the principle of humanity[124]. In view of the above reasons, it shall be concluded that "humanity" shall be viewed as a principle in the unilateral sanctions' environment. As a principle it shall be applied to the activities of States without any territorial limitations.

States have the primary positive responsibility to respect, promote and protect fundamental human rights and freedoms, and to ensure compliance with international law, including to respect "*the inherent dignity and of the equal and inalienable rights of all members of the human family*" [125]. The principle of humanity reflects their necessary commitments to do so under applicable

119 UNGA, Resolution 58/114, preamble.

120 Fundamental principles of international humanitarian law, ICRC. Available at: https://casebook.icrc.org/law/fundamentals-ihl#d_iii.

121 The Principles of humanity and necessity, ICRC. Available at: https://www.icrc.org/sites/default/files/wysiwyg/war-and-law/02_humanity_and_necessity-0.pdf.

122 Humanitarian principles, UNHCR. Available at: https://emergency.unhcr.org/protection/protection-principles/humanitarian-principles#:~:text=At%20the%20core%20of%20all,%2F182%20and%2058%2F114.

123 Larsen K., Cooper C., Nystuen G. "Searching for a "Principle of Humanity" in International Humanitarian Law", (Cambridge: Cambridge University Press, 2016), 378 p.; Coupland R (2001) "Humanity: What Is It and How Does It Influence International Law?", in International Review of the Red Cross, 2001, Vol 83, No. 844, pp. 969-989; Atadjanov R., "The Concept of Humanityin International Criminal Law", in Central Asian Yearbook of International Law and International Relations, 2022, No. 1, pp. 6-32; Larsen K.M. "A principle of "humanity" or a principle of "human-rightism", in K.M. Larsen (ed.), Searching for the principle of humanity in international humanitarian law (Cambridge: Cambridge University Press, 2012), P. 124

124 *Portuguese Colonies* case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), P. 1026.

125 UDHR, Preamble

treaties, the International Bill of Rights and under customary public international law.

The International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) both refer to the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms[126], and also to the duties of individuals to strive for the promotion and observance of human rights and freedoms.[127] As set forth in the "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" (1998): "Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, *inter alia*, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice"[128].

Although States can impose some limitations on human rights, such restrictions and limitations shall not result in arbitrary, intended or non-intended violations. Under article 29(2) of the UDHR "*[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*". Such limitations shall never affect the exercise of the fundamental human rights.

The principle of humanity requires therefore that all actors must treat all persons, individually and in communities, with due respect for their fundamental human rights and with dignity, without discrimination or distinction of any kind, whether on the basis of race, color, sex, birth, language, religion, political or other opinion, national or social origin, property or any other status. The criteria of non-discrimination are derived from a set of human treaties and are referred to in the commentary to the Guiding Principles on Business and Human Rights[129].

The use of the term "unintended"[130] with regard to the humanitarian consequences of uni-

126 ICCPR, ICESCR, Preamble, para. 3.

127 Ibid, para. 4.

128 UNGA, Resolution 53/144 of 9 December 1998. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art.2. Available at https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-right-and-responsibility-individuals-groups-and#:~:text=Each%20State%20has%20a%20prime,legal%20guarantees%20required%20to%20ensure.

129 Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework, P. 1. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

130 Majidpour M. "The Unintended consequences of US-led sanctions on Iranian Industries", in Iranian

lateral sanctions is misleading and even dangerous because it might imply the legitimacy of such measures. When unilateral sanctions are taken without or beyond the authorization of the UN Security Council, and do not correspond to the criteria of retortions and countermeasures, sanctioning States are responsible for ensuing violations of international law, and for any negative consequences regardless of their intentions. States are subjects of international law and they cannot act unconsciously. Therefore, criteria of intention or guilt are not applicable[131]. When proclaiming the unintentional character of the impact of unilateral sanctions and over-compliance on the right to health, making references to good intentions do not legitimize or justify any such conduct.

The Guiding Principles on Business and Human Rights set out "*human rights expectations*" in the operations and commercial activities of businesses, and even in "*conflict affected areas*" these are to be ensured by states[132]. Businesses on their turn are under the obligation to respect human rights and "*to address adverse human rights impacts with which they are involved*"[133]. The GPBHR view assessment and treatment of "the risk of causing or contributing to gross human rights abuses as a legal compliance"[134]. Banks, businesses and individuals must not perpetrate or facilitate breaches of human rights, and the principle of humanity also embodies their obligations in that regard. Without limitation, the principle of humanity requires that all actors must treat all persons, individually and in communities, with due respect for their fundamental human rights and with dignity, without discrimination or distinction of any kind, whether on the basis of race, color, sex, birth, language, religion, political or other opinion, national or social origin, property or any other status.

While it is clear that businesses experience pressure in sanctions compliance policies and that sometimes entrepreneur risks are at stake, the Guiding Principles are concerned with preventing and mitigating risks to people and to their rights. It includes thus on the one hand an obligation of States to ensure a favorable environment enabling businesses to promote and protect human rights even in a sanctions environment, and on the other the obligation of businesses to exercise "human rights due diligence" without any discrimination to the maximum possible extent.

The obligation to take all measures necessary to ensure that the activities of businesses under

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Studies, 2013, Vol. 46, No. 1; SC/14788 of 7 February 2022 "Concerned by Unintended Negative Impact of Sanctions, Speakers in Security Council Urge Action to Better Protect Civilians, Ensure Humanitarian Needs Are Met". Available at: https://press.un.org/en/2022/sc14788.doc.htm; Aita S. "The Unintended Consequences of U.S. and European Unilateral Measures on Syria's Economy and Its Small and Medium Enterprises", (Atlanta: The Carter Center, 2020).

131 A/HRC/54/23, Report "Impact of unilateral sanctions on the right to health", paras. 85, 90. Available at: https://documents.un.org/doc/undoc/gen/g23/148/52/pdf/g2314852.pdf.

132 Guiding Principles on Business and Human Rights, paras. 2, 6, 7.

133 Ibid, paras. 11, 13-14.

134 Ibid, para. 23

their jurisdiction or control do not violate human rights, and therefore act in accordance with the principle of humanity, is an obligation of conduct. Therefore, a violation of this obligation might result in the responsibility of the host State in accordance with the law of international responsibility.

11. Accessibility of humanitarian assistance

11.1 Access to humanitarian assistance and humanitarian relief shall be granted in any and all circumstances to all persons in need, without any discrimination or distinction, in accordance with the principles of humanitarian assistance: humanity, neutrality, impartiality, and independence.

11.2 Obstruction of humanitarian relief is prohibited. No unilateral sanctions shall be formulated or implemented that obstruct humanitarian relief or the supply of essential goods or services.

11.3 Any reprisals or other penalties for humanitarian work and/or assistance in the delivery of humanitarian goods in a sanctions environment are prohibited. Delivery of humanitarian assistance shall not in any way be interpreted as circumvention of sanctions regimes.

11.4 UN Security Council resolutions, including those relevant to humanitarian action, shall be implemented in good faith, with due respect for the Charter of the United Nations, in particular its article 25, and for the competence and authority of the UN Security Council. All stakeholders are under an obligation to implement fully all existing or future humanitarian resolutions and provisions of resolutions of the UN Security Council, including resolution 2664 (2022).

11.5 People in States affected by unilateral sanctions, and in the absence of sanctions of the UN Security Council, shall enjoy humanitarian assistance regimes not less favorable than those proposed for countries under sanctions of the UN Security Council. They shall fully benefit from the principle of humanity and access to humanitarian aid and assistance.

Commentary

The delivery or provision of humanitarian assistance in general, is not codified. However, several universal treaties have addressed specific types of disasters[135], or specific forms of assistance[136],

135 For instance, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency of 26 September 1986. Available at: https://www.iaea.org/sites/default/files/infcirc336.pdf.

136 For instance, the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 18 June 1998. Available at: https://www.ifrc.org/Docs/idrl/I271EN.pdf.

and some regional treaties[137] and soft law[138] are equally assuming an increasingly important role of and for humanitarian actors and humanitarian assistance. GA Resolution 46/182 and subsequent resolutions set forth principles of UN humanitarian assistance: humanity, neutrality, impartiality and independence[139]. Rapid and unimpeded humanitarian access is a fundamental prerequisite to effective humanitarian action. The same rules and requirements shall be applied to the delivery of humanitarian assistance to all those in need. The topic of obligations to grant access to effective humanitarian action is not adressed in the Resolution, but shall be understood broadly and to include all actors, including sanctioning countries in sanctions environment.

"Humanitarian relief" has no uniform scope of regulation, and various provisions of international humanitarian law treaties set out indicative lists of relief items[140]. Humanitarian relief operations may include, though are not limited to, operations to provide food, water, medical supplies, clothing, bedding, means of shelter, heating fuel, and other supplies and related services essential for the survival of a civilian population, as well as objects necessary for religious worship.[141] As a result, a narrow approach to humanitarian assistance in unilateral sanctions regimes such as only including food and medicine, does not correspond to the needs of humanity and standards of availability of humanitarian assistance. Access to essential goods shall be understood broadly, as it is identified in the definition of "essential goods" and the commentary to para. 8, that is, to include "humanitarian goods" and "development goods". In particular, GA Resolution 46/182 of December 19, 1991 explicitly makes clear that humanitarian assistance shall not be viewed as immediate humanitarian relief only, but rather as to "*ensure a smooth transition from relief to rehabilitation and development [···], supportive of recovery and long-term development*." [142] UN Security Council Resolution 2664 (2022) follows the broad approach as well, by interpreting humanitarian assistance as one referred to "*activities that support basic*

137 For instance, the Inter-American Convention to Facilitate Disaster Assistance of 7 June 1991. Available at: https://www.oas.org/juridico/english/treaties/a-54.html; Arab Cooperation Agreement on Regulating and Facilitating Relief Operations (Arab League Decision No. 39) of 3 September 1987. Available at: https://disasterlaw.ifrc.org/media/3123.

138 UNGA, Resolution 46/182; UNSC, Resolution 2664 (2022), etc.

139 UNGA, Resolution 46/182.

140 See, the Geneva Convention Relative to the Protection of Civilian Persons in Times of War of 12 August 1949, art. 59; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict of 8 June 1977, art. 69; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict of 8 June 1977, art.18.

141 OCHA, Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict Commissioned, P.8

142 OCHA, Guiding Principles annexed to UNGA Resolution 46/182 "Strengthening of the coordination of humanitarian emergency assistance of the United Nations", para. 9.

human needs" [143].

Common articles 9/9/9/10 to the Geneva Conventions mention two categories of "humanitarian activities": (i) activities "undertaken for the protection" of persons protected under these instruments; and (ii) activities undertaken for their "relief". Security Council Resolutions 2462 (2019) and 2482 (2019) similarly use the term "*humanitarian activities (…) carried out in a manner consistent with international humanitarian law*".

The term "in any circumstances" also refers to specific peculiarities of situations when humanitarian assistance becomes necessary. The reason for the lack of a restrictive definition of "humanitarian assistance" per se lies in the difficulty of anticipating the humanitarian needs that might arise. It is true for the law of armed conflict ("*as the nature of armed conflicts may change, so may the humanitarian needs that they engender, and hence also the services that may be offered*" [144]), as well as for post-conflict and/or peace situations.

General Comment No. 8 of the CESCR on the impact of sanctions on human rights explicitly states that humanitarian exemptions do not have the expected positive effects, such as e.g. the unhindered flow of essential goods and services destined for humanitarian purposes[145]. The UN Secretary General refers in a 1996 report to the ambiguous character of humanitarian exemptions providing for a broad possibility for arbitrary and inconsistent interpretation, causing delays, confusion and the denial of requests to import essential humanitarian goods, in turn leading to resource shortages in the countries targeted by sanctions.[146]

Sanctions have impact on effective humanitarian assistance in three interlinked ways: 1) they have direct effects on humanitarian assistance (financial and export-import limitations), 2) they pose administrative and operational challenges, and 3) they can result in over-compliance-related challenges[147].

The overall effect on human rights of over-compliance alone can be enormous, especially in sensitive humanitarian situations, and must be recognized as a significant new threat to international law and human rights. As the provision of authorized humanitarian goods and services to sanctioned States often involves a significant number of different actors in multiple countries, over-compliance by any of them, including by manufacturers, exporters, financial service pro-

143 UNSC, Resolution 2664 (2022), para. 1.

144 See ICRC Commentary on the First Geneva Convention, para. 813; ICRC Commentary on the Third Geneva Convention, para. 850.

145 ECOSOS E/C.12/1997/8, paras. 4, 5.

146 See Impact of Armed Conflict on Children: Note by the Secretary-General, U.N. Doc. A/51/306 (1996). Available at https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/04/Machel-Report-Impact-Armed-Conflict-Children-EN.pdf.

147 Assessing the Impact of Sanctions on Humanitarian Work, December 2022, pp. 13-15. Available at https://www.caritas.org/wordpress/wp-content/uploads/2023/03/Final_Report_ARP_Sanctions-2.pdf.

viders, and transportation and insurance companies, may prevent essential goods from reaching persons in need.

Humanitarian organizations report that *"over-compliance can prevent, delay, or increase the costs of purchase and shipments of humanitarian goods to sanctioned countries required for the provision of humanitarian assistance, which in turn can pose serious consequences for those in need"*.[148] In relation to post-earthquake Syrian Arab Republic, they refer to sanctions-induceddifficulties *"to access essential goods, leading to reduced funding for aid organizations, restricting travel and movement, increasing bureaucratic hurdles, and more generally, impeding economic activity"*[149].The detrimental effects of over-compliance prevent, therefore, even exempted goods, such as food and medicines, from reaching people in need.[150]

The wordings in the documents of the humanitarian carve-outs, as well as structural and administrative challenges, undermine their humanitarian purpose, thereby maintaining a sense of uncertainty and fear about the real scope of sanctions-related prohibitions and enforcement, and thus exacerbating over-compliance.

Reported challenges include: (a) unclear, overlapping, confusing and complicated sanctions regulations; (b) complexity of terms and confusing procedures for granting licensces for humanitarian operations in accordance with existing humanitarian exceptions, exemptions or derogations[151]; (c) requirements for multiple licenses for a sole humanitarian activity or good[152];(d) serious delays in the processing of license applications (up to 1 – 1.5 years)[153]; (e) cumbersome legal fees for regulatory interpretation and legal support; (f) the requirement for humanitarian actors to prove the humanitarian character of their activities (burden of proof)[154];(g) the impossibility to deliver medical goods even with received licenses in the face of banking, financial, insurance and delivery sanctions; (h) the embargo on the delivery of dual-use goods (including toothpaste, water purifying reagents, laboratory equipment and radioisotopes used for radiation medicine

148 Ibid, p.16.

149 Human Rights Watch, "Questions and answers: how sanctions affect the humanitarian response in Syria" of 22 June 2023. Available at: https://www.hrw.org/news/2023/06/22/questions-and-answers-how-sanctions-affect-humanitarian-response-syria.

150 Offers by Member States of study and training facilities for inhabitants of Non-Self-Governing Territories", Report of the Secretary-General, A/74/65, para. 45. Available at: https://documents.un.org/doc/undoc/gen/n19/084/83/pdf/n1908483.pdf.

151 Communications reports of special procedures, No. AL USA 21/2022.

152 *Visit to the Syrian Arab Republic,* Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/HRC/54/23/Add.1, para. 51. Available at: https://documents.un.org/doc/undoc/gen/g23/127/57/pdf/g2312757.pdf.

153 Ibid, para. 54.

154 Communications reports of special procedures, No. AL USA 21/2022; "Commission guidance note on the provision of humanitarian aid in compliance with EU restrictive measures (sanctions) issued by the European Commission, paras. 3.9-3.10.

for the diagnosis and treatment of specific diseases)[155]; and (i) the absence of mechanisms for the protection of humanitarian actors in their efforts to pursue their principled humanitarian work.

These challenges have reportedly shifted humanitarian work from "need assessment" to "risk assessment" [156] and that does not help the proper delivery of necessary humanitarian assistance.

The threat of being held legally accountable for any violation of sanctions requirements persists amidst often ambiguous and unclear sanctions legislation, and is exacerbated by cases in which humanitarian organizations were investigated by the US government for an alleged violation of sanctions requirements.[157] Even when the charges were eventually dropped, such cases contributed to de-risking among organizations involved in the provision of humanitarian assistance, including humanitarian actors themselves, as well as banks, suppliers, and donors. Those that do not withdraw from projects in sanctioned environments tend to adopt more stringent due diligence measures, often requiring humanitarian actors to share detailed information on staff members, implementing partners, and in extreme cases, final beneficiaries. The unwillingness of banks to process transfers to sanctioned environments and the closing of bank account of related organizations have been reported as the biggest challenges to the implementation of humanitarian projects.[158]

Recipients of humanitarian assistance shall not be discriminated against on any grounds. Humanitarian relief shall be provided to all those most in need. Humanitarian organizations shall not be requested to do any profiling, or report on recipients or condition humanitarian assistance by support of sanctions or political views. The delivery of humanitarian assistance to countries under sanctions shall not be viewed as a circumvention, or assistance in circumvention, of sanctions regimes, also when referring to sanctions of the UN Security Council[159].

UN Security Council resolution 2664 (2022) established a mechanism to enable the unfreezing of assets to ensure the delivery of humanitarian assistance within the Security Council sanctions regimes. The challenges in the implementation of humanitarian provisions of Security Council resolutions were subject of communications by the Special Rapporteur[160]. Security Council Res-

155 Submission by the Gujarat National Law University Student Research Development Council (GNLU SRDC); International Atomic Energy Agency, "IAEA Director General's introductory statement to the Board of Governors" of 14 September 2020. Available at: https://www.iaea.org/newscenter/statements/iaea-director-generals-introductory-statement-to-the-board-of-governors-14-september-2020.

156 Human Rights Watch, "Put people's rights first in Syria sanctions" of 22 June 2023. Available at: https://www.hrw.org/news/2023/06/22/put-peoples-rights-first-syria-sanctions.

157 Assessing the Impact of Sanctions on Humanitarian Work of December 2022, p. 44. Available at https://www.caritas.org/wordpress/wp-content/uploads/2023/03/Final_Report_ARP_Sanctions-2.pdf.

158 Ibid.

159 UNSC, Resolution 2664 (2022), para. 1.

160 Communications reports of special procedures Nos. AL USA 21/2022; AL OTH 106/2022 of 26 October 2022.

olution 2664 (2022) provides for an institutional legal mechanism to ensure its implementation and to avoid any diversion.

The Guiding Principles are based on and in line with the provisions of Security Council Resolution 2664 (2022) which regards the rules of international humanitarian law as applicable in relation to respect for, and the protection of, humanitarian personnel and consignments for humanitarian relief operations[161]. In light of the growing body of evidence of such impacts, the Security Council has regularly urged States to take into account the potential effect of measures aimed at countering terrorism, including its financing, on *"exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law"*.[162]

Humanitarian exemptions need to have a generally accepted wide approach by analogy to the regime envisaged by UN Security Council Resolution 2664 (2022). General licenses adopted by states in the implementation of UNSC Res.2664 (2022) are not sufficient and not effective. States do not only have an obligation to unfreeze assets explicitly prescribed by the UN Security Council, but also to enable the delivery of humanitarian assistance by removing financial, delivery, insurance and other types of impediments. In accordance with art. 24 – 25 of the UN Charter, the provisions on enabling humanitarian assistance of Resolution 2664 (2022), adopted by the Security Council while acting under Chapter VII of the UN Charter, are binding for all states and shall be fully implemented.

The time factor is of great importance in assessing the effectiveness of humanitarian exemptions. General License 23, issued by the Office of Foreign Assets Control (OFAC) for Syria following the earthquake, serves as a real-life illustration of over-compliance and of the ineffectiveness of exemptions that are not accompanied by operational guidance for businesses. The ambiguity and limited duration of the license led to over-compliance among and by financial institutions that opted not to utilize this General License, fearing repercussions for their operations once the license expired[163]. The usual duration of six-months or less of the exceptions is not sufficient to effectively conduct all necessary relief efforts, according to humanitarians and development actors[164]. Many relief operations (such as the rebuilding of hospitals and the replacement of complex medical equipment) take years to complete because permits and specialist machinery

161 UNSC, Resolution 2664 (2022).

162 UNSC Resolution 2462 (2019), para. 24; UNSC Resolution 2482, para. 16.

163 A/78/196, para. 97.

164 See, e.g., Communication of the Special Rapporteur to the United Kingdom of Great Britain and Northern Ireland GBR 6/2023, of 3 April 2023, on Information concerning the comment on the document on Humanitarian Activity INT/2023/2711256 issued on 15 February 2023 under Regulation 61 of The Syria (Sanctions) (EU Exit) Regulations 2019 ("The Syria Regulations") pertaining to the humanitarian activity in relations to the earthquake in Syria and Turkey. Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27952.

replacements are difficult to secure in the six-month window.

12. Equality of all human rights

12.1 All human rights, freedoms, and dignity enshrined in the International Bill of Rights (the acquis of the international community) shall be fully respected and protected while implementing UN Security Council enforcement measures under Chapter VII of the UN Charter, or in the course of any unilateral activity.

12.2 All persons shall enjoy all human rights enshrined in the International Bill of Rights, independently of the aims of any sanctions policy, or implementation and enforcement of relevant sanctions, or over-compliance with the latter.

12.3 All public and private actors shall respect and prioritize all human rights without discrimination when formulating and implementing sanctions and/or compliance policies.

Commentary

The preamble of the Universal Declaration starts with the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family, as *"the foundation of freedom, justice and peace in the world"*. All human rights shall be recognized and ensured by all states as regards all territories under their jurisdictions and control. All rights set forth in the UDHR shall be accepted as *"a common standard of achievement for all peoples and all nations"* [165].

Equality and nondiscrimination are the cornerstone of the Declaration and the Covenants, which form in general the International Bill of Human Rights.[166] The Guiding Principles reiterate that all human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated and should be promoted and implemented in a fair and equitable manner, and comprehensively, without distinction amongst them. The same approach is taken in the GPBHR as concerns business activity[167]. The GPBHR reflect a comprehensive human rights approach. They take into account the International Bill of Human rights as including the UDPH, ICCPR, ICESCR, together with the principles concerning fundamental rights in the eight ILO core conventions and also the Declaration on Fundamental Principles and Rights at Work, with its recognition of the need to observe additional standards as regards vulnerable groups. They also reflect

165 UDHR, preamble, art. 2.

166 Fact Sheet No.2 (Rev.1), The International Bill of Human Rights. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet2Rev.1en.pdf.

167 GPBHR, para. 12.

norms of international humanitarian law[168].

International law recognizes the special status of fundamental human rights and non-derogable human rights in the case of emergency. The ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("DARS") codifies and contains customary norms of international law prohibiting states from using countermeasures that infringe fundamental human rights[169]. The International Law Commission views fundamental human rights rather broadly, as including all basic human rights, including those recognized by the Committee on Economic, Social and Cultural Rights ("CESCR")[170]. Special attentions are paid to non-derogable human rights "*as set forth in relevant treaties*". The ICCPR refers to rights to life (art. 6), freedom from torture (art. 7), the prohibition of slavery (art. 8), the prohibition of imprisonment due no inability to fulfill contractual obligations (art. 11), the presumption of innocence (art. 15), the right to the recognition of personality (art. 16) and the right to freedom of thought, conscience and religion (art. 18)[171]. It is generally recognized that procedural rights and the right to fair trial (art. 14(2-7)) also have a non-derogable imperative nature as safeguarding rights intended to protect all other human rights[172].

Unilateral sanctions, however, infringe all human rights including those identified by the HR Committee as non-derogable. References to a state of public emergency are often used by the United States as a ground for introduction of unilateral sanctions, but they do not correspond to the criteria in art. 4 of the ICCPR[173]. Moreover, the notion of fundamental human rights from which lawful countermeasures cannot derogate is even broader than the usual understanding of non-derogable human rights.

According to article 28 of the Universal Declaration, "*everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized*". As a result, states are under obligation to ensure that at least fundamental human rights are not affected by their unilateral activity (when the criteria of counter-measures are observed), and that no human rights from the International Bill of Human Rights are affected including extraterritorially when the criteria of counter-measures are not met.

In the same way states are obliged to ensure that business activity under their jurisdiction or control does not affect all human rights. It includes the obligation of states to avoid any threats

168 GPBHR with commentaries, commentary to para. 12.

169 DARS, art.50 (1b).

170 DARS with commentaries, P. 132.

171 ICCPR, art. 4.

172 UNHRC, General comment No. 29: Article 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16. Available at: https://www.refworld.org/docid/453883fd1f.html.

173 OL USA/5/2021; A.F. Douhan, "Unilateral coercive measures: notion and qualification", *BSU Journal International Relations* 2(2021): 26 – 48.

to businesses with liability for non-observance of sanctions regimes, shifting responsibility for human rights violations due to implementation of sanctions policies to private actors, as well as an obligation to protect businesses under their jurisdiction or control from any threats or risks of such liability from third states. Businesses are also under an obligation to formulate their operational and other policies to ensure proper respect for all human rights set forth in the International Bill of human rights[174]. No references to the implementation of unilateral sanctions compliance policies have any ground in international law. To avoid or minimize negative humanitarian impact all actors must prioritize human rights in any type of activity, including formulation of foreign policy and other activities covered by multiple UN documents.[175]

The obligation to respect fundamental human rights also refers to measures intended to implement resolutions of the UN Security Council in the sphere of the maintenance of international peace and security. The UN Security Council is not free to take any measures, but rather it must act in accordance with the UN's purposes and principles[176], including the requirement "*to promote and encourage respect for human rights and fundamental freedoms*".[177] Due to the high humanitarian impact of sanctions, the UN Security Council has recalled the need for all states "*to ensure that all measures taken by them to implement sanctions, including in the context of counter-terrorism, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law*"[178] without any limitation as regards the scope of human rights required to be respected.

In trying to abide by a wide range of applicable sanctions measures, implementing actors sometimes adopt an overly broad interpretation of what is required by the relevant sanctions regimes, infringing human rights obligations as a result.[179] This magnifies the harm that sanctions cause to individuals' human rights by widening the scope of effective targets to include non-sanctioned individuals, entities and sometimes entire populations. In consequence, the overall effect on human rights of over-compliance alone can be enormous, potentially in ways that go beyond any

174 GPBHR, paras.12, 23.

175 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, GA Resolution 53/144 of 9 December 1998, preamble, paras. 3, 8. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-right-and-responsibility-individuals-groups-and.

176 Article 24(2), Charter of the United Nations.

177 Article 1(3), Charter of the United Nations.

178 UNSC, Resolution 2664(2022), preamble. Available at: https://digitallibrary.un.org/record/3997259/files/S_RES_2664_%282022%29-EN.pdf.

179 See, e.g., communications by the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Nos. AL USA 25/2022; AL CHE 5/2022; AL OTH 135/2022; AL OTH 134/2022; AL FRA 5/2022; AL USA 19/2022; AL SWE 4/2022; AL OTH 95/2022; AL SWE 3/2021; AL OTH 230/2021; AL USA 13/2022; AL USA 23/2021; AL OTH 207/2021; OL USA 7/2023, OL GBR 6/2023, OL OTH 21/2023, etc. Available at: spcommreports.ohchr.org/TmSearch/Mandates?m.

harm that the sanctions themselves inflict.[180] To avoid such negative consequences, at every stage of sanctions formulation and/or implementation, the Guiding Principles strive for prioritization of human rights in any such activity. These Guiding Principles echo numerous UN documents, which address all members of international community - including individuals, groups and associations, businesses, companies, non-governmental organizations and governments - in promoting human rights as a priority in any activity.[181]

13. Precautionary principle

13.1 All stakeholders shall take all necessary precautionary measures, and perform ongoing humanitarian impact assessments, when formulating and implementing any measures and actions within the UN Security Council' s sanctions frameworks or when acting unilaterally, and shall reformulate them or adjust their enforcement as appropriate to avoid negative impact on human rights.

13.2 Lack of full scientific certainty about specific negative humanitarian impact shall not be used as a reason/ground for ignoring humanitarian concerns and not taking all measures necessary to avoid or minimize over-compliance and possible consequential negative humanitarian impact.

13.3 No reference to an "unintended" character of humanitarian impact shall be invoked to legalize, legitimize or justify adoption of unilateral coercive measures, enforcement or implementation of the above measures, or failure to take all measures necessary to avoid or minimize over-compliance with such measures.

13.4 Sanctions' policies and their implementation shall not affect delivery of essential goods as being contrary to the humanity and precautionary approach *per se*.

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180 *Secondary sanctions, civil and criminal penalties for circumvention of sanctions regimes and overcompliance with sanctions*, A/HRC/51/33.

181 See, e.g., 4thpara of the preamble and para 3 art 18 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, GA Resolution 53/144 of 9 December 1998, correspondingly: "all members of the international community shall fulfil, jointly and separately, their solemn obligation to promote and encourage respect for human rights and fundamental freedoms for all without distinction of any kind, including distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and reaffirming the particular importance of achieving international cooperation to fulfil this obligation according to the Charter".

Commentary

The precautionary approach was first introduced in international environmental law[182]. In accordance with Rio Declaration 1992 "*Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.*" [183] It was later confirmed by ITLOS[184]. The general idea of the precautionary principle is the need for states to act carefully and with foresight when it comes to activities in their jurisdiction which may have negative consequences for the environment, even when there is a lack of scientific evidence.[185] From the international law perspective the precautionary principle is embodied in the obligations to monitor, to assess and take all necessary measures to prevent or minimize any possible harm[186]. States are obliged to exercise a high level of caution when it comes to activities in their jurisdiction which may have negative consequences [initially for the environment].[187]

From a human rights perspective, the precautionary principle has been embodied in the obligation of states to promote, respect and protect human rights, which includes risk-assessment and -preventive behavior. Resolution 2664(2024) highlights the importance of assessing potential humanitarian impacts prior to a Council decision to establish a sanctions regime. Under GPBHR states are obliged to take "*appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication*", including establishment of monitoring and accountability mechanisms[188]. Businesses in their turn are required to respect human rights, to avoid causing or contributing to negative humanitarian impact, to draft

182 The Convention for the Protection of the Marine Environment of the North-East Atlantic, Art. 2. Available at: https://www.ospar.org/site/assets/files/1169/ospar_convention.pdf; United Nations Framework Convention on Climate Change.Available at: https://unfccc.int/resource/docs/convkp/conveng.pdf; The ConventiononBiological Diversity. Available at: https://www.cbd.int/doc/legal/cbd-en.pdf; The Convention on the Protection and Use of Transboundary Watercourses and International Lakes. Available at: https://unece.org/DAM/env/water/pdf/watercon.pdf, etc.

183 Rio Declaration on Environment and Development, pr. 15.Available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

184 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, ITLOS Reports 2011, p. 10, para. 135. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf.

185 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, ITLOS Reports 2011, para. 131.

186 Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment (Separate Opinion of Judge Cançado Trindade), ICJ Reports 2010, para. 61. Available at: https://www.icj-cij.org/sites/default/files/case-related/135/135-20100420-JUD-01-04-EN.pdf; M.Stevens, "The Precautionary Principle in the International Arena", Sustainable Development Law and Policy2 (2)(2002), P.15.

187 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area,* Advisory Opinion, ITLOS Reports 2011, para. 131.

188 Para.1, GPBHR, commentary to para. 6.

proper policies, to exercise due diligence, to establish mechanisms for remedies, and to identify, prevent, mitigate or compensate any human rights harm[189].

Unilateral sanctions, the means of their enforcement and over-compliance have a well-documented record of serious negative humanitarian impact[190]. To be able to collect and verify information about such impact, the mandate has launched a Monitoring and Impact Assessment Tool[191] which can be used and open for submission of relevant information by any stakeholder[192]. Humanitarian exemptions are frequently shown to be ineffective and inefficient (see commentary to para. 8)[193].

References to the "unintended" humanitarian consequences of unilateral primary and secondary sanctions, and statements that businesses are solely responsible for instances of over-compliance and excessive de-risking, do not provide any grounds for the legality or legitimacy of the adoption and enforcement of unilateral primary and secondary sanctions, or the imposition of civil and criminal penalties for their alleged circumvention.[194] States and businesses are obliged to undertake due diligence (see commentary to para. 4, 8) and all appropriate policy, legislative (internal policy drafting), administrative, and operational measures to establish mechanisms of preliminary assessment of possible humanitarian harm. This obligation includes requirements for monitoring, assessment of risks and impact, mitigation and accountability for human rights harm in a sanctions environment.

An absolute requirement is to avoid any interference with delivery of essential goods and services. For this purpose, the concept of essential goods and services must be understood broadly and cannot be limited to food and medicine (see Commentary to para. 8, 11).

14. The principle of non-discrimination

14.1 States shall not purport to derogate from their human rights obligations, including their obligation not to discriminate against any person on the basis of race, nationality, gender, political opinion or any other recognized ground, and shall ensure that businesses and other entities under their jurisdiction or control do not formulate or implement discriminatory policies.

189 GPBHR, paras.13, 15, 17.

190 See A/HRC/54/23; A/78/196; reports on country visits to Syria, Iran, Zimbabwe, Venezuela, China. Available at:https://www.ohchr.org/en/documents-listing?field_content_category_target_id%5B182%5D=182&field_entity_target_id%5B1282%5D=1282.

191 Monitoring and Impact Assessment of Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights.Availableat:https://ucmmonitoring.ohchr.org.

192 Submission form. Available at:https://survey.ohchr.org/762521?lang=en.

193 A/78/196; JAL USA 21/2022; JAL OTH 106/2022.

194 Para.78 of the GA Report 2023.

14.2 Businesses shall take all appropriate measures to elaborate, monitor and implement the compliance policy aligned to a human rights-based approach on a non-discriminatory basis, also extraterritorially. This approach shall apply to all operational processes, all levels of decision-making, all products and services.

14.3 No collective punishment is allowed. Nationals or residents of countries under sanctions, relatives or friends of designated individuals shall not be subjected to any limitation or face negative consequences due to their place of birth, nationality, residence, IP address, personal ties or any other nexus with designated states, entities, individuals.

Commentary

The principle of non-discrimination is fundamental for all human rights systems and is embodied in numerous human rights instruments[195]. The HR Committee understands discrimination as comprising *"any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms"*.[196] As the list of the grounds of discrimination is not exhaustive, today UCMs, along with the means of their enforcement and over-compliance regularly result in discrimination against people on the ground of their nationality, place of birth, residence, phone or IP address. Indeed, entire populations (nationals and residents of countries under sanctions) are habitually targeted, with heavy violation of their human rights and SDG 10[197].

Sanctions-related discrimination has a mass character and prevents nationals or residents of countries under sanctions from benefitting from international cooperation in academia, sports, arts and culture. Examples include Iran, Syria, Venezuela, Russia, Zimbabwe and Cuba.[198] Such discrimination excludes entire populations from use of online platforms (North Korea, Cuba,

195 UN Charter, preamble, 34; UNHR, art.7, 23; ICCPR, art.4, 24, 26; ICESCR, art.2; CRC, art.2 etc.

196 Human Rights Committee's General comment 18 on Non-Discrimination, 10/11/1989, HRI/GEN/I/Rev. 5. Available at: https://www.refworld.org/legal/general/hrc/1989/en/6268.

197 UNGA, Resolution 70/1 Transforming our world: the 2030 Agenda for sustainable development, 21 October 2015, 2015, A/RES/70/1. Available at: https://documents.un.org/doc/undoc/gen/n15/291/89/pdf/n1529189.pdf.

198 *Visit to the Bolivarian Republic of Venezuela,* A/HRC/48/59/Add.2, para. 78; *Unilateral sanctions in the cyber world: tendencies and challenges,* A/77/296, paras. 35 – 36; *Visit to the Islamic Republic of Iran*, A/HRC/51/33/Add.1, para. 55; *Visit to Zimbabve*, A/HRC/51/33/Add.2, para. 17; *Visit to the Syrian Arab Republic*, A/HRC/54/23/Add.1.

Iran, Venezuela etc.[199]), applications and software[200], events and training for civil society actors (for example, in Zimbabwe) *inter alia* due to the challenges in getting visas, procurement of tickets, booking hotels, opening or having bank accounts abroad (Iran[201], Venezuela, Zimbabwe[202], Russia, Belarus[203]). Sanctions-related discrimination also excludes populations from any possibility of receiving humanitarian assistance (Syria, Iran), or buying necessary medicine and medical equipment (Venezuela, North Korea, Cuba, Iran, Belarus, etc.).[204] It cuts off scholars, students and professionals from access to training materials, academic supplies and equipment, publication in scientific journals, academic discussion and cooperation[205].

Nationals of countries under sanctions face demands that they close their bank accounts in the EU, UK and the USA, or limitation of their activity. The victims include people with permanent residence who obviously need banking facilities. They even include people with surnames that sound similar to surnames of citizens of countries under sanctions[206], and diplomatic agents of countries under sanctions.[207]

Discrimination on the basis of sanctions denies access to justice, equal protection by law, access to remedies and redress[208]. Multiple reports refer to the attempts to introduce a presumption of legality of all types of sanctions and to extend them to everything that might have anything to do with target countries, their nationals or companies[209].

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199 *Unilateral sanctions in the cyber world: tendencies and challenges*, A/77/296, paras. 30 – 33; JAL/USA/11/2024. Available at:https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28933.

200 A/78/196, para. 25. Available at: https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/78/196&Lang=E

201 *Visit to the Islamic Republic of Iran*, A/HRC/51/33/Add.1, para. 56.

202 *Visit to Zimbabve,* A/HRC/51/33/Add.2, paras. 14 – 16.

203 *EU foreign ministers agree to scrap Russia visa deal but stop short of full tourist ban*, Euronews 2022. Available at: www.euronews.com/my-europe/2022/08/31/eu-foreign-ministers-agree-to-scrap-russia-visa-deal-but-stop-short-of-full-tourist-ban.

204 *Negative impact of unilateral coercive measures on the enjoyment of human rights*, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan, A/75/209, 21 July 2020, paras. 38 – 39, 49, 52 – 57. Available at: documents-dds-ny.un.org/doc/UNDOC/GEN/N20/190/03/pdf/N2019003.pdf?OpenElement.

205 JAL USA/9/2022; JAL OTH 38/2022; JAL OTH 37/2022; JAL/OTH/39/2022; JAL/OTH/40/2022.

206 *Scores of customers have sued over "Kafkaesque" mistreatment*, RT, 26 August 2022.Available at:www.rt.com/news/561626-french-banks-russians-discrimination/.

207 *Visit to the Islamic Republic of Iran*, A/HRC/51/33/Add.1; *Visit to Zimbabve*, A/HRC/51/33/Add.2; *Visit to the Syrian Arab Republic*, A/HRC/54/23/Add.1.

208 *Access to justice in the face of unilateral sanctions and overcompliance,* A/79/183, paras. 5, 15, 48, 59.Available at: https://documents.un.org/doc/undoc/gen/n24/213/84/pdf/n2421384.pdf.

209 Ibid.,paras. 18, 20.

The costs and consequences of sanctions for people of countries affected constitute a form of collective punishment. Collective punishment is prohibited under international law even in the wartime. In particular, under international humanitarian law *"the collective punishment of a group of persons for a crime committed by an individual is forbidden"* [210]. The HR Committee in General comment No. 29 treats collective punishment and related violation of the presumption of innocence as a violation of peremptory norms, which is impermissible even in a time of emergency[211]. It follows that unilateral sanctions, means of their enforcement and over-compliance can all be regarded as collective punishment and are therefore illegal under international law where they interfere with human rights on the basis of some nexus to countries under sanctions.

The current practice of imposing unilateral sanctions against family members or friends of directly designated individuals without producing and presenting evidence of any wrongdoing or criminal act on their part[212] constitutes a clear example of collective punishment and is also impermissible under human rights law. The European Court of Justice has also recognized that the mere existence of family links is not a sufficient ground for listing[213].

15. The principle of proportionality

15.1 All measures undertaken by any actor to implement UN Security Council sanctions must be proportionately interpreted in a strict sense, i.e. such measures must be necessary and suitable to achieve the desired purpose, and must not impose a burden on an individual or a community that is excessive in relation to the sought objective.

15.2 States shall not purport to confer immunity on any person or entity in respect of their over-compliance with measures imposed by the Security Council under Chapter VII of the U.N. Charter or their purported compliance with unilateral coercive measures.

15.3 Any means of pressure taken by States or international organizations in the course of

210 Art. 87of the III Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949. Available at: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32_GC-III-EN.pdf; Art. 75.2.d of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and;Art. 4.2.bof the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. Available at: https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977.

211 General comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights, para. 11. Available at: https://digitallibrary.un.org/record/451555/files/CCPR_C_21_Rev.1_Add.11-EN.pdf.

212 AL/OTH/123/2024; AL/CHR/4/2024.

213 *Tomana,* T-190/12, para. 235. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2015.190.01.0010.01.ENG; see A/79/193, para. 46.

counter-measures against other subjects of international law shall be performed in full compliance with the standards of the law of international responsibility, and must be proportionate to the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question, being limited to non-performance for the time being of international obligations with no effect to the obligations for the protection of human rights.

Commentary

The UN Security Council bears *"primary responsibility for the maintenance of international peace and security"* in accordance with Article 24 (1) of the UN Charter and is authorized to take enforcement measures with respect to threats to the peace, breaches of the peace, and acts of aggression[214](chapter VII of the Charter). In particular, such measures may include *"complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations"* [215]. Such measures not involving the use of armed force imposed by the UN Security Council within its competence to maintain international peace and security, including struggling against international terrorism, protecting human rights, promoting non-proliferation etc.[216].

Sanctions of the UN Security Council are legally binding on the UN member-states [217]. Moreover, by virtue of Article 103 of the UN Charter they prevail over any other international agreement[218]. As noted in the commentary to paras. 11 and 12 sanctioning resolutions of the UN Security Council shall be interpreted narrowly and in good faith. Moreover, states are obliged to exercise due diligence to make sure that human rights are not affected by enforcing resolutions of the UN Security Council, having regard to the fact that many sanctions promulgated by the UN Security Council have considerable potential to damage human rights[219]. For its part, since 2005,

214 Chapter VII of the UN Charter.

215 Art. 41 of the UN Charter.

216 See Sanctions. Available at: https://main.un.org/securitycouncil/en/sanctions/information.

217 The Charter of the United Nations: a commentary / ed. by Simma, Bruno; H. Mosler(et ot.) (Oxford; New York : Oxford University Press, 2012), pp. 800 – 803.

218 Article 25, 103 of the UN Charter; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 3, para. 39. Available at: https://www.icj-cij.org/sites/default/files/case-related/88/088-19920414-ORD-01-00-EN.pdf.

219 Coping with the Humanitarian Impact of Sanctions: An OCHA Perspective.Available at: https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.seco.admin.ch/dam/seco/de/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/Exportkontrollen/Sanktionen/Smart%2520Sanctions%2520%25E2%2580%2593%2520Gezielte%2520Sanktionen/Bruderlein,%2520Claude,%2520Coping%2520with%2520the%2520Humanitarian%2520Impact%2520of%2520Sanctions,%2520An%2520OCHA%2520Perspective,%2520December%25201998.pdf.download.pdf/Bruderlein,%2520Claude,%2520Coping%2520with%2520the%2520Humanitarian%2520Impact%2520of%2520Sanctions,%2520An%2520OCHA%2520Perspective,%2520December%25201998.pdf&ved=2ahUKEwic05zHl7SIAxV3yzgGHazvCwcQFnoECCAQAQ&usg=AOvVaw3NU-ROJdD4owCYnXWb6ORn.

the UN Security Council has mostly imposed targeted sanctions after 2005 and seeks to ensure that humanitarian needs of those affected by its sanctions are properly addressed.

The precise scope of the obligations deriving from the UN Security Council can be deduced from the content of Article 2(2), which lays down the obligation to fulfill in good faith the obligations assumed by them in accordance with the UN Charter. The concept of good faith here requires the states to take measures to fully, effectively and promptly, but they must not misuse Security Council resolutions for achievement of their own unilateral goals.

The interpretation of the provisions of the UN Security Council must *be strictosensu*, i.e. *"literally and without exaggeration or approximation"* [220]. This should be distinguished from one of the sub-principles of the principle of proportionality itself (proportionality strictosensu) under which *"it is evaluated whether a measure overall is excessive, attributing relative weight to each component of the principle involved, therewith taking into account all available factors and preventing unreasonable results"* [221].

The principle of sovereign equality of states is embodied in the UN Charter as well as Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[222] and the Helsinki Final Act,[223] and its importance[224] and customary nature was confirmed by the ICJ.[225] This principle limits the power of any state to take any coercive action towards other state(s) on a unilateral basis, as if acting as a superior power. States enjoy the right to take countermeasures in respect to any international wrongful act committed against them in full conformity with the law of international responsibility[226] and they can implement retortions to respond to unfriendly acts of other states if none of their international obligations are violated by such actions[227]. Any measures that are not explicitly set forth in the resolutions of the UN Security Council, including the expansion of lists of designated individuals or companies, or implementation of resolutions for broader objectives

220 See https://www.oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1945.

221 T. Cottier T. (et. oth.), "The Principle of Proportionality in International Law: Foundations and Variations", *Journal of World Investment & Trade* 18 (2017): 628 – 672. P. 629.

222 See https://treaties.un.org/doc/source/docs/A_RES_2625-Eng.pdf.

223 See https://www.osce.org/files/f/documents/5/c/39501.pdf.

224 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99, para. 57. Available at: https://www.icj-cij.org/sites/default/files/case-related/143/143-20120203-JUD-01-00-EN.pdf.

225 Ibid.

226 International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence of Kosovo, Advisory Opinion, ICJ Reports (2010), para. 80. Available at: https://www.icj-cij.org/node/101885.

227 Th.Giegerich, *Retorsion*. Available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e983.

than intended by the Security Council, constitute unilateral sanctions. If such measures do not qualify under the criteria and conditions of countermeasures or retortions, they are illegal under international law. Individual states and states belonging to regional organizations are not authorized to take any action beyond that authorized by the UN Security Council.

Illegal activity of this kind gives rise to accountability and responsibility under international law in accordance with the law of international responsibility. No reference to the unintended character of negative humanitarian consequences, or pursuit of common high goals, or the need for additional measures to achieve objectives of the UN Security Council can be used as a circumstance precluding wrongfulness of such behavior.

Several Sanctions' Committees have either Implementation Assistance Notices[228] or Guidance on due diligence[229] to ensure compliance with the measures adopted by the UN Security Council[230].

The duty to interpret the UN Security Council sanctions in a strict sense to achieve the desired objective also derives from the principle of proportionality well-established in human rights law in the context of possible restrictions of human rights[231]. A narrow approach must be followed assiduously with due regard for conditions of "*necessity*" and "*suitability*" in order to prevent over-compliance and to avoid additional burdens on people in sanctioned states. The HR Committee has stated that "*where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights*" [232].

The word "*suitability*" is used here to underline the permissibility of only those measures, which are carried out through methods that themselves do not violate norms of international law. The methods must comply with jus cogens, the principles and norms of international human rights law, international humanitarian law etc. They must be reasonable and capable (realistic and practical)[233] of achieving the goal identified in a relevant UN Security Council Resolution, and they must maintain a necessary level of human rights protection for those targeted and any general population affected.

Under international law countermeasures are regarded as circumstances precluding wrongful-

228 See https://main.un.org/securitycouncil/en/sanctions/1718/implementation-notices; https://main.un.org/securitycouncil/en/sanctions/1591/implementation-assistance-notices; https://main.un.org/securitycouncil/en/sanctions/1718/implementation-notices etc.

229 See https://documents.un.org/doc/undoc/gen/n10/615/06/pdf/n1061506.pdf.

230 The Charter of the United Nations: a commentary, pp. 800 – 803.

231 Art. 1 ICCPR.

232 UN Human Rights Committee, General comment No. 31, para.6; CCPR/C/75/D/932/2000, 21 July 2002, para. 13.

233 Popovćet al. (IT-05-88-A), para. 1929. Available at: https://www.icty.org/en/case/popovic.

ness if they are taken in accordance with limitations set forth in international law[234]. In particular, they can only be taken by the directly affected States in response to violations of international obligations in order to restore fulfilment of the obligations previously breached[235].

Under art. 22 of the Draft Articles on the Responsibility of International Organisations ("DARIO"), countermeasures can only be taken by international organizations (e.g. the EU) in accordance with the substantive and procedural conditions required by international law (art. 22(1), they shall not be inconsistent with the rules of the organization; no appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparations (art. 22 (2)). Such countermeasures may be taken against a member State or international organization in response to a breach of an international obligation under the rules of the organization only if such countermeasures are provided for by those rules (article 22(3)).

Countermeasures shall be temporary and proportionate to the violation, and shall not affect "*obligations for the protection of fundamental human rights; obligations of a humanitarian character prohibiting reprisals; other obligations under peremptory norms of general international law*[236]*; obligations to respect the inviolability of diplomatic or consular agents, premises, archives and documents of the state*[237]*.*

Countermeasures can also be taken by States other than directly affected States in response to violation of ergaomnes obligations like aggression, genocide, apartheid or a gross violation of fundamental human rights shocking the conscience of Mankind. Thus, DARS provides for the possibility of non-directly injured states to invoke responsibility only if "*the obligation breached is owed to the international community as a whole*" [238], *i.e.*, in response to the "*serious breach by a State of an obligation arising under a peremptory norm of general international law*" if it "*involves a gross or systematic failure by the responsible State to fulfil the obligation*" [239] with the purpose to cease the internationally wrongful act and to guarantee its non-repetition[240]. The International Court of Justice concluded in a number of cases that such violations can include acts of aggression, genocide, apartheid, impediments to the right to self-determination, slavery, slave trade, racial discrimination, torture, and serious violations of international

234 DARS, Chapter II. Available at:https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf; DARIO. Available at:https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf.

235 DARS, art.49(1); DARIO, art.51(1).

236 DARS, art.50(1); DARIO, ART.53(1).

237 DARS, art.50(2).

238 Ibid., art. 48(1b).

239 Ibid, art. 40.

240 Ibid, art. 48(2). See also B. Simma, "Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations ErgaOmnes?",pp. 126 – 127.

humanitarian law of a *"systematic, gross or egregious nature"* [241]. Traditionally, these situations are usually qualified by the UN Security Council as constituting a threat to, or breach of, international peace and security.

Even in the case of a breach of ergaomnes obligations, countermeasures must be restricted to addressing the *"non-performance for the time being of international obligations of the State taking the measures towards the responsible State"* [242], proportionate with the injury suffered[243], with due account for the requirements of humanity and the rules of good faith[244], and implemented in accordance with the rules of art. 52 of DARS[245] and art.54 of the DARIO[246].

16. Accessibility of information

16.1 Access to information through all types of communication services is an indispensable element and a mediator of the complex of human rights. No sanctions shall interfere with the right to information through all media and all means of communication, as it is set forth in art. 19 – 20 of the ICPPR.

16.2 States, international and regional organizations shall provide transparency, timeliness and adequacy of all information on matters related to sanctions, including reporting on humanitarian impacts, and the free and non-discriminatory character of access thereto. Access to IT-platforms shall be guaranteed by the operators.

16.3 All sanctioning actors shall create enabling environments and maintain open channels for communication on human rights and humanitarian aspects relevant to sanctions and their implementation, including as a primary obligation, but not limited to, the establishment of focal points with adequate financial and human resources.

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241 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, International Court of Justice, para. 33. Available at: https://www.icj-cij.org/sites/default/files/case-related/50/050-19700205-JUD-01-00-EN.pdf; *Case Concerning East Timor (Portugal v. Australia)*, International Court of Justice, June 30, 1995, para. 29. Available at:https://www.refworld.org/cases,ICJ,40239bff4.html. See also, DARS, pp. 111 – 113, 127.

242 DARS, art. 49. Even so, B. Geyrhalter, *e.g.*, claims it is possible that economic sanctions may be applied to states responsible for mass violations of fundamental human rights; see B. Geyrhalter, *Friedenssicherung durch Regionalorganizationen ohne Beschluß des Sicherheitsrates* (Cologne: LIT, 2001), p. 65.

243 DARS, art. 51.

244 See *The Naulilaa Case (Portugal vs. Germany)*, Special Arbitral Tribunal, 1928, p. 1026. Available at: https://legal.un.org/riaa/cases/vol_III/1371-1386.pdf; DARS, comments to art. 50(6).

245 DARIO, *Yearbook of the International Law Commission*, 2011, vol. II, Part Two, P. 94 – 95; DARS with commentaries with commentaries, p. 135.

246 Ibid.

16.4 Focal points shall provide detailed information, clarification and advisory services, free of charge and in a timely manner, regarding licensing, the scope of humanitarian carve-outs and relevant procedural matters, including administrative and legal procedures for de-listing of designated individuals and entities, and arrangements to secure access to justice.

Commentary

Access to information constitutes one of the fundamental human rights[247] set forth in art. 19 – 20 of the ICCPR, and art.19 of the UDHR.[248] It is viewed as one of the indicators of the Sustainable Development Goals (16.10)[249]. Access to information on human rights also serves as a means to guarantee other human rights and fundamental freedoms as stipulated in art. 2 (1) of the ICPPR which states that: "*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant*" both "*among public officials and State agents but also among the population at large.*" [250] The HR Committee in General comment 3 has made the same point: "*it is very important that individuals should know … their rights under the Covenant (and the Optional Protocol, as the case may be)*" [251]. Access to information on economic, social and cultural rights is considered within the term "*appropriate measures*" (in particular, educational and other measures) to satisfy the obligation under the ICESCR[252]. The right of access to information must be ensured both by states and international organizations[253]. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stresses: that "*Transparency within intergovernmental organizations advances the same objectives that underlie the expansion of freedom of information and open government initiative*" [254].

Since unilateral sanctions affect the human rights set forth in the ICCPR in many ways, states are under an obligation to provide all necessary, adequate, transparent and comprehensive informa-

247 Order of the Inter-American Court of Human Rights,Case of Claude-Reyes et al. v. Chile, Judgment of September 19, 2006 (Merits, Reparations and Costs).Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf.

248 See https://www.un.org/en/about-us/universal-declaration-of-human-rights.

249 SDG indicator metadata. Available at: https://unstats.un.org/sdgs/metadata/files/Metadata-16-10-02.pdf.

250 https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D, para 7.

251 CCPR, General comment No. 3: Article 2 (Implementation at the National Level), para 2; see https://www.refworld.org/legal/general/hrc/1981/en/27231.

252 CESCR, General comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), para. 7. Available at: https://humanrights.asn.au/ICESCR/GeneralComment3.

253 A/68/362, A/72/350; see https://unesdoc.unesco.org/ark:/48223/pf0000371485/PDF/371485eng.pdf.multi.

254 A/72/350, paras.19, 21.

tion concerning any sanctions imposed[255]. Since the UN Security Council itself must respect international human rights[256](art. 1(3) and 55 c) of the UN Charter, it is responsible for providing full access to information on the sanctions regime, delisting process, humanitarian exemptions, ombudsman service and all necessary clarifications with respect to these issues.

As unilateral sanctions impose serious limitations on the rights of designated individuals and of general populations, sanctioning states are under obligations to provide detailed information about sanctions regulations, grounds for listing, relevant evidence, general licenses, de-listing processes, humanitarian exemptions and instructions for humanitarian actors, mechanisms of appeal to achieve de-listing and access to courts. Information on unilateral sanctions is quite clearly of public interest since it affects well-being of individuals and the life of communities[257] by impacting human rights[258]. As fundamental human rights (see Commentary to para. 12) cannot be affected even by countermeasures,[259] access to information on unilateral sanctions or means of their enforcement cannot be subject to any restrictions, and must be provided in online and offline modes[260] in a timely manner.[261] It should be "adequate" in terms of effectiveness and practical accessibility.

As matters stand, and very unfortunately, this obligation is mostly ignored. Unclear, ambiguous, fast-evolving and overlapping sanctions regimes and broad, unclear and confusing terminology of sanctions regulations lead to uncertainty also concerning their scope of application. That in turn produces over-compliance and oppressive zero-risk policies[262]. Designated individuals and companies are not able to get access to information used as a ground for their listing, civil charges or criminal penalties[263]. Information on civil and criminal penalties for circumvention

255 See https://documents.un.org/doc/undoc/gen/g11/453/31/pdf/g1145331.pdf, para. 19.

256 Commentary to the UN Charter, Oxford Public International Law, (c) Oxford University Press, 2015. All Rights Reserved. Subscriber: Gujarat National Law University. Available at: http://opil.ouplaw.com;

257 ECHR, *Case of Magyar Helsinki Bizottság v. Hungary*, judgement, para.162. Available at:https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-167828%22]}.

258 Ibid, para. 20; ICCPR, General comment № 34 (Article 19: Freedoms of opinion and expression), para. 3. Available at:https://documents.un.org/doc/undoc/gen/g11/453/31/pdf/g1145331.pdf; A/68/362, para. 20.

259 DARS, art.50(1b).

260 UNESCO, Development and Promotionof the Right to Informationin National Frameworks, p. 13. Available at:https://unesdoc.unesco.org/in/documentViewer.xhtml?v=2.1.196&id=p::usmarcdef_0000385179&file=/in/rest/annotationSVC/DownloadWatermarkedAttachment/attach_import_d521161c-ff22-425a-8010-4369f432329e%3F_%3D385179eng.pdf&locale=ru&multi=true&ark=/ark:/48223/pf0000385179/PDF/385179eng.pdf#1%20-%20updatePolicy%20Guidelines%20Version%20V7_28_02_23.indd%3A.18384%3A200.

261 Ibid, para. 20.

262 A/78/196, para.9; A/HRC/51/33, para.45.

263 A/79/183, paras.49, 59, 63.

of sanctions regimes are very fragmentary or not available at all[264]. The situation is substantially complicated by the proliferation of complex non-legal documents, such as guidance documents, frequently asked questions and other forms of non-normative legal acts extensively interpreting legal regulations[265]. This exacerbates over-compliance and de-risking policies of banks, businesses and other actors, which often prefer to discontinue their activities and exclude any nexus to sanctioned jurisdictions for fear of severe penalties.

The right to seek and receive information also includes the right of access to information on human rights violations caused by the impositions of unilateral sanctions[266]. The information regarding violations of human rights or humanitarian law is subject to a high presumption of disclosure, and in any event may not be withheld on national security grounds[267]. In the past, as noted above, sanctioning states have often failed to monitor and assess the humanitarian impact of their unilateral sanctions and over-compliance (see Commentary to para. 13), with the result that no information in that regard is available.

Information about de-listing, licensing, and mechanisms for humanitarian deliveries is also fragmentary or not available. From that perspective one contact point on sanctions created within the EU is not sufficient to ensure easy, prompt, effective and practical access to information, especially as it functions merely as a mailbox[268]. Other sanctioning states do not establish any competent body or contact point in that regard. Because contradictory interpretations of sanctions regimes result in over-compliance[269], international intergovernmental organizations as well as states must establish focal points responsible for providing free of charge, adequate, timely and accessible information on unilateral sanctions, humanitarian carve-outs, delisting processes and other procedural issues related to human rights protection (the right to legal aid, the right to fair trial etc.). Such focal(contact) points themselves should comply with human rights standards on access to information.

Unilateral sanctions, the means of their enforcement and over-compliance also affect access to online resources and communication platforms including UN ones[270] and access to databases (including professional ones, like PubMed[271]). This often limits access to information that con-

264 A/78/196, paras.20 – 24.

265 A/78/196, para. 15.

266 ICCPR, General comment № 34(Article 19: Freedoms of opinion and expression), para.3.

267 ICCPR, General comment № 34 (Article 19: Freedoms of opinion and expression), paras.21, 66 (b).

268 EU-level contact point for humanitarian aid in environments subject to EU sanctions. Available at: https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/humanitarian-assistance-environments-subject-eu-sanctions_en#contact-point.

269 AL DEU 1/2024, 27 February 2024. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28799.

270 A/77/296, paras. 20 – 21, 31 – 32; JAL USA 11/2024.

271 A/77/296, para. 32.

tradicts the political position of the sanctioning country, which frequently castigates dissent as defamation and disinformation[272].

Access to Internet technologies and Internet resources have been referred to as a fundamental aspect of the right to development – including overcoming the pandemic.[273] The same approach is taken by the UN Human Rights Council[274] and by the Special Rapporteur on the freedom of opinion[275]. The HR Council emphasizes the importance of free, fair and balanced access to information[276]) to ensure the right to development.

Possible restrictions on freedom of expression and access to information have been set out in a number of international treaties including para. 3 of art.19 and art. 20 of the ICCPR: propaganda for war; statements in favor of national, racial or religious hatred and incitement to discrimination, hostility or violence;[277] orders not to leave anyone alive;[278] incitement to commit acts of genocide;[279] distribution of child pornography;[280] dissemination of racist and xenophobic materials through online means, threats and insults;[281] denial, extreme minimization, approval or justification of genocide or crimes against humanity;[282] calls for the overthrow of a government,

272 A/77/296, paras.20 – 22.

273 UN Social Forum on 8 October 2020 (2020). Available at:http://webtv.un.org/watch/2nd-meeting-social-forum-2020-/6199054565001/?lan=russian#player.

274 HRC, *The promotion, protection and enjoyment of human rights on the Internet*, A/HRC/32/L.20, 27 June 2016, preamble.Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/131/89/PDF/G1613189.pdf?OpenElement.

275 UNGA, *Promotion and protection of the right to freedom of opinion and expression*, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 66/290, 10 August 2011, paras. 45 – 75. Available at:https://www.ohchr.org/documents/issues/opinion/a.66.290.pdf.

276 HRC, Resolution 33/3 'Promotion of a democratic and equitable international order', 29 September 2016, para. 6j. Available at: https://digitallibrary.un.org/record/849536/files/A_HRC_RES_33_3-EN.pdf?ln=en.

277 Art. 20 of the ICCPR.

278 Art.40 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

279 Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, entered into force on 12 January 1951, 78 UNTS 277, art. 3.

280 Art 9 of The Convention on Cybercrime (Budapest Convention, ETS No. 185). Available at: https://www.coe.int/en/web/conventions/-/council-of-europe-convention-on-cybercrime-ets-no-185-translations.

281 Art. 3 – 5 of the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189).Available at: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=189.

282 Ibid., Art. 6.

involvement in terrorist activities. [283]

Ⅳ. STATE ORIENTED PRINCIPLES
A. FUNDAMENTAL PRINCIPLES FOR STATES AND REGIONAL ORGANIZATIONS

17. The principle of respect for the rule of law

17.1 The UN Security Council shall formulate sanctions resolutions in clear, non-ambiguous terms to facilitate the understanding of their ambit and application, outlining the measures to be taken by States for their enforcement and implementation, as well as provisions on humanitarian exemptions.

17.2 States and regional organizations shall not adopt or implement any means of pressure that are incompatible with their obligations under international law, in relation to substantive content, exercise of jurisdiction and access to remedies. Coercive measures can only be taken by States and international organizations in the course of the implementation of resolutions of the UN Security Council adopted under Chapter VII of the UN Charter, or when such measures do not violate their international obligations (retorsions), or their wrongfulness is precluded under international law when the measures constitute counter-measures in full conformity with the rules of the law of international responsibility. All other unilateral means of pressure constitute unilateral coercive measures and are illegal under international law. States and regional organizations shall not exercise their jurisdiction extraterritorially, contrary to the principles of sovereign equality and of non-intervention into the domestic affairs of states.

17.3 Secondary sanctions, civil and criminal penalties for the circumvention of primary unilateral sanctions regimes, as well as any other mechanism for their implementation, do not form any legal basis to circumvent peremptory norms of public international law as well as other customary law or treaty obligations.

17.4 States are under the obligation to refrain from implementing unilateral sanctions imposed by other States and/or regional organizations and are obliged to ensure that businesses under their jurisdiction and/or control do not comply and/or over-comply with such unilateral sanctions.

17.5 States shall take all necessary legislative and administrative measures to avoid over-compliance with sanctions.

283 UNGA, Resolution 67/357 'Report of the Special Rapporteur to the General Assembly on hate speech and incitement to hatred', 7 September 2012. Available at: https://documents.un.org/doc/undoc/gen/n12/501/25/pdf/n1250125.pdf.

17.6 States shall provide for accountability- and redress-mechanisms for violations of human rights perpetrated in the context, or as a result of, sanctions' policies.

17.7 Sanctions, secondary sanctions and over-compliance shall not obstruct access to justice, the administration of justice, respect for judicial procedures, and access to effective remedies.

Commentary

The Rule of Law is recognized in the practice of the United Nations as one of the pillars of the world order. In the report on the rule of law and transitional justice in conflict and post-conflict societies 2004, the UN Secretary General reflects that "*the rule of law shall rely on measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law … legal certainty, avoidance of arbitrariness and procedural and legal transparency*" and rely on "*capacity, performance, integrity, transparency and accountability*"[284].

The declaration of a high-level meeting of the General Assembly on the rule of law at national and international levels in 2012 called for the international order to be "*based on the rule of law, and they both to be "indispensable foundations for a more peaceful, prosperous and just world*" (para. 1).[285] The declaration makes a direct link between human rights and the rule of law as core principles of the United Nations (para. 5). It also requests the development of fair trial [procedures] and judicial institutions (para. 14), the right to remedies for victims and responsibility of penetrators of international crimes (paras. 21 – 22). All of these are seen as safeguards of a Rule of Law – based international order. A similar approach with a focus on access to remedies and accountability of perpetrators is taken in the 2030 Agenda (target 16.3 of the Sustainable Development Goals)[286], and the Report of the UN Secretary General "Our common Agenda" (2021) (paras. 23, 94, 96, 113)[287] – the New vision of the UN Secretary General on the rule of law,[288] regarded as necessary inter alia for the maintenance of international peace and

284 UNSC, 'The rule of law and transitional justice in conflict and post-conflict societies', S/2004/616. Available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/PCS%20S%202004%20616.pdf; The United Nations Rule of Law indicators: Implementation Guide and Project tools, 2011, p. v. Available at: https://peacekeeping.un.org/sites/default/files/un_rule_of_law_indicators.pdf.

285 Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, A/RES/67/1, para. 1.

286 Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1.

287 Our common Agenda, Report of the UN Secretary General, 2021. Available at: https://www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Report_English.pdf.

288 Our common Agenda, Report of the UN Secretary General, 2021. Available at: https://www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Report_English.pdf.

security[289].

By contrast, the United States' announcement and pursuit of a "*Rules based international order*" [290] as a political concept has nothing to do with international law.[291] It appears to be an attempt to replace universal treaties (to many of which in Human Rights law or international humanitarian law the US is not a party) with some domestic law concepts.[292] This contradicts the principles of international law - especially the fundamental principles of the sovereign equality of states and non-intervention in the domestic affairs of states, respect for international obligations (*pactasuntservanda*), the principle of the non-use of force, the principle of cooperation etc. It also violates the general principle of law - *par in parem non habet imperium* – Equals have no sovereignty over each other. It runs counter to the strictures of the Vienna Convention on the Law of Treaties concerning the creation of obligations for third states without their explicit consent[293].

By its very nature, international law has a consensual character. It follows that in principle it cannot admit the possibility of one state or group of states imposing their own rules over other states. As a result, the concept of the "*rules based international order*" where the rules are promulgated by one state or group of states goes against the recognized concept of the "*adherence to the rule of law*" and is illegal under international law.

Extraterritorial application of secondary sanctions, and civil and criminal cases for circumvention of sanctions regimes results in prosecution for acts often not criminalized in the country of nationality/residence. This is accompanied by a range of legal problems, including low standards of proof, difficulties in accessing legal support for defence, and [extradition without legal grounds].[294] Practitioners refer to the high risk of arbitrary interpretations of alleged circumvention where, on a proper analysis, there is no offence[295] even under sanctions regulations. Penalties and designations for circumvention in such circumstances violate requisite standards of fair trial, the presumption of innocence, and the right to not be punished for activities which do not constitute a crime.

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289 A New Agenda for Peace, 2023. Available at:https://www.un.org/sites/un2.un.org/files/our-common-agenda-policy-brief-new-agenda-for-peace-en.pdf.

290 National Security Strategy, USA October 2022. Available at: https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf.

291 J. Dugard, "The choice before us: International law or a 'rules-based international order'?", *Leiden Journal of International Law* 36 (2023): 223 – 232. (P. 223).

292 Ibid., pp. 226 – 228.

293 VCLT, art.34 – 35.

294 See https://therecord.media/us-fails-in-bid-to-extradite-brit-for-helping-north-korea-evade-sanctions-with-cryptocurrency; https://corkerbinning.com/enforcement-of-financial-sanctions-and-extradition-risk/.

295 See https://corkerbinning.com/enforcement-of-financial-sanctions-and-extradition-risk/.

Businesses frequently breach human rights as a result of the foreign policy of states imposing sanctions. States with jurisdiction over such businesses are therefore obliged to take all necessary measures (administrative, legislative, operational etc.) to make sure that businesses under their jurisdiction and control do not violate human rights and to establish mechanisms of monitoring, access to justice and effective remedies for victims of violations (See commentary to paras. 8, 15). In sanctions environment unfortunately businesses stay unprotected and are presented as final violators of human rights, taking decisions within their "*corporate policy*"[296]. All the above hinders identification of responsible actors and a competent court, resulting in impunity for human rights violations, and inability of victims to obtain redress.

Currently, unilateral sanctions are enforced and implemented by all possible types of actors (states, international organizations, donors, banks, businesses, humanitarian actors, individuals)[297]. Recent laws aim to obstruct compliance with foreign sanctions and protect individuals and entities from harm resulting from compliance. These include blocking statutes promulgated by the European Union in 1996,[298] by the Russian Federation in 2018,[299] and by China in 2020 and 2021 including most recently the Anti-Foreign Sanctions Law.[300] The European Union blocking statute has been recognized as ineffective and in 2021 the European Commission announced plans to amend it.[301] while recent European Union case law may also strengthen it.[302]

The list of measures referred to expanded from basic prohibition to enforce third country sanctions at the national territory (although with broad scope for permission to obey in the face of possible business risks), up to providing financial and other assistance[303], taxation vacations, legal

296 Responses of states to communications. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=38352; https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=37797; https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=38354; etc. See also request of the European Parliament on the extradition of Bulgarian national to the US for doing business in alleged circumvention of sanctions regimes with Russia, 30 August 2024. Available at: https://www.europarl.europa.eu/doceo/document/P-10-2024-001577_EN.html.

297 A/79/193, para. 26.

298 Council Regulation (EC) No. 2271/96 of 22 November 1996.

299 Government of the Russian Federation, Law on measures (countermeasures) against unfriendly actions of the United States of America and other foreign countries, signed into law on 4 June 2018.

300 *Visit to China,* Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, AlenaDouhan, A/HRC/57/55/Add.1.

301 European Parliament, 'Amendment to the Blocking Statute Regulation', 20 May 2022.Available at: https://www.europarl.europa.eu/legislative-train/theme-a-stronger-europe-in-the-world/file-blocking-statute-regulation.

302 Court of Justice of the European Union, *Bank Melli Iran v Telekom Deutschland GmbH*, case No. C-124/20, December 2021; Sidley Austin LLP, 'EU Blocking Statute: Toward Enhanced Enforcement?', 3 February 2022. Available at https://www.sidley.com/en/insights/newsupdates/2022/02/eu-blocking-statute_toward-enhanced-enforcement.

303 A/HRC/57/55/Add., paras. 66, 71 – 72.

help[304], move trade and private law cases to their jurisdiction (mostly states under sanctions) to protect rights of individuals and companies affected by unilateral sanctions[305], including due to so-called sanctions clauses.[306] Some statutes move trade and private law cases to the home jurisdiction of an affected national (mostly states under sanctions) in order to protect the rights of individuals and companies affected by unilateral sanctions[307], including due to so-called sanctions clauses[308]. At the same time such measures are qualified as very low effective due to the refusal of sanctioning states to apply agreements on mutual recognition of judicial decisions, and to recognize and enforce judicial and arbitration decisions[309], providing for anti-suit injunctions[310], "to prevent circumvention of sanctions regimes by judicial means." [311]

Nonetheless, businesses have legitimate expectations to be protected by the country of their residence / operations against sanctions enforcement (see Commentary to para. 18).

18. The principle of legal certainty

18.1 If states adopt any means of pressure, including for the implementation of sanctions of the UN Security Council, they shall do so by means of formal legislation in clear language and in the narrowest possible way to ensure that such measures are readily understood by all affected, and are precise in their application to avoid over-compliance, and with due respect to their obligations to respect and protect human rights and human dignity.

18.2 Measures imposed by the Security Council of the United Nations under Chapter VII of the UN Charter shall be interpreted and implemented by States and regional organizations in good faith and consistent with their human rights obligations.

18.3 States and relevant regional organizations shall provide for legal certainty in the scope and methods for compliance policies of companies within their jurisdiction or control. Require-

304 A/HRC/57/55/Add., paras.60 – 61.

305 Submission by A.D. Bolivar.

306 A/HRC/57/55/Add., paras.60 – 61.

307 Submission by A.D. Bolivar.

308 Submission by Venezuela; Law Countering Foreign Sanctions 2021, China.

309 Report, China country visit; Submission by Dominicana; Submission by Broken Chalk.

310 *Renaissance Securities (Cyprus) Ltd v Chlodwig Enterprises Ltd & Others* [2023] EWHC 2816; *US court grants JPMorgan anti-suit injunction against VTB in sanctions case.* Available at:https://globalsanctions.co.uk/2024/05/us-court-grants-jpmorgan-anti-suit-injunction-against-vtb-in-sanctions-case/.

311 *EU responds to Russia's anti-suit injunctions with transaction ban.* Availableat:https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2024/june/eusanctionsreponsetoarticle248; EU Council regulation 2024/1745 of 24 June 2024, art. 5ab.

ments for compliance policies of companies must be clear, certain and foreseeable, accessible, and adopted in the form of the legally binding document.

18.4 Banks shall draft their compliance policies consistent with humanitarian and human rights concerns.

Commentary

The practice of the UN Security Council acting under Chapter VII of the UN Charter has changed substantially after 2005 as broad authorization e.g. to use *"all means necessary"* for achievement of the specific goal or absence of time limits of the authorization, qualification of the situation or events as a threat to the international peace and security or absence of condemnation of unilateral measures taken, have been repeatedly used by states for unilateral action under different pretexts.[312] In addition, states often purport to justify unilateral sanctions by reference to the need to enforce or implement resolutions of the UN Security Council but the scope of measures taken as well as the lists of designated individuals are usually much broader than those decided upon by the UN Security Council.[313] For these reasons, and having regard to the high humanitarian impact that sanctions may have, the UN Security Council became more and more specific in formulating its resolutions – for example: authorization providing for specific and limited goals (resolution 1863(2009), para. 2; resolution 1838(2008), para. 3); specific and strict frames of the operation (resolution 1863(2009), para. 6); specific tasks (resolution 1822(2008), para. 1, 6), limiting the duration of authorization (resolution 1572(2004), paras. 7-10) and changing to targeted instead of comprehensive and sectoral sanctions. States must interpret and implement UN Security Council measures in the narrowest possible way as an exception to normal standards in international relations (see Commentary to para. 12).

States are therefore obliged to interpret and apply UN sanctions in the narrowest possible way in full conformity with the exceptional authority of the Council in accordance with art. 24, 25 of the UN Charter. Existence of sanctions authorized by the UN Security Council cannot be used as *carte blanche* for the use of unilateral sanctions. Any measure taken to enforce their implementation must fully correspond international law. Any measures taken beyond the explicit authorization of the UN Security Council can only be taken if they do not violate international obligations of relevant states (meaning that they must qualify as retortions or countermeasures - See commentary to para. 15). Means of enforcement of unilateral sanctions, including secondary sanctions, civil, criminal or administrative penalties have no basis in international law. As primary unilateral sanctions are illegal under international law, all means of enforcement are equally illegal.

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312 See A.F. Douhan, *The Principle of Non-Intervention into the Domestic Affairs of States: Contemporary Challenges* (Minsk: Economy and Law, 2009), pp. 81 – 83.

313 A/HRC/48/59, paras.68 – 71.

With due regard to the Commentary to para. 17 on the adherence to the rule of law, states and international organizations must draft their legislation and compliance policies to implement UN Security Council resolutions in good faith, in clear and precise language to avoid ambiguity and over-compliance. The principle of legal certainty means that any measures with punitive or potentially punitive impacts must be transparent, adopted in clear terms via adoption of legislative acts. The principle is breached where states promulgate non-binding interpretative ("explanatory") documents alongside legislation, especially where they have unclear legal status within the relevant national legal system. That is so whether or not they influence national courts or executive authorities in decision making[314] and even if no jurisdiction of the country in the case has been recognized[315]].

Enforcement of unilateral sanctions often involves assertion of extraterritorial jurisdiction with no basis in international law, violation of the process of adoption of legislative acts or via adoption of recommendatory acts, using maximum pressure campaigns, and assertion of criminal liability for non-criminal conduct.[316] Frequently, it involves imposition of pressure on third states and foreign Businesses to force them to comply.

Even where UN Sanctions are enforced in accordance with their terms, parallel provision for humanitarian relief is often inadequate. For example, the humanitarian relief in resolution 2664(2022) and humanitarian provisions of individual resolutions is often narrow compared with the broad scope of sanctions, which can have comprehensive impact on business, finance, shipping and insurance. This makes even the delivery of humanitarian assistance very complicated, lengthy and costly even for the UN institutions or humanitarian organizations mentioned in the relevant Security Council resolutions.

States and Businesses are obliged to act in good faith and to ensure that unilateral measures or compliance policies do not obstruct delivery of humanitarian assistance authorized by the UN Security Council, or increase related costs. Issuance of General licenses for implementation of humanitarian resolutions of the UN Security Council is not sufficient if they cannot be used without inconvenience to providers of aid. Any impediments for humanitarian deliveries authorized by the UN Security Council constitutes violation of UN Security Council resolutions and should attract censure and sanction from the UN Security Council.

It is an obligation of states to provide favorable environment for business activity[317] and to protect businesses against external threats (see commentary to para. 17). In accordance with the

314 See Settlement Agreement between OFAC and Tango Card, Inc.Available at:https://ofac.treasury.gov/recent-actions/20220930_33.

315 See https://www.washingtonpost.com/dc-md-va/2022/05/16/first-us-criminal-cryptocurrency-sanctions.

316 A/78/196.

317 GPBHR, para. 7.

General comment 24(2017), a state "*would be in breach of its obligations under the Covenant where the violation reveals a failure by the State to take reasonable measures that could have prevented the occurrence of the event. The responsibility of the State can be engaged in such circumstances even if other causes have also contributed to the occurrence of the violation, and even if the State had not foreseen that a violation would occur, provided such a violation was reasonably foreseeable.*" [318] At the same time failure of states to ensure full protection does not excuse or exclude responsibility of Business for over-complying or adopting extensive zero-risk policies and thereby violating human rights. Corporate obligations set forth in the UN Guiding principles on business and human rights include obligations to conduct business with due respect for human rights, to prevent and mitigate any possible negative human rights impact and to put in place policies appropriate for protection of human rights. Businesses must also exercise due diligence to avoid infringing human rights and to facilitate remediation where breaches of human rights occur.[319]

19. The principle of respect for internationally recognized jurisdiction

19.1 States shall protect against human rights abuses within their territory or jurisdiction by third parties, including businesses, when adopting and implementing sanctions. This includes the obligation of States to take all appropriate action to prevent, investigate, punish and redress such violations through effective policies, legislation, regulations and adjudication.

19.2 States shall implement a due diligence approach to ensure that businesses acting under their jurisdiction or control do not over-comply and do not violate human rights, including extraterritorially.

19.3 States are obliged to take all measures necessary to protect businesses under their jurisdictions or control from any means of enforcement on the part of sanctioning States including through diplomatic protection and international adjudication, to prevent or minimize over-compliance.

19.4 Extraterritorial application of unilateral coercive measures is illegal under international law, being a violation of fundamental principles of international law. Secondary sanctions, civil and criminal penalties, can not be used as grounds for the extension of the jurisdiction of sanctioning States over third States, their nationals and companies, as well as their own companies and nationals.

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318 General comment No. 24 E/C.12/GC/24, paras. 32, 40 – 41; Commission on Human Rights, Report on the Fifty-Fifth Session (22 March-30 April 1999), p. 43. Available at: https://www.un.org/esa/documents/ecosoc/docs/1999/e1999-23.htm; OHCHR and WHO, "The Right to Health," Fact Sheet No. 31, 2008, pp. 25 – 26.

319 GPBHR, paras. 11, 13, 15 – 20, 22 – 23.

Commentary

States are responsible for ensuring the efficacy of human rights within their territory or jurisdiction in accordance with art. 2(1) of the ICCPR and technically pursuant art.2(1) of the ICESCR[320]. This obligation extends to each branch of state authority (whether legislative, administrative or judicial).[321] All are bound to protect human rights when giving effect to any UN Sanctions or unilateral measures. As the HR Committee stresses "*the obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole*"[322].

The Human Rights Committee in its General comment No 31 noted that "*despite the fact states are not per se responsible for human rights abuse by private actors, their obligation to protect against such abuses in fact extend to acts of private persons and entities*". "*When state party fails to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities by permitting or failing to take appropriate measures or to exercise due diligence that gives rise to violations by this respective State Party its obligations under article 2 of the ICCPR*"[323] The same approach has been maintained by the CESCR (See Commentaries to paras. 17 – 18).

The obligation to protect human rights must be addressed through all relevant state authorities including legislative, judicial, administrative, educative and others as appropriate.[324] States also have a duty to protect and promote the rule of law, including by taking steps to ensure equality before the law, fairness in its application, and by ensuring legal certainty, procedural fairness, transparency of law and legal process, accountability for wrongs and effective redress.[325]

The principle of due diligence is a commonly accepted principle of international human rights

320 See https://humanrights.asn.au/ICESCR#article-2; , F. Coomans, "The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights". Available at: https://www.corteidh.or.cr/tablas/r26506.pdf.

321 Conclusion 5. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf.

322 CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para.4 .

323 General comment No. 31 (2004), para. 8. Available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D.

324 Ibid, para. 7.

325 See GPBHR, commentary to the first principle. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

law[326]. It frequently features in the work of the Human Rights Committee[327], the Committee on the Elimination of Discrimination against Women[328], Special procedures[329], etc. (See Commentary to para. 4, 8, 15).

The general concept of the principle was formulated in the decision of the Inter-America Court of Human rights on the case *Rodriguez v. Honduras*. The Court held that "*The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.*" [330]

The states are obliged to ensure protection against the violation of all rights (civil, cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system). The obligation extends to their territory and their jurisdiction, and includes an obligation not to inflict breaches of human rights abroad since all human rights are "*universal, indivisible and interdependent and interrelated*" [331]. Unfortunately, Businesses quite often over-comply with unilateral sanctions for various reasons[332], which

326 Case of Vel á squez-Rodr í guez v. Honduras Judgment of July 29, 1988 (Merits); para.172. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf; Case of Opuz v. Turkey, para. 131. Available at: https://hudoc.echr.coe.int/fre#{"itemid":["001-92945"]}.

327 CCPR, General Comment No. 31 [80] "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", CCPR/C/21/Rev.1/Add. 1326 May 2004, 29 March 2004, para. 8. Available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D.

328 CEDAW, General Recommendation No. 19: Violence against Women, A/47/38, para. 9. Available at: https://www.legal-tools.org/doc/f8d998/pdf/&ved=2ahUKEwi4r8KY2dX#:~:text=(b)%20States%20parties%20should%20ensure,should%20be%20provided%20for%20victims.

329 E/CN.4/2006/61; A/HRC/ 51/33, paras.50 – 51.

330 Case of Vel á squez-Rodr í guez v. Honduras Judgment of July 29, 1988, paras.174 – 175.

331 United Nations, Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms,A/34/RES/48, 1977; United Nations, Declaration on the Right to Development, UNGA Res. 41/128, 4 December 1986; United Nations, Vienna Declaration and Programme of Action, World Conference on Human Rights, UN Doc. A/CONF.157/24, 1993.

332 A/78/196.

seriously aggravates the humanitarian situation in countries under sanctions[333].

The term "jurisdiction" includes territorial, prescriptive and adjudicative jurisdiction. This means that a State must respect and protect the rights laid down in the Covenant for the benefit of anyone under jurisdiction or control of that State Party, even if that person is not situated within the territory of the State Party[334]. The conduct of state-owned companies *prima facie* is not attributable to the State unless they are conduits for governmental authority within the meaning of art. 5 of the DARS. However, States may incur responsibility if they fail to prevent human rights abuses by any kind of corporation susceptible to their control which operates internationally[335]. Draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights stipulate: "*States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights*", that corresponds the approach of the HRC and CESCR[336].

States bear the main responsibility for protecting private entities under their jurisdiction. This responsibility derives from the sovereignty of a State, which entails the power and responsibility to protect the rights of its subjects, and to demand respect for the rules of international law. This is reflected in the state functions of legal and consular services and diplomatic protection.[337] At the International Law Commission comments "*diplomatic protection has traditionally been seen as an exclusive State right in the sense that a State exercise diplomatic protection to a national is deemed to be an injury to the State itself*"[338]. Diplomatic protection can be exercised in favour of a corporation by the state under whose law it is incorporated[339]. However, if the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and financial control is located in another State, that State can exercise diplomatic protection[340].

Jurisdiction of a state is primarily a territorial concept. A State enjoys extraterritorial jurisdiction only in limited circumstances prescribed by international law. Extraterritorial prescriptive jurisdiction is commonly exercised with respect to activities conducted by a State's nationals;

333 A/HRC/51/33; A/78/196.

334 CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 10.

335 E/CN.4/Sub.2/2003/12.

336 HRC, General comment No. 31 (2004), para.8; CESCR, General comment No. 24, paras. 32, 40 – 41.

337 *The Mavrommatis Palestine Concessions*. Available at: https://www.worldcourts.com/pcij/eng/decisions/1924.08.30_mavrommatis.htm.

338 Draft Articles on Diplomatic Protection with commentaries. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf.

339 Ibid., art. 9.

340 Ibid.

extends to vessels and aircraft possessing its nationality; applies to foreign nationals who undermine its essential State interests; applies also to foreign nationals who injure its nationals, with certain limitations; and covers international crimes[341]. Extraterritorial enforcement jurisdiction can be exercised only in the case of specific allocation of authority under international law or valid consent by a foreign government to exercise jurisdiction on its territory[342]. State jurisdiction is also excluded in relation to public officials who enjoy immunities under international law and state property.

It follows that a State exceeds its jurisdiction where it tries to enforce unilateral sanctions abroad, or where it attempts to secure over-compliance through pressure[343]. Creeping extraterritorial jurisdiction obliges foreign businesses with any financial or operational nexus to targeted states or entities to terminate their activities in or with such states in order to escape any risk of sanctions penalties. "*Extraterritoriality*" in sanctions enforcement extends a state's jurisdiction with respect to persons, property and activity beyond its territory and proper jurisdiction. Even sanctioning countries admit that the practice of extraterritoriality violates international law and that the concept of extraterritoriality with regard to sanctions raises questions of compatibility with international law, including international human rights[344].

Extraterritorial applications of unilateral sanctions violates a number of core principles and norms of international law. Similarly, because primary sanctions are generally illegal, unless, doubtfully, they qualify as retortions or countermeasures[345], the status of measures aimed at their enforcement, including civil and criminal proceedings, is similarly tainted. Such measures cause huge damage, because the fear of penalties, combined with factors such as the lack of clarity about enforcement, can induce over-compliance with sanctions by domestic parties [346] with very low possibility for judicial protection.

Secondary sanctions imposed extraterritorially also contradict international law, firstly because they are based on illegal primary coercive measures, and secondly because of equivalent objections to extraterritorial enforcement. Further, they infringe the sovereignty of other States by violating the legal principles of jurisdiction and non-intervention in the internal affairs of States,

341 M. N. Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed. (Cambridge University Press, 2017), p. 60.

342 Ibid, p. 66.

343 A/79/196, para.61; A/51/33, paras. 13, 39 – 42.

344 A/78/196, paras. 58 – 59; European Commission, *Humanitarian Exemption in the EU Syria Sanctions Regime following the February 2023 earthquakes in T ü rkiye and Syria*, p. 5. Available at: https://finance.ec.europa.eu/system/files/2023-05/230516-faqs-humanitarian-exemption-syria_en.pdf.

345 J. Schmidt, "The legality of unilateral extra-territorial sanctions under international law", *Journal of Conflict and Security Law* 27 (1) (2022): 53 – 81; S. Lohmann, "Extraterritorial U.S. sanctions", *StiftungWissenschaft und Politik*, SWP Comment 2019/C 05 (2019). Available at: https://www.swp-berlin.org/10.18449/2019C05/.

346 Ibid, para.16; OL OTH 75/2023 of 9 June 2023.

and finally, they conflict with the human rights obligations of sanctioning States under the ICCPR,[347] and also transgress international trade law, friendship and commerce treaties etc.

B. OPERATIONAL PRINCIPLES FOR STATES AND INTERNATIONAL ORGANIZATIONS

20. The principle of respect for fair trial and due process standards

20.1 Without any prejudice to the legality of unilateral measures taken, any means of pressure implemented in the national criminal, administrative, customs, civil and other areas of law shall be formulated in an open and transparent manner. States shall ensure that public and transparent reasons and evidence are provided as a ground for any measure taken unilaterally, regardless of the mechanism used, and provide the opportunity to bring a case and successfully contest it in court under the standard of the due process.

20.2 States and regional organizations shall bear the burden of proof in sanctions adoption and sanctions' compliance procedures. States or regional organizations must not transfer the burden of proof to any other actor, including targeted states, third states, entities or individuals regardless nationality, registration or residence, their counter-partners or any other subjects.

20.3 Introduction, implementation and enforcement of a rebuttable presumption of the wrongdoing of any actor within sanctions' policy constitutes a further violation of international law.

Commentary

As states bear primary responsibility to take all measures necessary to prevent, mitigate and remedy human rights violations in business activity within their jurisdiction or control, access to justice, the right to fair trial and due process are the integral parts of the mechanism of human rights protection in any sanctions environment, especially in view of their obligation to establish and maintain judicial protection for all human rights as part of their due diligence obligation[348] including as regards economic, social and cultural rights as reflected in a number of CESCR General comments[349].

347 A/HRC/51/33, para. 13.

348 Access to Justice for Economic, Social and Cultural Rights Training Materials on Access to Justice for Migrant, International Commission of Jurists, September 2021. Available at: https://www.icj.org/wp-content/uploads/2021/09/Module-3-Access-to-justice-for-economic-social-and-cultural-rights.pdf; Adjudicating Economic, Social and Cultural Rights at National Level, Practitioners Guide No. 8, p. 14; International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), p. 6.

349 CESCR, General comment No. 9, E/C.12/1998/2, paras. 2, 3, 10; CESCR, General comment No. 12; see also Adjudicating Economic, Social and Cultural Rights at National Level, Practitioners Guide No. 8, para. 24; ICESCR, art.2; CESCR, General comment No. 20, E/C.12/GC/20.

The right of every individual to access to justice is inherent in many international human rights documents as a means to ensure that other human rights are protected properly[350]. Art. 26 of the ICCPR explicitly refers to equality of all persons before the law and sets forth their entitlement "without any discrimination to the equal protection of the law". Similarly, art. 14 provides for a list of safeguards in the face of criminal charges against a person with special emphasis on the presumption of innocence.

Sanctioning states, however, tend to characterise unilateral sanctions as a foreign policy tool, and as an administrative rather than criminal mechanism[351], in order to avoid the requirement of due process, the presumption of innocence and fair trial guarantees[352]. This is unsustainable. The consequences of sanctions designations, criminal charges and civil liabilities for circumvention of sanctions regimes amount to penalties normally associated with criminal offences. Therefore sanctioning states are obliged to ensure access to justice for protection of rights affected by sanctions and associated criminal, administrative and civil enforcement.[353]

According to the General Recommendation No. 33 of the CEDAW, access to justice encompasses "*justiciability, availability, accessibility, good quality and accountability of justice systems, and provision of remedies for victims*"[354]. General comment No. 32 includes as its integral part access to legal assistance, access to the documents, evidences and other relevant materials; access to the "duly reasoned written judgement of the trial court"; access to the tribunal at the appeal level[355]. Guidance on the Access to justice for women additionally refers to: non-discrimination; widespread legal awareness and literacy among the population; affordable and quality legal advice and representation; accessible, affordable, timely, effective, efficient, impartial, corruption-free and trustworthy dispute settlement mechanisms; respect to the human rights standards; availability of efficient and impartial mechanisms for the enforcement of judicial decisions[356].

The right of individuals to judicial protection of their rights is guaranteed both in international

350 ICCPR, art.6 (1), 17 (2), 18 (3); CEDAW, art.2 (c).

351 A/HRC/48/59, paras.50 – 51; 2022 Economic Sanctions Year in Review and Outlook for 2023.Available at: https://www.akingump.com/en/insights/alerts/2022-economic-sanctions-year-in-review-and-outlook-for-2023.

352 A/79/183, para. 6.

353 Ibid, paras. 10 – 12.

354 CEDAW, General recommendation No. 33.

355 HRC, General comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32; A/60/147, para. 12 (c, d); 67/187.United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2013, para. 3.

356 Frameworkfor measuring access to justice including specific challenges facing women, Guidance note, 2016, p. 7.

practice and legal doctrine. All procedural guarantees – including the right to due process[357] and the right not to be held guilty of any offence that was not an offence at the moment of its commission[358] – are considered inalienable by human rights institutions[359], legal scholars[360] and international treaties[361] Violating these rights is qualified even in wartime as a serious breach of international humanitarian law.[362]

Additionally, numerous reports refer to the lack of transparency regarding the grounds and evidence provided for any type of designation or penalty, including those implemented through the seizure of cargoes and administrative and civil charges. Sanctions regulations are traditionally uncertain concerning their scope, means of implementation, interpretation via non-binding acts, and contradicting statements. One of Chinese businesses in particular, report on their efforts to engage with US authorities through the Administrative Procedure Act[363] by filing a Modification Petition for removal from a sanctions list. They produced more than 10,000 pages demonstrating the absence of any nexus with Xinjiang in their supply chain, but the Petition was denied without any indication that the submitted evidence was reviewed and assessed or any explanation for the denial decision.[364] This constitutes a clear violation of the right to full access to materials used as grounds for accusations.[365]

Many challenges are cited by lawyers when dealing with sanctions cases, including, but not limited to, the need to obtain a license for every sanctions-related case; the lengthy and uncertain process of obtaining licenses to represent clients under sanctions and to be entitled to payment for services; geopolitical motivations in licensing decision-making; challenges in receiving payment for work done, as banks are blocking client accounts, relevant bank transfers, or already-transferred funds; fear of criminal prosecution due to the adoption of legislation criminal-

357 ICCPR, art. 14 (2 – 7).

358 ICCPR, art.15 (1).

359 RC, CCPR General comment No. 29: Article 4: Derogations during a State of Emergency (CCPR/C/21/Rev.1/Add.11), para. 16.

360 Roberta Arnold, "Human Rights in Times of Terrorism", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Vol. 66 (2006), P.305; Y.Dandurand, Handbook on Criminal Justice and Responses to Terrorism*, Criminal Justice Handbook Series (New York: United Nations, 2009), pp. 40 – 41.

361 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, 75 *UNTS* 287, art.72 – 73, 146 (4); Geneva Convention Relative to the Treatment of Prisoners of War, 1949, 75 *UNTS* 135, art. 105 – 108, 129 (4); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1977, *UNTS* 3, art.75; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1977, *UNTS* 609, art. 76.

362 IV Geneva Convention, art.147; Protocol I, art. 85 (4e).

363 Administrative Procedure Act. Available at: https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf.

364 Report, China country visit, paras. 55, 59.

365 A/79/193, para. 19.

ising the circumvention of sanctions regimes, providing for higher standard of responsibility of legal professionals[366]; requests to report on the content of discussions with clients and to monitor all details of clients' structures, including piercing the corporate veil; the obligation to report on violations of EU unilateral sanctions "*when providing services in the context of professional activities*"; reputational risks, including accusations of amorality or the characterisation of efforts to challenge the legality of unilateral sanctions as defamation or disinformation[367]; and the prohibition against providing legal advisory services to certain types of clients.[368]

Under criminal law, the burden of proof regarding the illegality of an action lies with the prosecution and constitutes an integral part of the presumption of innocence in accordance with General Comment 13 (1984) to the ICCPR (para. 7) and General Comment 32 (2007) (para. 30); therefore, the state must establish the fact of a violation beyond a reasonable doubt[369]. In administrative law, the state must present proof of the complaint with clear and sufficient evidence to support the accusation.[370] The burden of proof in customs law lies with customs authorities.[371]

Therefore, the burden of proof regarding the wrongfulness of behaviour of a state, entity, or individual lies with the state intending to exercise jurisdiction over a case or to take unilateral measures. This is in accordance with the law of international responsibility as regards interstate measures and adheres to the standards for establishing jurisdiction under criminal, administrative, customs, or civil law, as well as the standards of proof in such cases, which require clear and transparent evidence.

The unilateral sanctions environment and the expanding use of means for their enforcement employ a series of steps in which the burden of proof is shifted between different actors, creating legal uncertainty, a sense of fear, and resulting in the growing use of de-risking policies

366 Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673, art.8 (c).

367 See MP names 'amoral' British lawyers silencing press for Vladimir Putin's 'henchmen'. Available at: https://www.standard.co.uk/news/uk/bob-seely-vladimir-putin-libel-law-russia-parliamentary-privilege-b985500.html.

368 A/79/193, paras. 32 – 35.

369 General comment No. 13, art. 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para. 7; General comment No. 32, art. 14: Right to equality before courts and tribunals and to a fair trial (2007), para. 30.

370 5 CFR § 2423.32 – Burden of proof before the Administrative Law Judge. Available at: https://www.law.cornell.edu/cfr/text/5/2423.32.

371 Commissioner of Customs (Preventive) vs Rajendra Kumar Damani @ RajuDamani (Calcutta High Court). Available at: https://taxguru.in/custom-duty/case-analysis-burden-proof-customs-law-commissioner-customs-vs-rajendra-kumar-damani.html; Guidelines on the consequences of the Judgment of the Court of 9 March 2006 in Case C-293/04 "Beemsterboer". Available at: https://taxation-customs.ec.europa.eu/system/files/2016-09/beemsterboer_en.pdf

and over-compliance. In particular, there is increasing use of shifting the burden of proof from sanctioning states to third states (often states of residence of companies), the EU, and businesses if human rights are violated as a result of the enforcement of, for example, US sanctions by European companies[372]. Humanitarian actors are obliged to bear the burden of proof of the purely humanitarian nature of humanitarian deliveries to countries under sanctions[373]. Businesses are obliged to prove that they fully comply with unilateral sanctions regimes, and designated individuals and entities must prove that their designation was unfounded due to the alleged presumption of legality of unilateral sanctions promoted by sanctioning states.

All the above elements constitute serious challenges to the functioning of legal systems and human rights protection. The presumption of legality of unilateral sanctions has no ground in international law. In accordance with international law, neither national law nor domestic policy interests can justify the non-fulfilment of international obligations. Any measures taken without UN Security Council authorisation are permissible only if their legality or the existence of circumstances precluding wrongfulness is proven by the sanctioning party.

Therefore, the burden of proof of the legality of any unilateral activity lies with the imposing or enforcing state. In accordance with Article 31 of the Vienna Convention on the Law of Treaties, *"a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"* [374]; therefore, malicious re-interpretation of treaties and customary international legal norms is not possible. No reference to "high goals," "common concerns," "the need to demonstrate that we care," or a "do something or do nothing" doctrine provides any legality, legitimacy, or justification for otherwise illegal activity.

Given the complicated system of unilateral sanctions, their enforcement mechanisms, and over-compliance by third states, entities, and individuals, the shifting of responsibility from sanctioning states to businesses and vice versa results in human rights violations and the impunity of those who perpetrate them, preventing victims from any possibility of redress.

Under international law, it is the state that bears the burden of proof regarding the illegality of any type of activity by private actors. The burden of proof of the legality of any unilateral activity thus lies with the imposing or enforcing actors rather than on the designated state, company,

372 See e.g. communications reports of special procedures AL USA 25/2023. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28386; AL SWE 3/2023. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28385; AL OTH 108/2023. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28382; responses of states. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=38352; https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=37797.

373 A/78/196, paras. 9, 71, 77.

374 Vienna Convention on the Law of Treaties.

or individual. No reference to "high goals" or "common concerns" provides any legality, legitimacy, or justification for otherwise illegal activity or can be used to hinder access to justice. As the cited grounds for designations often have nothing to do with possible violations and are extremely broad and vague—for example, the "*need to ensure protection of national security*"[375] —and secondary sanctions are imposed for "*circumvention/alleged circumvention/assistance in circumvention of sanctions regimes,*" the burden of proof is shifted *de facto* to the targets of unilateral sanctions, even if they are not explicitly designated but merely have a nationality, place of residence or registration, or any other nexus with the country, territory, or entity under sanctions. This constitutes, *inter alia*, discrimination on the ground of nationality, place of residence, or birth.

Sanctioning states shift the burden of proof to third states, regional organisations, and businesses, resulting in human rights violations against the most vulnerable.[376] Humanitarian actors are obliged to bear the burden of proof of the purely humanitarian nature of humanitarian deliveries to countries under sanctions[377]; businesses must prove they have fully complied with unilateral sanctions regimes. All the above hinders the possibility of identifying the accountable actor and the competent court, resulting in impunity for human rights violations and preventing victims from accessing effective remedies and redress[378], contrary to both international law and general principles of law.

The introduction of the rebuttable presumption of guilt for entities and individuals under sanctions is a rather recent development in US legislation[379], although it derives directly from the alleged presumption of the legality of unilateral sanctions. The burden of proof of the wrongfulness of behaviour lies with states, and states are obliged to provide clear evidence of any charges against an entity or individual.

The rebuttable presumption of wrongfulness of any nexus to a specific country, region, sphere of the economy, company, or individual contradicts the very idea of presumption in criminal or administrative law and runs counter to the principles, treaty and customary norms of international law, and the law of responsibility for wrongful acts at the international and national levels, including the presumption of innocence, a peremptory norm of international law. The burden

375 Executive Order 13959 of 12 November 2020. Available at: https://www.federalregister.gov/documents/2020/11/17/2020-25459/addressing-the-threat-from-securities-investments-that-finance-communist-chinese-military-companies; Countering America's Adversaries Through Sanctions Act (CAATSA) of 2 August 2017. Available at: https://congress.gov/115/plaws/publ44/PLAW-115publ44.pdf.

376 AL USA 25/2023; AL SWE 3/2023; AL OTH 108/2023; responses of states; AL SWE 3/2023.

377 A/78/196, paras. 9, 71, 77.

378 A/79/183, paras. 18, 20-21.

379 See Uyghur Forced Labor Prevention Act Is Coming… Are You Ready? CBP Issues Hints at the Wave of Enforcement To Come. Available at: https://www.afslaw.com/perspectives/alerts/uyghur-forced-labor-prevention-act-coming-are-you-ready-cbp-issues-hints-the; CAATSA, section 321.

of proof of the illegality of an action lies with the prosecution and constitutes an integral part of the presumption of innocence, in accordance with General Comments 13 and 32 of the Human Rights Committee; therefore, the state must establish the fact of a violation beyond a reasonable doubt.[380] In administrative law, the state must provide clear and sufficient evidence to support the accusation[381]. The burden of proof in customs law rests with the customs authorities[382]. Regarding access to information and limitations on the mass media, the burden of proof regarding the wrongfulness of information also lies with the state.[383]

States must not shift the burden of proof of the legality of their activity to individuals or entities under sanctions. The burden of proof regarding the illegality of acts or omissions by entities and individuals under sanctions lies with states, and only if the existence of state jurisdiction is properly grounded.

Access to justice, as well as the consequent right to remedy for human rights violations resulting from unilateral sanctions, constitute an integral part of human rights protection, which is currently underdeveloped at the universal, regional, and national levels. It also forms an important means for establishing mechanisms of restitution, compensation, and redress for human rights violations caused by unilateral sanctions, their enforcement mechanisms, and over-compliance.

Acting under the principle of due diligence, states must ensure that all victims of human rights violations, both those directly designated and those affected by sanctions enforcement and over-compliance, have proper access to justice, with full observance of the right to a fair trial, the presumption of innocence, and procedural guarantees.

21. Humanitarian carve-outs clarity

21.1 Humanitarian exemptions shall be formulated in a clear, transparent and precise manner and be interpreted in the broadest possible manner, with due account of the principle of humanity.

21.2 States and regional organizations shall establish focal points on humanitarian exemptions and endow them with legal authority and material resources to provide prompt, comprehensive and no-cost consultation on mechanisms and procedures.

380 A/78/196, paras. 30-40.

381 HRC, General comment No. 13, art. 14, (HRI/GEN/1/Rev.1), para.7; HRC, General comment No. 32, art. 14, para. 30.

382 5 CFR § 2423.32 – Burden of proof before the Administrative Law Judge.

383 Commissioner of Customs (Preventive) Vs Rajendra Kumar Damani @ RajuDamani (Calcutta High Court); Guidelines on the consequences of the Judgment of the Court of 9 March 2006 in Case C-293/04 "Beemsterboer".

21.3 Humanitarian actors shall not bear the burden of proof of the pure humanitarian character of their work, and shall not be held responsible for any alleged non-compliance or circumvention of unilateral sanctions regimes on account of performing their humanitarian work.

21.4 Humanitarian resolutions/provisions of resolutions of the UN Security Council, as well as exemptions granted by the UN Security Council subsidiary bodies, shall be fully implemented by the Member States of the United Nations. Sanctioning actors shall ensure that no unilateral measures applied by them prevent the full implementation of humanitarian deliveries under the UN Security Council resolutions.

21.5 Member States of the United Nations also bear responsibility for the full implementation of these measures by private actors under their jurisdiction or control.

Commentary

Humanitarian carve-outs in unilateral sanctions regimes exist *de jure* but *de facto* are proven to be ineffective and inefficient. Their ineffectiveness was recognised by the CESCR as early as 1997 in General Comment No. 8 (1997), noting that carve-outs did not have the expected positive effects and did not provide for the unhindered flow of essential goods and services destined for humanitarian purposes, even in relation to UN Security Council sanctions[384]. The UN Secretary-General, in his 1996 report, refers to the ambiguous nature of humanitarian exemptions, which provide broad scope for arbitrary and inconsistent interpretation, causing delays, confusion, and denial of requests to import essential humanitarian goods, leading to resource shortages in the countries targeted by sanctions.[385]

Due to the specifics of unilateral sanctions and growing over-compliance by banks, businesses, donors, and other actors, humanitarian exemptions are rendered ineffective and inefficient due to administrative and operational obstacles, with adverse effects on the procurement and delivery of goods explicitly exempted from sanctions regimes[386]. Humanitarian organisations report that *"over-compliance can prevent, delay, or increase the costs of purchasing and shipping humanitarian goods to sanctioned countries required for the provision of humanitarian assistance, which in turn can have serious consequences for those in need."* [387] In post-earthquake Syria, they refer to sanctions-related difficulties in *"accessing essential goods, leading to reduced funding for aid organisations, restricting travel and movement, increasing bureaucratic hurdles, and more generally, impeding economic activity."* [388]

384 CESCR, E/C.12/1997/8, 1997, paras. 3 – 5

385 A/51/306 (1996).

386 Assessing the Impact of Sanctions on Humanitarian Work, pp. 15-16.

387 Ibid, p. 16.

388 Human Rights Watch, "Put people's rights first in Syria sanctions".

Over-compliance with unilateral sanctions prevents, delays, or increases the cost of purchasing and shipping goods, including humanitarian goods and services such as essential food, medicine, medical equipment, and spare parts for such equipment, to sanctioned countries, even when such goods are not on sanctions lists or are exempted from sanctions regimes, and even when the need is urgent and if they are of a life-saving nature[389]. The detrimental effects of over-compliance, therefore, prevent even exempted goods, such as food and medicines, from reaching people in need.[390]

The wording of humanitarian carve-out documents, as well as structural and administrative challenges, undermines their humanitarian purpose, maintaining a sense of uncertainty and fear about the real scope of sanctions-related prohibitions and enforcement, thus exacerbating over-compliance. Reported challenges include unclear, overlapping, confusing, and complicated sanctions regulations; the complexity of terms and confusing procedures for granting licenses for humanitarian operations in accordance with existing humanitarian exceptions, exemptions, or derogations[391]; requirements for multiple licenses for a single humanitarian activity or good[392]; significant delays in processing license applications (up to one to one-and-a-half years[393]); cumbersome legal fees for regulatory interpretation and legal support; the requirement for humanitarian actors to prove the humanitarian nature of their activities (burden of proof)[394]; the impossibility of delivering medical goods even with licenses, due to banking, financial, insurance, and delivery sanctions; the embargo on the delivery of dual-use goods (including toothpaste, water-purifying reagents, laboratory equipment[395], and radioisotopes used for nuclear medicine in the diagnosis and treatment of specific diseases[396]); and the absence of mechanisms for the protection of humanitarian actors in their efforts to pursue their principled humanitarian work. These challenges have reportedly shifted humanitarian work from "needs assessment" to "risk assessment."[397]

To enable the delivery of humanitarian assistance, humanitarian carve-outs of any type shall be

389 Guidance Note on Overcompliance with Unilateral Sanctions and its Harmful Effects on Human Rights. Available at: https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures/resources-unilateral-coercive-measures/guidance-note-overcompliance-unilateral-sanctions-and-its-harmful-effects-human-rights.

390 A/74/65, para. 45.

391 AL USA 21/2022.

392 Syria country visit, para. 51.

393 Syria country visit, para. 54.

394 AL USA 21/2022; Commission Guidance Note on the provision of humanitarian aid in compliance with EU restrictive measures (sanctions), paras. 3.9-3.10.

395 Submission by Iran.

396 Submission by GNLU SRDC; International Atomic Energy Agency, "IAEA Director General's Introductory Statement to the Board of Governors".

397 Human Rights Watch, "Put people's rights first in Syria sanctions"; A/78/196, paras. 67-70.

formulated using clear and specific language, in good faith, to facilitate the delivery of goods necessary for the maintenance of critical infrastructure and services, rather than food and medicine only (see commentary to para. 10).

To enable the delivery of humanitarian assistance to countries under UN Security Council sanctions, in accordance with the humanitarian provisions of Resolution 2664 (2022), states are obliged to act in good faith and with due diligence, in accordance with the principle of humanity (see commentary to para. 11). Unilateral financial, trade, delivery, insurance, or any other sanctions that make the delivery of goods to targeted societies impossible, as well as the activity of private actors under the jurisdiction or control of sanctioning states that impede the implementation of such resolutions (considering the obligation of states to ensure that activity under their jurisdiction and control does not violate their international obligations), therefore constitute a violation of relevant UN Security Council resolutions and obligations under Articles 24 – 25 of the UN Charter.

Humanitarian actors shall not bear the burden of proof of the "purely humanitarian" character of their work or be required to obtain multiple licenses for a single delivery, as the expense of obtaining multiple licenses can exceed the amount of donations. States are therefore obliged to ensure the protection of humanitarian actors against liability and charges in connection with their humanitarian work in countries under sanctions (see commentary to para. 20).

For the establishment of the focal point, see commentary to para. 16.

22. Licensing minimization and simplification

22.1 Delivery of essential goods, equipment and spare parts, including food, medicine, medical and adaptive equipment, seeds, fertilizers, as well as machinery and equipment necessary for the maintenance of critical infrastructure and services, shall not be subjected to, or made conditional upon any requirement, restriction or licensing.

22.2 When necessary a single license shall be issued without delays and at a nominal cost. Humanitarian organizations shall not be requested to obtain multiple licenses within one or multiple jurisdiction(s) for a single delivery.

22.3 States and international organizations shall ensure that deliveries of essential goods are not prevented by sanctions or other regulatory restrictions, including, but not limited to, the prohibition of financial transactions, carriage or insurance, prohibitions to receive payments from countries under sanctions, or sanctions on transport insurance.

Commentary

Contemporary practice in delivering humanitarian assistance is very challenging and is limited in practice to the possibility of sometimes obtaining licenses for the delivery of food and medicine only, as opposed to the delivery of goods, spare parts, and services necessary for the maintenance of critical infrastructure, which are classified as development goods by sanctioning states.

Delivery of essential goods is understood broadly (see the definition in para. 8 and the commentary thereto). Contemporary challenges to deliveries and licenses have been evaluated and assessed in detail in the commentary to para. 11. The current paragraph formulates recommendations, prepared after multiple consultations with humanitarian stakeholders, to enable them to carry out their humanitarian work effectively. States and regional organisations are obliged to fully implement the provisions of these Guiding Principles concerning the concept, scope, and delivery of humanitarian assistance; the wording and application of humanitarian carve-outs in all cases, including those aimed at implementing humanitarian resolutions of the UN Security Council; licensing; and the protection of humanitarian workers.

Because states and regional organisations are responsible for ensuring that the activity of all private actors under their jurisdiction or control does not violate human rights, references to the freedom of commercial transactions and the responsibility of businesses for creating impediments to the delivery of humanitarian assistance, including essential goods, are unacceptable. As referred to in the above commentaries, in such cases, states are responsible under international law for their omission to take necessary steps and establish the necessary conditions for businesses to respect and protect human rights, for not applying a humanitarian precautionary approach, and consequently, for violations of the relevant provisions of the Bill of Rights.

References to a lack of precise knowledge about humanitarian impact are also unacceptable (see commentary to para. 13), particularly given the existence of considerable evidence provided by humanitarian organisations, individuals, and companies on the ground, as well as reports from UN Special Rapporteurs.

V. PRINCIPLES FOR BUSINESSES

A. FUNDAMENTAL PRINCIPLES FOR BUSINESSES

23. Human rights based approach in business activity

23.1 Business enterprises shall refrain from any act or omission resulting in violation of human rights, including extraterritorially, and shall take all necessary measures to eliminate or mitigate any adverse human rights impact that results from their implementation of sanctions

measures, including extraterritorially.

23.2 Businesses shall embed responsible anti-over-compliance business conduct in accordance with the OECD Due Diligence Guidance for Responsible Business Conduct (2018) into their policies and management systems in all sectors of economy.

23.3 Banks and businesses shall not invoke the content or effects of any unilateral coercive measure as discharging them from any legal obligation under the pretext of, on the basis of frustration or force majeure or any related legal doctrine.

23.4 Banks and businesses shall not purport to conclude contractual terms which require observance of a unilateral coercive measure, or which purports to release them from any legal obligation on account of such a measure, and/or encourage over-compliance. Given the illegality of unilateral coercive measures such terms shall be null and void.

Commentary

This principle refers to the basic obligation of businesses to respect, promote, and protect human rights, as well as to enable proper mechanisms for remediation and accountability in cases of human rights abuses. It requires businesses to respect human rights in their activities both in their state of incorporation and abroad, as provided for in Principle 11 of the UN Guiding Principles on Business and Human Rights: "*The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate.*" [398]

The basic obligation of businesses to respect human rights contains two main elements. Firstly, businesses "*shall refrain from any act or omission resulting in violation of human rights, including extraterritorially.*" Businesses are therefore prohibited from causing intentional harm to the enjoyment of human rights, as well as harm caused by negligence in violation of their due diligence obligations. Secondly, businesses "*should take all necessary measures to eliminate or mitigate any adverse human rights impact.*" The term "necessary" refers primarily to all "*feasible measures within their power*" [399] to achieve the prescribed results, which in this case are to "*eliminate or mitigate any adverse human rights impact.*" Business activity should fully comply with the General principles of these Guiding Principles, especially the Principle of Humanity (see commentary to para. 10), but also with all principles and norms set forth in Part II of the GPBHR, "The Corporate Responsibility to Respect Human Rights," [400] as well as relevant provisions in Part III, "Access to Remedy." [401]

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398 GPBHR, para. 11, commentary to para. 11.

399 Hadžihasanović & Kubura (IT-01-47-A), Appeal Judgement of 22 April 2008. Available at: https://www.refworld.org/jurisprudence/caselaw/icty/2008/en/61263.

400 GPBHR, paras. 11-24.

401 GPBHR, paras. 30-31.

This principle does not allow businesses to choose between pursuing full elimination or mitigation of the results of their unlawful compliance practices. The term "mitigation" is used to refer to particular circumstances (force majeure or distress) that make it virtually impossible to eliminate an adverse human rights impact immediately, or to circumstances related to the irreversible effects of such an impact. All actual impacts—those that have already occurred due to the failure to exercise due diligence—should be subject to remediation.[402]

Neither frustration nor *force majeure* are considered grounds for excluding responsibility or discharging businesses from any legal obligation to respect human rights. Freedom of contract, therefore, does not entitle businesses to include arbitrary "sanctions clauses" in contracts, especially those relating to the delivery of essential goods as understood by these Guiding Principles (see the concept in para. 8 and the commentary thereto). Sanctions clauses can only be limited to the need to implement, in the strictest sense, the provisions of UN Security Council resolutions. Sanctions clauses providing for the possibility of non-performance in cases of "frustration" or fear of possible negative consequences therefore constitute a breach of contract. If such non-performance has a negative humanitarian impact, it also constitutes a violation of the relevant standards of human rights due diligence and humanitarian precaution by the business in question.

Unilateral coercive measures (UCMs) are illegal under international law. In numerous resolutions, the Human Rights Council[403] and the UN General Assembly[404] have declared all UCMs illegal[405]. This position is also supported and reiterated in several reports and communications by the UN Special Rapporteur on the negative impact of UCMs on the enjoyment of human rights[406]. Therefore, businesses must not rely on UCMs as a legitimate ground to cease the per-

402 Guiding Principles on Business and Human Rights, P. 18.

403 HRC, Resolution 15/24 of 6 October 2010, paras. 1 – . Available at: https://undocs.org/en/A/HRC/RES/15/24; HRC, Resolution 19/2 of 18 April 2012, paras 1 – . Available at: https://undocs.org/en/A/HRC/RES/19/2; HRC, Resolution 24/14 of 8 October 201, paras. 1 – . Available at: https://undocs.org/en/A/HRC/RES/24/14; HRC, Resolution 0/2 of 12 October 2015, paras. 1 – 2, 4. Available at: https://undocs.org/en/A/HRC/RES/0/2; HRC, Resolution 4/1 of 24 March 2017, paras. 1 – 2, 4, available at: https://undocs.org/en/A/HRC/RES/4/1; HRC, Resolution 45/5 of 6 October 2020, preamble. Available at: https://undocs.org/en/A/HRC/RES/45/5.

404 UNGA, Resolution 69/180 of 18 December 2014, paras. 5 – 6. Available at: www.ohchr.org/Documents/Issues/UCM/Res/A-RES-69-180.pdf; UNGA, Resolution 70/151 of 17 December 2015, paras. 5 – 6. Available at: www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/151; UNGA, Resolution 71/193 of 19 December 2016, paras. 5 – 6. Available at: www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/193.

405 Unilateral coercive measures, IHL and impartial humanitarian action: An interview with Alena Douhan. Available at: https://international-review.icrc.org/articles/unilateral-coercive-measures-ihl-interview-with-alena-douhan-916#footnote3_y86nl4g.

406 A/HRC/57/55, para. 84; A/79/183, paras. 6, 14; USA 20/2024. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=29224$ USA 11/2024, Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28933, etc.

formance of their commercial or employment contracts. Since the obligation to respect human rights *"exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, does not diminish those obligations, and exists over and above compliance with national laws and regulations protecting human rights*,[407] all contractual terms that require observance of a UCM, purport to release businesses from any legal obligation on account of such a measure, and/or encourage over-compliance are not only illegal but void.

In some areas, over-compliance manifestly results in a direct violation of the basic obligation of businesses to respect human rights. When over-compliance by the private sector prevents access to medicines, even in the absence of comprehensive or sectoral sanctions[408], the violation of the right to health, due to its high sensitivity and close linkage to the right to life cannot be denied. Businesses must, therefore, avoid zero-risk policies and over-compliance, which are incompatible with their obligations under the GPBHR, especially regarding medicines, vaccines, medical equipment, spare parts, and other goods necessary for providing health-related services and supporting critical infrastructure[409]. A similar situation exists regarding access to other essential goods and services, as understood by these Guiding Principles.

If a company has taken all preventive measures in good faith, but a negative impact still arises and is reported to it, the company must take all necessary measures to terminate its harmful practices without delay.

Responsible anti-over-compliance business conduct should be based on the due diligence process enshrined in the OECD Due Diligence Guidance for Responsible Business Conduct (2018), which consists of the following steps:

1. Embed responsible business conduct into policies and management systems.

2. Identify and assess actual and potential adverse impacts associated with the enterprise's operations, products, or services.

3. Cease, prevent, and mitigate adverse impacts.

4. Track implementation and results.

5. Communicate how impacts are addressed.

6. Provide for or cooperate in remediation when appropriate.[410]

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407 Guiding Principles on Business and Human Rights, P. 13.

408 A/HRC/54/23, para. 17.

409 A/HRC/54/23, para. 95.

410 OECD Due Diligence Guidance for Responsible Business Conduct. Available at: https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.

These practical measures, as interpreted in the OECD Due Diligence Guidance for Responsible Business Conduct (2018), fully reflect the provisions of the GPBHR and should be implemented into the policies and management systems of all businesses, regardless of their size, in all sectors of the economy (mining and quarrying, agriculture, automobile production, textiles, insurance and banking, healthcare services, legal services, information technology, education, etc.).

24. The principle of due diligence

24.1 Businesses shall undertake due diligence procedures and methods in interpreting and implementing all requirements, exemptions, exceptions and derogations. As unilateral coercive measures are illegal under international law, businesses shall challenge their implementation and enforcement by all available legal means.

24.2 In relation to the supply of essential goods and services, the termination of existing contracts, the refusal to continue supplies, and the inclusion of sanctions clauses, are unacceptable in accordance with the prohibition of discrimination and the duty of care, especially in the cases when the business is a monopolist supplier of life-saving and/or essential goods and/or equipment.

Commentary

Human rights due diligence serves the purpose of identifying, preventing, mitigating, and accounting for how businesses address their adverse human rights impacts through compliance with all requirements, exemptions, exceptions, and derogations.

Businesses should refrain from implementing unilateral sanctions and should consider them illegal. As previously clarified, UCMs are illegal under international law (see commentary to paras. 8 and 23). Therefore, all legal means, including informing, consultations, administrative procedures, and civil action, must be used to challenge their implementation and enforcement at the national level. Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights.[411]

States should take all possible measures to assist businesses in their legitimate pursuit of their human rights due diligence obligations in the context of compliance policies and practices. For that reason, the right of businesses to seek exemptions from compliance obligations should be safeguarded to prevent any risk of bankruptcy. Businesses should have the right to challenge any compliance obligation through effective access to justice (see commentary to para. 27). Any rules concerning the application of unilateral sanctions must be embodied in law and approached and worded in the clearest and most transparent way possible (see commentary to para. 26).

411 Guiding Principles on Business and Human Rights, P. 13.

Unilateral sanctions and over-compliance by businesses, including banks and pharmaceutical, transportation, and insurance companies, violate the due diligence obligations of businesses and the states that own or control them, or in whose territory or jurisdiction those businesses are domiciled. Businesses are obligated to take measures to prevent any violation of human rights, at a minimum those set forth in the International Bill of Human Rights. States are obligated to take all measures necessary to ensure that the activity of private businesses under their jurisdiction and control is exercised in full conformity with human rights standards. Increasing mortality rates, reduced life expectancy, the rising prevalence of physical and mental health conditions and disabilities due to the lack of timely diagnosis and treatment, and increasing physical and psychological suffering are only some of the serious tangible consequences. These constitute violations of human rights, such as the rights to life and freedom from torture and inhuman treatment, and the principle of non-discrimination.[412]

The most striking examples where the right to health was affected by over-compliance involve the provision of medical dressings to patients suffering from the skin disease epidermolysis bullosa (EB) in Belarus and Iran in the context of unilateral sanctions imposed by the United States, including via UNICEF. The most commonly used dressings are those designed to be removed easily, such as those coated with soft silicone, foam, or mesh, lipido-colloid, and polymeric membrane produced by Mölnlycke Health Care AB (Mepilex, Mepilex EM, Mepilex Transfer, Mepilex Ag, etc.). Other types of dressings have proven less effective. Over-compliance by the company, which is, in fact, the sole manufacturer of these medical products, inevitably leads to a severe deterioration in the health condition of such patients[413] and a decrease in their life expectancy.[414] Unfortunately, even after the issue was reported to the company[415], it not only failed to provide any explanation for its behaviour, considering that the provision of these medical products is not prohibited by existing unilateral sanctions regimes, but also failed to stop its harmful practices. This manifestly constitutes a breach of the human rights due diligence obligation, since a monopolist supplier of life-saving and/or essential goods and/or equipment refused to continue medical supplies and did not cease, prevent, or mitigate the adverse impacts, even after being directly informed about them.

The proliferation of secondary sanctions as a means of enforcing unilateral sanctions against

412 A/HRC/54/23, para. 82.

413 AL USA 25/2023. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28386; AL SWE 3/2023. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28385; AL SWE 4/2022. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27591; AL USA 19/2022. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27593.

414 AL OTH 95/2022. Avalilable at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27592.

415 AL OTH 108/2023. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28382; AL OTH 95/2022.

states or key economic sectors, foreign companies, organisations, or individuals exacerbates all the negative effects of unilateral sanctions on human rights[416]. The actual use of secondary sanctions generates fear of any interaction with targets of primary sanctions, even in countries where doing business with them is legal[417]. This fear has consequences for human rights, especially the right to health, in states targeted by primary sanctions[418] (on the reasons for and consequences of over-compliance, see the commentaries to paras. 2, 10, and 11).

For this reason, sanctioning states should refrain from threats of secondary sanctions or criminal or civil penalties for the circumvention of sanctions regimes, as these are illegal under international law. Sanctioning states should only engage in enforcement processes that comply with international law. Any aspects of sanctions enforcement that do not comply with international law should be brought into line with it, with particular attention to the direct and indirect impact of sanctions enforcement on human rights. Sanctioning states must adapt their sanctions enforcement procedures and penalties to take into account, *inter alia*, the relative resources of individuals, companies, and other entities, particularly humanitarian organisations, in response to suspected violations, to alleviate any pressures and burdens that encourage over-compliance. Under no circumstances should a sanctioning state intentionally encourage over-compliance through the design of its sanctions or through threats or any other means adopted to enforce them.[419]

The failure to deliver essential and especially life-saving goods, particularly when the business is a monopolist supplier of the goods, services, equipment, or spare parts, cannot be justified by references to freedom of contract or commercial activity, or by fear of or reluctance stemming from unilateral sanctions or their enforcement. It constitutes a violation of the generally recognised "duty of care," derived from common law, defined as "a legal obligation requiring adherence to a standard of reasonable care while performing any act that could foreseeably harm others," or "a legal obligation to act towards others with prudence and vigilance to prevent any risk of foreseeable damage,"[420] which is inherently part of the due diligence obligation in the broader human rights context.[421]

Because the unavailability of medicine or other goods produced by a monopolist (or a limited number of producers) will evidently result in the deterioration of health status, suffering, and,

416 A/HRC/51/33, para. 11.

417 A. Shalal, "IMF sees no 'bounce back' in Russian economy, warns of further damage if sanctions expanded".

418 A/HRC/51/33, para. 13.

419 A/HRC/51/33, paras. 92-95.

420 ICRC Duty of care: elements of definition. Available at: https://unsceb.org/sites/default/files/imported_files/ICRC%20-%20Duty%20of%20Care%20ICRC%20definition.pdf.

421 What is the duty of human rights vigilance in the supply chain? Available at: https://www.yvea.io/en/services/quality-compliance/product-quality-standard/human-rights-duty-of-care-in-the-supply-chain.

with a high probability, the death of people in need, and because, when such people rely on an established supply scheme from a monopolist (or a limited number of producers), businesses do not have the right to terminate existing contracts or refuse to proceed with procurement due to the obvious foreseeable severe harm to the health and lives of those in need. Such activity constitutes a violation of the right to life, the right to the highest attainable standard of health, and freedom from torture of people affected by the manufacturers of life-saving goods, as well as any other businesses (including banks and other financial institutions, and delivery and insurance companies) that impede the delivery of such goods.

States' failure to ensure the unimpeded flow of such goods, as well as other essential goods, constitutes a violation of their due diligence obligations (see commentary to paras. 8 and 13) and a violation of relevant human rights, including the right to life, freedom from torture, the right to the highest attainable standard of health, and freedom from hunger (see commentaries to paras. 4, 8, and 13).

B. OPERATIONAL PRINCIPLES FOR BUSINESSES

25. Minimization of humanitarian impact in compliance policies

25.1 Compliance policies of businesses should be based on the requirements prescribed by law only.

25.2 Businesses should have policies and processes in place in order to avoid any adverse human rights effects resulting from the implementation of sanctions. Businesses shall formulate and include sanctions impact assessment criteria as part of their human rights assessment policies.

25.3 Businesses should avoid general (non-individual) measures, discriminatory and/or non-transparent practices.

Commentary

Businesses should base their compliance policies exclusively on law. As a result, the implementation of UN Security Council resolutions shall be in accordance with mechanisms established at the legislative level, in full conformity with the scope of authorisation and relevant sanctions (both targeted and non-targeted) of the UN Security Council, and with due respect for international human rights and international humanitarian law obligations[422]. Such measures should not be intended to "*have adverse humanitarian consequences for civilian populations nor adverse*

422 UNSC, Resolution 2664(2022), preamble.

consequences for humanitarian activities and those carrying them out." [423]

At the same time, because Resolution 2664(2022) was adopted by the UN Security Council acting under Chapter VII of the UN Charter, states are under obligation to fully implement it in domestic law, including the principles of humanitarian work outlined in Resolution 46/182[424]. Businesses shall, therefore, rely on general domestic legislation concerning the implementation of UN Security Council resolutions and should not expect the adoption of specific licenses for every individual case. If such general domestic legislation authorises businesses to take certain measures to implement UN Security Council resolutions, then the provisions of paragraphs 1 – 4 should be directly applied.

For the purposes of legal clarity and consistency, states taking enforcement measures shall adopt them through legislative acts, with due respect for the hierarchy of their normative systems. A similar approach shall be taken by states when deciding on measures taken unilaterally. States acting under the principles of due diligence and legal certainty (see commentaries to paras. 17 – 18) are obliged to cease the practice of issuing sanctions-related non-binding interpretative documents and to avoid adopting such acts with uncertain status in the future (including Guidances, FAQs, Q&As, Business Advisories, or any other form)[425], in order to prevent and minimise over-compliance by businesses.

The use of such non-binding documents increases the risk of over-compliance, causes significant harm to human rights, seriously augments and multiplies the negative humanitarian effects of unilateral coercive measures (UCMs), and affects not only states under sanctions but also third states[426], their nationals and companies, and the general population. Therefore, states are obliged to take all necessary measures to ensure that any derogations from human rights standards are taken in accordance with international law[427].

The second aspect of this principle addresses the responsibility of businesses to comply with international human rights law, as set forth in multiple UN documents as part of corporate responsibility[428], including the UN Guiding Principles on Business and Human Rights[429] (UN GPBHR) and the Norms on the Responsibilities of Transnational Corporations and Other Business

423 Ibid.

424 UNGA, Resolution 46/182.

425 A/78/196, paras. 32-40.

426 A/HRC/57/55, para. 24.

427 CCPR General Comment No. 29, art. 4: Derogations during a State of Emergency, para. 16; art. 9 (1,3), 12 (3), 13, 15 (1), 18(3), 19(3), 20, 21, 22(2) of the ICCPR.

428 The UN 'Protect, Respect and Remedy Framework'; GPBHR; Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. Available at: https://digitallibrary.un.org/record/501576?v=pdf.

429 Guiding Principles on Business and Human Rights.

Enterprises with Regard to Human Rights[430].

Such policies must provide for:

1. A preliminary assessment of possible humanitarian impacts before drafting or implementing sanctions compliance policies.

2. Continuous impact assessment during implementation to determine whether sanctions requirements should be challenged and/or to avoid breaching the Principle of Humanity by amending implementation measures.

3. Amendment of compliance policies to ensure respect for internationally recognised human rights, with due consideration for the principle of humanity, including the prohibition of discrimination (see commentaries to paras. 10 and 14).

The GPBHR are based on the presumption of the obligation of businesses to respect human rights[431]. This means that they "should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved" (Principle 11). This responsibility refers "*to internationally recognised human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work*" (Principle 12). *Human Rights Translated: A Business Reference Guide* provides a range of examples under each human right and can be used to understand the human rights potentially affected by business activities, including over-compliance with unilateral sanctions[432](see commentaries to paras. 5, 10, and 12).

As clarified in the GPBHR, "*the responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate.*" *For this reason, businesses should address "adverse human rights impacts [by] taking adequate measures for their prevention, mitigation and, where appropriate, remediation.*"[433]

The term "policies" refers to the policy commitment described in Principle 15 of the GPBHR. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy. The term "statement" is used generically to describe whatever means an enterprise employs to set out publicly its responsibilities, commitments, and expectations. Such a statement of policy

430 Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights.

431 Guiding Principles on Business and Human Rights, principle 11.

432 Human Rights Translated: A Business Reference Guide. Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Human_Rights_Translated_web.pdf.

433 Ibid.

should: be approved at the most senior level of the business enterprise; be informed by relevant internal and/or external expertise; stipulate the enterprise's human rights expectations of personnel, business partners, and other parties directly linked to its operations, products, or services; be publicly available and communicated internally and externally to all personnel, business partners, and other relevant parties; and be reflected in operational policies and procedures necessary to embed it throughout the business enterprise[434].

Business policies and processes should aim at two basic goals set forth in Principle 13 of the GPBHR: "(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."

Businesses should avoid any adverse human rights effects resulting from their activities, including the implementation of sanctions. To identify, prevent, mitigate, and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence in accordance with Principles 17 – 22 of the GPBHR.

After sanctions are imposed on specific countries, state officials, companies, and nationals of specific countries, many companies based in sanctioning states stop deliveries of life-saving medicines and diagnostic equipment, including for HIV/AIDS, tuberculosis, cancer, hepatitis B, hepatoses and cirrhosis; high-intensity painkillers; certain antiepileptic medications, tranquillisers, and sedatives; bone tissue calcium regulators; various types of sterilizing equipment and their spare parts; arthroscopes; raw materials and reagents; and many other items[435]. Such over-compliance directly affects the enjoyment of the right to health; however, companies continue these harmful practices even without any direct prohibition on delivering life-saving medicines and diagnostic equipment to the affected countries (see commentary to para. 24).

The term "processes" includes due diligence processes and processes to enable the remediation of any adverse human rights impacts, as referred to in Principle 15(b) and (c) of the GPBHR .

General (non-individual) measures include those indiscriminately affecting racial, national, ethnic, religious, and other social groups. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic and general principle relating to the protection of human rights[436]. Article 2 of the ICCPR stipulates that state parties must "*ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex,*

434 Guiding Principles on Business and Human Rights, P. 13.

435 A/HRC/54/23, paras.19-37.

436 CCPR General Comment No. 18: Non-discrimination, para. 1.

language, religion, political or other opinion, national or social origin, property, birth or other status." As stipulated by the Inter-American Court of Human Rights in its Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants (2023), "*the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.*" [437]

Business transparency is usually understood as the "*lack of hidden agendas and conditions, accompanied by the availability of full information required for collaboration, cooperation, and collective decision making.*" [438] However, from a legal perspective, non-transparency is more often considered within anti-corruption policies [439], accountability policies[440], or in the context of personal data protection[441]. However, the non-transparent practices referred to in this principle mostly deal with human rights transparency within the meaning of Principle 21 of the GPBHR. Companies must avoid any potential harm to human rights within the context of compliance with sanctions. In this regard, businesses need to be able to demonstrate that they are meeting their responsibility to respect human rights in practice[442]. The responsibility to respect human rights requires that business enterprises have policies and processes in place that enable them to both know the risks sanctions pose to human rights and demonstrate that they respect human rights.[443]

26. The principle of transparency

26.1 Business policies should be publicly available and communicated internally and exter-

437 Advisory opinion OC-18/03 of 17 September 2003, para. 101. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

438 Trancparency. Marketing dictionary. Available at: https://www.monash.edu/business/marketing/marketing-dictionary/t/transparency.

439 UN Convention against corruption, art. 12 (2 (c); An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide. Available at: https://www.unodc.org/documents/corruption/Publications/2013/13-84498_Ebook.pdf.

440 OECD Principles of Corporate Governance. Available at: https://www.oecd-ilibrary.org/docserver/9789264015999-en.pdf?expires=1727808976&id=id&accname=guest&checksum=93554181AF700CD577ACE9739B64ACC7; Accountability and Transparency: a Guide for State Ownership. Available at: https://www.oecd-ilibrary.org/docserver/9789264056640-en.pdf?expires=1727809018&id=id&accname=guest&checksum=91E9CEE39D5B674B074453B7BF04353C.

441 Transparency reporting: Considerations for the review of the privacy guidelines. Available at: https://www.oecd-ilibrary.org/docserver/e90c11b6-en.pdf?expires=1729703622&id=id&accname=guest&checksum=15252CFAF3C62A1E627F238D3CA76EA7.

442 The Corporate Responsibility to Respect Human Rights: An Interpretive Guidehttps. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2_En.pdf.

443 Guiding Principles on Business and Human Rights, pp. 23-24.

nally to all personnel, business partners, and other relevant parties.

26.2 Businesses shall implement sanctions in a clear, transparent and accessible manner and take all reasonable measures to provide transparency of the relevant rules and procedures while implementing/complying with sanctions.

26.3 Businesses shall take measures to monitor their compliance policies and strategies for abiding with human rights and to adjust them as soon as a negative humanitarian impact is identified.

26.4 For this purpose businesses shall assess the consequences of the measures adopted. Assessments should be based on appropriate qualitative and quantitative indicators, conducted on a systematic basis.

Commentary

Transparency is closely linked to accountability and therefore plays a significant role in remediating potential harm to human rights that can occur while implementing sanctions. The GPBHR establish the obligation of businesses to respect human rights. Business policies should be *"publicly available and communicated internally and externally to all personnel, business partners and all relevant parties."* [444] To ensure transparency, businesses are required to have external assessments[445] and to communicate externally *"how they address human rights impacts"* and risks[446]. This approach constitutes a measure of *"transparency and accountability"* to those whose human rights have been affected and should include public, formal reporting in the case of severe human rights risks.[447]

The business policies mentioned in this principle include a statement of policy available to the public, but are not limited to it. Other policy documents, such as the tracking (or monitoring) methodology for mitigating risks stemming from compliance with sanctions, reports on periodic assessments of compliance practices in the context of adherence to human rights standards, and the results of internal and/or independent external human rights expertise, can also contribute to implementing the principle of transparency.

Companies should view human rights comprehensively when conducting due diligence and developing human rights policies. They should examine how their sanctions compliance, and any over-compliance, may negatively impact human rights, including abroad, and take corrective action.[448]

444 GPBHR, para. 16.

445 Ibid. para. 18.

446 Ibid, para. 21.

447 GPBHR, commentary to para. 21.

448 A/HRC/51/33, paras. 97-99.

The phrase "*communicated internally and externally*" should be interpreted in the context of Principle 21 of the GPBHR. Such communication can take various forms, including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports. Formal reporting is itself evolving, from traditional annual reports and corporate responsibility/sustainability reports to include online updates and integrated financial and non-financial reports. Formal reporting by enterprises is expected where risks of severe human rights impacts exist[449], whether due to the nature of the business operations or the operating contexts. The reporting should cover topics and indicators concerning how enterprises identify and address adverse impacts on human rights. Independent verification of human rights reporting can strengthen its content and credibility. Sector-specific indicators can provide helpful additional detail[450].

The above principles and their interpretation should be fully implemented in sanctions and unilateral sanctions environments. Apparently, business policies regarding sanctions implementation are often not transparent. Although, in some cases, businesses may include general information about limitations to the provision of services with reference to the implementation of unilateral sanctions[451], individuals, other businesses, and humanitarian organisations are mostly informed about business sanctions policies only when they are already facing the consequences. This can take the form of having their bank accounts closed; bank transfers blocked in general or in a specific case; being refused acceptance of a publication for peer review due to a nexus to a country under sanctions; or receiving a refusal of cooperation or procurement due to sanctions-related compliance and over-compliance (even with sanctions of third states), even when it concerns food security or health-related goods. To minimise the chance of accountability and remedy, including through legal claims brought before judicial institutions, many businesses do not cite unilateral sanctions as the grounds for their refusal to cooperate, but rather cite different reasons or ignore any appeals from individuals or companies with any nexus to countries, businesses, or individuals under sanctions by not responding at all or referring to "advice" not to deal with such actors. Such an approach breaches paragraphs 23 – 24 and 29 of the GPBHR.

Therefore, state activity resulting in over-compliance (see commentary to para. 8), which is often uncertain and non-transparent, enables the shifting of responsibility. Public policies aimed at creating a "positive image" of unilateral sanctions, calls to make them more effective, or denial of any negative humanitarian impact of unilateral sanctions on the one hand, and the feeling among businesses of being unprotected and left alone against any sanctions-related charges on the other hand, result in attempts by businesses to minimise transparency and visibility in sanctions-related areas. Because there are usually no requests from sanctioning countries to monitor and assess any possible humanitarian impact, businesses do not feel that the obligations under the GPBHR apply in unilateral sanctions environments.

449 GPBHR, para. 21.

450 Guiding Principles on Business and Human Rights, P. 23.

451 JAL USA 11/2024; JAL OTH 38/2022; JAL OTH 37/2022; JAL OTH 39/2022; JAL OTH 40/2022.

Consequently, it is a primary obligation of states to ensure that businesses are aware of their human rights obligations, including in the context of the principle of transparency, and that they implement such obligations effectively when dealing with sanctions-related issues. The proliferation of legal frameworks that criminalise the circumvention of unilateral sanctions and impose criminal penalties, civil liability, and secondary sanctions, as well as interpretative acts complementing existing sanctions regulations, many of which are unclear within national legal systems[452], does not contribute to fulfilling this duty.

States must ensure, *inter alia,* "*effective, comprehensive and unconditional exemptions for humanitarian organizations instead of the existing narrow and often confusing carve-outs regimes, which do not eliminate over-compliance and may discourage humanitarian and other relevant actors from pursuing their life-saving operations out of fear of potential repercussions.*" [453] In turn, businesses cannot ignore humanitarian resolutions of the UN Security Council or any humanitarian exemption rules, general licenses, or other licenses. Because businesses are obliged to act in accordance with the principle of humanity, they are under obligation to adopt clear and transparent humanitarian delivery policies, interpreted broadly in accordance with international human rights law and the principles of humanitarian aid delivery.

Therefore, states must not only "*avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur*," but also "*seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.*" [454]

The meaning of "reasonable measures" depends on many circumstances and requires a context-specific assessment[455]. In general terms, it may include "those measures that could have had a real prospect of mitigating the harm and do not impose a disproportionate burden" on a particular business.[456]

In terms of monitoring and assessing their compliance policies and strategies from the perspective of abiding by human rights, all businesses are bound by Principles 18 and 19 of the GPBHR, which constitute an integral part of human rights due diligence. Companies should regularly monitor the human rights impact of their compliance and over-compliance with unilateral

452 A/78/196, para. 32.

453 A/78/196, para. 35.

454 GPBHR, para. 13.

455 Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete. Available at: https://academic.oup.com/hrlr/article/23/3/ngad010/7187933.

456 Mink, F. Frontex: Human Rights Responsibility and Access to Justice. Available at: https://eumigrationlawblog.eu/frontex-human-rights-responsibility-and-access-to-justice/?print=print.

sanctions and adjust their practices to eliminate or mitigate any negative impact that is identified. Companies should engage with the governments of sanctioning states about aspects of sanctions that prompt over-compliance through a lack of clarity, complexity, or any other reason, with a view to adjusting the relevant features of sanctions to avoid that result. Companies should consult with their respective governments when they deem over-compliance with sanctions to be necessary for adhering to other national laws and regulations pertaining to their business, with the aim of adjusting such laws and regulations, or their enforcement, to ensure that the companies can act in line with their human rights responsibilities.[457]

As a result of monitoring, businesses should prevent, terminate, or mitigate the adverse impact of their compliance with sanctions. Ending a business relationship as a consequence of a compliance policy should always be considered from a humanitarian standpoint, especially when the company is a monopoly in a specific area or an important manufacturer or supplier of medical, food, or other products essential for humanitarian purposes.[458]

Monitoring should be carried out systematically and permanently in a manner that allows businesses to track the effectiveness of their response concerning compliance practices[459]. For that reason, qualitative and quantitative indicators should be used, as well as feedback from both internal and external sources, including affected stakeholders. The indicators can include those developed in the Monitoring and Impact Assessment tool[460], but are not limited to them. All other humanitarian indicators that allow for a comprehensive assessment of both actual and potential negative effects may be used.

VI. ACCESS TO JUSTICE

27. ffective access to justice

27.1 Access to justice, including access to all types of legal services, with regard to violations of human rights by unilateral sanctions, sanctions' enforcement, or over-compliance with sanctions of the UN Security Council and unilateral coercive measures, shall be granted without constraints and in a timely manner to all persons, natural and legal, in full conformity with the presumption of innocence, with respect for due process and with fair trial guarantees, in line with international law.

457 A/HRC/51/33, paras. 97-99.

458 See Mölnlycke Health Care AB cases: OTH 95/2022, OTH 108/2023; Roquette Fr è res case: OTH 135/2022, Novartis International AG case: OTH 134/2022, etc.

459 GPBHR, para. 20.

460 Sanctions Monitoring & Impact Assessment Tool. Available at: https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures/sanctions-monitoring-impact-assessment-tool; A/HRC/57/55.

27.2 Any person shall have real and effective access to any national or international mechanism for the protection of rights against the implementation of sanctions, secondary sanctions, other means of sanctions enforcement and over-compliance.

27.3 Access to justice shall not be impeded by any legislative, administrative or operational measure, including impediments to transfer or unfreeze funds to cover legal fees and expenses, including legal advice and representation.

Commentary

The right of every individual to be protected by the law is inherent in many international human rights documents as a means to ensure that other human rights are protected properly[461]. Article 26 of the ICCPR explicitly refers to the equality of all persons before the law and sets forth their entitlement "*without any discrimination to the equal protection of the law*". Similarly, Article 14 provides a list of safeguards in the face of criminal charges against a person, with special emphasis on ensuring the presumption of innocence. Access to justice also constitutes an integral part of adherence to the rule of law. The UN Secretary-General, in his 2004 report "*The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*" (2004) reflects that "*the rule of law shall rely on measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law… legal certainty, avoidance of arbitrariness and procedural and legal transparency […], capacity, performance, integrity and accountability.*" [462]

The content of access to justice has been repeatedly addressed in several UN documents. According to General Recommendation No. 33 of the CEDAW, access to justice encompasses the "*justiciability, availability, accessibility, good quality and accountability of justice systems, and the provision of remedies for victims.*" [463] General Comment No. 32 includes, as integral parts, access to legal assistance; access to documents, evidence, and other relevant materials; access to the "*duly reasoned written judgment of the trial court*"; and access to a tribunal at the appeal level[464]. Guidance on access to justice for women additionally refers to: non-discrimination; widespread legal awareness and literacy among the population; affordable and quality legal advice and representation; accessible, affordable, timely, effective, efficient, impartial, corruption-free, and trustworthy dispute settlement mechanisms; respect for human rights standards;

461 ICCPR, art. 6(1), 17(2), 18(3); CEDAW, art. 2(c).ICCPR, art. 6(1), 17(2), 18(3); CEDAW, art. 2(c).

462 See UNSC, 'The rule of law and transitional justice in conflict and post-conflict societies'; The United Nations Rule of Law indicators: Implementation Guide and Project tools; The need for the existence of the right to appeal and legal certainty is supported even by those institutions which support sanctions: submission by the Association of reunification of Ukraine.

463 CEDAW, General recommendation No. 33.

464 HRC, General Comment No. 32, art. 14: Right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32); A/60/147, para. 12 (c, d); 67/187; United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, para. 3.

and the availability of efficient and impartial mechanisms for the enforcement of judicial decisions[465].

The right of individuals to judicial protection of their rights is guaranteed in both international practice and legal doctrine. All procedural guarantees, including the right to due process[466] and the right not to be held guilty of any offense that was not an offense at the time of its commission[467], are considered inalienable by human rights institutions[468], legal scholars[469], and international treaties[470]. Violating these rights, even in time of war, is qualified as a serious breach of international humanitarian law.[471]

It is generally accepted in international law that every right must be accompanied by the availability of an effective remedy in the case of its violation[472]. This is relevant not only to the obligation of states to provide effective remedies for victims of crimes or abuse of power, in accordance with the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[473], but also to the possibility of obtaining judicial protection for all human rights as an exercise of the due diligence obligation[474], including economic, social, and cultural rights, as reflected in several general comments of the CESCR.[475]

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465 Framework for measuring access to justice including specific challenges facing women, Guidance note, P. 7.

466 ICCPR, art. 14 (2 – 7).

467 ICCPR, art. 15 (1).

468 CCPR/C/21/Rev.1/Add.11, para. 16.

469 R. Arnold, "Human Rights in Times of Terrorism"; *Zeitschrift f ü r ausländisches öffentliches Recht und Völkerrecht, P. 305; Y. Dandurand, Handbook on Criminal Justice and Responses to Terrorism*, Criminal Justice Handbook Series, pp. 40 – 41.

470 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, 75 *UNTS* 287, art. 72 – 73, 146 (4); Geneva Convention Relative to the Treatment of Prisoners of War, 1949, 75 *UNTS* 135, art. 105 – 108, 129 (4); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protectionof Victims of International Armed Conflicts, 1977, *UNTS* 3, art. 75; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1977, *UNTS* 609, art. 76.

471 V Geneva Convention, art. 147; Protocol I, art. 85 (4 e).

472 International Commission of Jurists, Adjudicating Economic, Social and Cultural Rights at National Level: Practitioners Guide No. 8 (Geneva, 2014), para. 24.

473 UNGA, Resolution 40/34, annex.

474 See Access to Justice for Economic, Social and Cultural Rights: Training Materials on Access to Justice for Migrants. Available at: https://www.icj.org/wp-content/uploads/2021/09/Module-3-Access-to-justice-for-economic-social-and-cultural-rights.pdf; International Commission of Jurists, Adjudicating Economic, Social and Cultural Rights at National Level, P. 14; and International Commission of Jurists, "International Principles and Guidelines on Access to Justice for Persons with Disabilities" of September 2021, P. 6.

475 Committee on Economic, Social and Cultural Rights, general comment No. 9 (1998), paras. 2, 3, 10; Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999); Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009); see also International Commission

Unilateral sanctions, along with their enforcement and over-compliance, violate a number of international treaty provisions, provisions of private law contracts, and human rights. Despite the well-recognised right to access justice as a means of protecting violated rights, sanctioning countries usually provide very limited possibilities for access to justice due to:

- challenges in identifying the responsible country and a competent court;
- refusal of courts in sanctioning countries to exercise jurisdiction due to insufficient nexus to the country (although the nexus to the country used as a ground to impose unilateral sanctions was recognised as sufficient);
- the absence of any mechanism, or complexity in identifying the relevant mechanism or body to appeal to in sanctions cases;
- refusal of courts to identify legal grounds for appeal for those not directly designated, but rather affected by sectoral sanctions or by over-compliance;
- non-transparency and non-disclosure of information used as grounds for designation before or during the appeal process, often with reference to the confidentiality of intelligence information;
- presumptions of wrongfulness of behaviour[476];
- high legal costs, affordable only for large corporations;
- the lengthy process of review;
- the existence of non-binding acts, such as Q&A, guidance documents, explanations, or any other instruments without formal legal status in the country's legal system, but used by courts and other state bodies as binding rules in the decision-making process;
- multiplicity and diversity of interpretations by different bodies within one state or bodies of different states[477];
- the need for lawyers to obtain special licenses to present specific cases;
- challenges in unfreezing money to cover legal costs, although some possibility for this is provided for in some sanctions regulations;

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of Jurists, Adjudicating Economic, Social and Cultural Rights at National Level, para. 24; and International Covenant on Economic, Social and Cultural Rights, art. 2.

476 Uyghur Forced Labor Prevention Act Is Coming… Are You Ready? CBP Issues Hints at the Wave of Enforcement to Come; CAATSA, section 321.

477 A/78/196, paras. 30-40.

- challenges in transferring money to cover legal costs from or on behalf of individuals or companies directly designated or with any nexus to the state, region, or sector of the economy under sanctions.

Sanctioning states usually qualify unilateral sanctions as a foreign policy tool and an administrative, rather than criminal, mechanism[478] to prevent the application of due process, the presumption of innocence, and fair trial guarantees. Secondary sanctions and criminal and civil penalties for the circumvention of sanctions regimes are equally illegal, given the illegality of primary sanctions[479]. Foreign companies and individuals with any nexus to designated countries, economic sectors, regions, companies, or individuals face serious consequences, including prohibition on doing business in the sanctioning state, using its currency in transactions, using its financial markets, seizure of goods, and facing civil, administrative, or criminal charges with no clear mechanism of appeal.

Access to justice must be provided to both individuals and private entities under the jurisdiction or control of the sanctioning state. As the Human Rights Committee clarifies, "*the right of access to courts and tribunals and equality before them is not limited to citisens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party*." [480] Any of these impediments, regardless of their nature, must be removed by states to ensure proper access to justice as a safeguard for the promotion and protection of all other human rights.

The commented principle also upholds that states must provide, without any discrimination, access to judicial protection for all human rights, including economic, social and cultural rights affected by unilateral sanctions, their enforcement, and over-compliance, through affordable, fast, clear, and transparent procedures, with unimpeded access to legal assistance without unreasonable costs, licensing requests, or the use of intelligence information, regardless of the national qualification of unilateral sanctions regimes. The freezing of assets must not be used to impede the right to access justice in terms of access to legal counsel, legal services, or paying necessary fees to ultimately enjoy access to a tribunal.

States must also eliminate and prevent any future discrimination based on nationality, origin, place of residence, phone number, internet protocol (IP) address in the country under sanctions, or the existence of any other nexus to such a country, and address such discrimination by establishing effective access to justice[481].

478 See A/HRC/48/59; 2022 Economic Sanctions Year in Review and Outlook for 2023.

479 For example, A/76/174/Rev.1.

480 CCPR/C/GC/32, para. 9.

481 A/79/183, para. 68(g)

The principle seeks to ensure the presumption of innocence in sanctions cases and prohibits transferring the burden of proof of the legality of the activity conducted to the individual or entity. The presumption of the wrongfulness of any nexus to a specific country, region, sphere of economy, company, or individual contradicts the very idea of the presumption of innocence in criminal or administrative law[482](See commentary to para. 20).

The overlapping unilateral sanctions of various types, the confusing wording of sanctions regulations, and the risk of severe penalties for their violation constitute serious challenges for access to justice and redress. Designated individuals or companies are often prevented from submitting a case to foreign courts and face challenges in obtaining proper legal assistance, travelling to present a case, and transferring money to cover legal expenses and court or commercial arbitration fees.

The extraterritorial application of secondary sanctions and civil and criminal cases for the circumvention of sanctions regimes results in prosecution for acts often not criminalised in the country of nationality or residence[483]. This approach raises several legal problems, including low standards of proof, the non-justiciability of cases and even extradition without any legal grounds, and the high risk of arbitrary interpretations of alleged circumventions of unilateral sanctions that, under proper analysis, do not constitute an offense even under sanctions regulations. In such cases, penalties for alleged circumvention, and the designation of individuals as a result of such alleged conduct, violate standards of fair trial, the presumption of innocence, and the right not to be punished for activities that do not constitute a crime[484].

Sanctioning states and regional organisations must provide, without any discrimination, access to judicial protection for all human rights, including economic, social, and cultural rights affected by unilateral sanctions, their enforcement, and over-compliance, through affordable, fast, clear, and transparent procedures, with unimpeded access to legal assistance without excessive costs, licensing requests, or reliance on intelligence sources, regardless of the national qualification of unilateral sanctions regimes.

28. Legal services

28.1 Sanctions policy shall never affect the provision of legal or other services that are commissioned in good faith for the purposes of challenging sanctions, defending any proceedings brought under them, and protecting the right to effective legal remedy.

482 A/79/183, para. 20.

483 A/79/183, paras. 13-14.

484 Ibid, para. 14.

28.2 Legal and other (notaries, customs officers etc.) professionals shall enjoy all traditional immunities and guarantees in the course of the exercise of their legal services in cases of sanctions, sanctions circumvention or over-compliance. Legal advice and representation shall not be treated as breach or circumvention of sanctions' regimes, and shall not request additional licensing.

Commentary

The availability or absence of legal assistance, as well as the imposition of fees, often determines whether or not a person can access the relevant proceedings or participate in them meaningfully[485]. States must ensure that the provision of legal services in sanctions cases is not qualified as a civil and/or criminal offense for lawyers, in order to preserve the integrity of legal professionals. Lawyers should not face reputational risks in such cases[486]. The costs of sanctions-related cases must not make the use of judicial institutions affordable only for large corporations, leaving small and medium-sised businesses and individuals unprotected[487].

Access to justice also includes access to legal assistance; access to documents, evidence, and other relevant materials; access to the "*duly reasoned, written judgment of the trial court*"; and access to a tribunal at the appeal level[488], but is not limited to these[489]. The term "in a timely manner" in the commented principle mostly means "without undue delay"[490].

Multiple reports refer to challenges in accessing legal assistance and the fear of legal professionals losing their licenses or being subjected to civil penalties for circumventing or assisting in the circumvention of sanctions regimes. Additionally, acting as a legal professional is qualified as an aggravating circumstance in Article 8(c) of Directive 2024/1226 of April 24, 2024[491]. Many exemptions from the prohibition to provide legal services under Article 5n of Council Regulation (EU) No. 833/2014 refer mostly to "*services that are strictly necessary for the exercise of the right of defense in judicial proceedings and the right to an effective legal remedy*"[492], and are therefore unable to ensure access to justice and the comprehensive provision of legal advice for individuals affected by unilateral sanctions or their enforcement.

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485 CCPR/C/GC/32, paras. 10-11.

486 A/79/183, para. 68(d)

487 A/79/183, para. 15.

488 A/79/183, para. 7; See also CCPR/C/GC/32; UNGA, Resolution 60/147, annex, para. 12 (c) and d); UNGA, Resolution 67/187, para. 3.

489 Ibid.

490 Justice in time: A theory of constraints approach. Available at: https://onlinelibrary.wiley.com/doi/full/10.1002/joom.1234.

491 Directive (EU) 2024/1226 of the European Parliament and amending Directive (EU) 2018/1673.

492 A/79/183, para. 32.

It is possible to identify a twofold effect of unilateral sanctions on judges and lawyers, affecting representatives of legal professions directly and hindering the right to legal aid of individuals affected by unilateral sanctions. The independence of judges and lawyers constitutes an important, inalienable mechanism to ensure the right to a fair trial and access to justice. Privileges and immunities are provided to lawyers and judges to ensure judicial independence and proper access to justice for all those whose rights are affected. The Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems explicitly request that they not be subjected to "*prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics*" (Principle 12)[493].

The following challenges are often reported by lawyers in sanctions and sanctions-related cases:

- the need to obtain a license for every sanctions-related case. A general license issued for lawyers in the UK, for example, is considered insufficient and inefficient[494]. US general licenses are provided only under specific sanctions regimes[495];

- the lengthy and uncertain process of obtaining licenses to represent clients under sanctions and to be entitled to payment for services (UK[496], US[497], EU[498]), even when it refers to international adjudication, including the International Court of Justice[499];

- geopolitical motivations in licensing decision-making, "even where the grounds of

493 UNODC, 67/187. UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2013, principle 12.

494 Submissions by M. Swainston, McNair International.

495 Dogra S., Wilhelm K., Darling S., Bowen J., Denton J. "Key Sanctions Issues in Civil Litigation and Arbitration". Available at: https://globalinvestigationsreview.com/guide/the-guide-sanctions/fourth-edition/article/key-sanctions-issues-in-civil-litigation-and-arbitration.

496 Designated persons face delays of many months in receiving licences even for subsistence. Available at: https://www.lawgazette.co.uk/practice-points/time-for-a-general-licence-to-cover-basic-needs/5117856.article; There is massive obstruction of businesses. Available at: https://www.bloomberg.com/news/articles/2022-09-13/investors-fume-at-uk-treasury-s-license-delays-for-russian-firms; Lawyers face lengthy delays in obtaining licences to represent clients, see e.g. "Russian sanctions and the law of unintended consequences". Available at: https://corkerbinning.com/russian-sanctions-and-the-law-of-unintended-consequences/.

497 Submission by A.D. Bolivar; U.S. Code of Federal Regulations, Title 31, § 542.201, 542.507, 542.508, 594.517. Available at: https://www.treasury.gov/resource-center/sanctions/Documents/legal_fee_guide.pdf.

498 Claire DeLelle, Nicole Erb, "Key Sanctions Issues in Civil Litigation and Arbitration", *Global Investigation Review*, 2020. Available at: https://globalinvestigationsreview.com/guide/the-guide-sanctions/first-edition/article/key-sanctions-issues-in-civil-litigation-and-arbitration; Submission by Partners for transparency.

499 Submission by M. Swainston.Ibid; "Guidance on the principles its licensing caseworkers follow to assess license applications". Available at: https://www.gov.uk/government/publications/financial-sanctions-licensing/ofsi-licensing-designated-individuals-licensing-principles--2.

a licensing purpose have been satisfied"[500];

– challenges in receiving payment for work done, as banks are blocking client accounts, relevant bank transfers, or already transferred money;

– fear of criminal prosecution due to the adoption of legislation criminalizing the circumvention of sanctions regimes, which provides for greater liability for legal professionals[501];

– requests to report on the content of discussions with clients and to monitor all details of client structures, including piercing the corporate veil;

– the obligation to report on the violation of EU unilateral sanctions "*when providing services in the context of professional activities*", as there "*is a clear risk of the services of those legal professionals being misused for the purpose of violating Union restrictive measures*"[502];

– reputational risks, including accusations of amorality, or characterisation of efforts to challenge the legality of unilateral sanctions as defamation or disinformation[503];

– prohibition on providing legal advisory services to certain types of clients, including "*the Russian Government, or legal persons, entities or bodies established in Russia, even those which do not fall under active sanctions regimes*", without clarity on what constitutes "legal advice"[504].

The above challenges constitute a clear violation of the presumption of innocence, the right to reputation[505], and standards aimed at guaranteeing the impartiality and independence of legal, notary, and customs professionals[506], thereby affecting access to justice for all those affected by unilateral sanctions, their enforcement, and over-compliance.

States must ensure that the provision of legal services in sanctions cases is not qualified as a civil and/or criminal offence for lawyers, to preserve the integrity of legal professionals and ensure they do not face reputational risks in such cases. The presumption of the lawfulness of unilateral

500 Ibid; "Guidance on the principles its licensing caseworkers follow to assess license applications". Available at: https://www.gov.uk/government/publications/financial-sanctions-licensing/ofsi-licensing-designated-individuals-licensing-principles--2.

501 Directive (EU) 2024/1226 and amending Directive (EU) 2018/1673, art. 8 (c).

502 Directive (EU) 2024/1226, preamble (18).

503 MP names 'amoral' British lawyers silencing press for Vladimir Putin's 'henchmen'.

504 Regulation (EU) No. 269/2014, art. 2; A/79/183, paras. 32-35.

505 A/77/296, paras. 10, 20.

506 OL OTH 75/2023.

sanctions constitutes a breach of fundamental principles, customary and treaty norms of international law, and therefore should be avoided and cannot be used as a means to put pressure on legal and other professionals. To ensure the effectiveness and impartiality of legal services and advice, lawyers should enjoy the traditional immunities of the legal profession.

VII. RESPONSIBILITY

29. Inevitability of responsibility

29.1 All actors shall be held responsible for violations of international law and human rights that may result from the adoption, enforcement of or compliance with unilateral coercive measures, and from over-compliance with any form of sanctions. Nothing in these Guiding Principles should be read as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regards to human rights, WTO law, international trade law and other areas of international law.

29.2 Shifting responsibility between international organizations, States and businesses does not provide any ground for excluding such responsibility or liability under international public law, international private law or national law (civil or criminal).

29.3 Provisions of national law of sanctioning States cannot be invoked to avoid responsibility under international law and/or liability for damages thereof.

29.4 The obligation of due diligence is the obligation of action. Therefore, States are obliged under international law to take all necessary legislative, organizational or operational measures to ensure that activity of businesses under their jurisdiction or control does not violate human rights, including extraterritorially. Regional organizations shall bear the obligation insofar as it falls within their functional competence.

Commentary

The principle of inevitability of responsibility is an integral part of the rule of law, embodied in several instruments[507]. It is closely related to other operational principles contained in these Guiding principles, namely minimisation of humanitarian impact in compliance policies, transparency, and access to justice. Its primary purpose is to ensure that no actor avoids legal responsibility for acts or omissions constituting a breach of international human rights obligations as a result of the adoption, enforcement of, or compliance with unilateral coercive measures, or from over-compliance with any form of sanctions.

507 DARS, art. 1. Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf; DARIO, art.3. Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf; principle 1. Available at: https://legal.un.org/ilc/documentation/english/a_cn4_l2.pdf; etc.

In international public law, the principle of inevitability of responsibility states that every internationally wrongful act entails international responsibility. An internationally wrongful act is an act or omission attributable to a state or an international organisation that constitutes a breach of the international obligations of the relevant subject of international law[508]. As a result, sanctioning states and regional organisations (imposing sanctions within the scope of their exclusive or shared competencies) can be held responsible for the violation of international obligations through unilateral sanctions, their enforcement and over-compliance if such measures violate their international obligations in any area of international law, including international trade law, international air law, international sea law, international investment law, treaties of amity, cooperation, mutual assistance, and human rights law, or if the wrongfulness of such behaviour is not precluded in the course of counter-measures fully conforming with the law of international responsibility (see commentary to paras. 8, 10, 12).

International human rights obligations of states include their obligations to refrain from committing human rights abuses and to ensure the human rights set forth in the International Bill of Rights by the adoption of "*legislative, judicial, administrative, educative and other appropriate measures*" or "*all appropriate means, including particularly the adoption of legislative measures*."[509] States must ensure protection from the acts of their agents, or private individuals or entities, that would impair the enjoyment of Covenant rights. Therefore, it is a primary responsibility of states to hold liable those private actors, including companies and individuals, who impede the enjoyment of human rights protected by the Covenants. States cannot cite any circumstances justifying their inaction with respect to over-compliance and zero-risk policies that negatively impact international human rights. States cannot invoke the provisions of their internal law as justification for their failure to perform a treaty[510]. States can be held responsible for the failure to ensure that businesses under their jurisdiction and control do not violate human rights and are equally responsible for the violation of affected human rights in such situations (See Commentary to para. 4).

International organisations are bound by *jus cogens* norms[511], customary international law[512] (including international human rights law), accepted general principles of international law[513], and

508 DARS, para. 2.

509 ICESCR, art. 2(1). Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights; CESCR, General Comment No.3: The Nature of States Parties' Obligations (art. 2, para. 1 of the Covenant), para. 3.

510 Vienna Convention on the Law of Treaties, art. 27.

511 Alexander Orakhelashvili. "The Impact of Peremptory Norms on the Interpretation and application of United Nations Security Council Resolutions", in European Journal of International Law, Vol. 16, No.1, P.60.

512 DARIO, P. 66.

513 Ferstman Carla, "International Organisations Obligations under Human Rights and International Humanitarian Law", *International Organisations and the Fight for Accountability: The Remedies and*

the rules of the international organisation[514]. Countermeasures may not be taken by an international organisation against a member State or another international organisation in response to a breach of an international obligation under the organisation's rules unless such countermeasures are provided for by those rules[515]. An international organisation is entitled to take countermeasures in response to an internationally wrongful act committed against it. International organisations are not entitled to adopt coercive measures against third parties for violations of their internal law. Therefore, unilateral sanctions by international organisations constitute a violation of international law, giving rise to the responsibility of such international organisations.

Private individuals or entities bear administrative and civil liability for all acts negatively impacting human rights under national legislation and international human rights law. States bear the main responsibility for ensuring that no private individual or entity under their jurisdiction goes unpunished for any human rights violation and cannot justify their failure to perform international human rights obligations. They also cannot invoke the provisions of their internal law as justification for their failure to perform human rights treaties[516]. The failure to ensure that business conduct does not violate the rights enshrined in the Covenant, and the failure to establish mechanisms to prevent such violations, including extraterritorially, constitute violations of the Covenant[517] as part of the due diligence obligations of States, regardless of their form (act or omission)[518].

Businesses, in particular, are obliged to take measures to prevent human rights violations, at a minimum those expressed in the International Bill of Human Rights and the International Labour Organisation Declaration on Fundamental Principles and Rights at Work (paras. 11 – 13). States must take all necessary measures to ensure that the activity of private businesses under their jurisdiction and control is exercised in full conformity with human rights standards (paras. 3 – 6)[519]. The use of the term "*due diligence*" by sanctioning states to ensure maximum implementation of compliance strategies is contrary to international legal standards and prevents the implementation of human rights obligations. This is very concerning, as it constitutes a misleading deviation from the universally recognised notion of due diligence in international law

Reparations Gap (Oxford: Oxford Academic, 2017; online edn.).

514 DARIO.

515 Para. 22(30).

516 Vienna Convention on the Law of Treaties, art. 27.

517 General comment No. 24 (2017) on State obligations under the ICESCR in the Context of Business Activities, paras. 12, 14, 17, 27; see Official Records of the Economic and Social Council, 1999, Supplement No. 3.

518 A/78/196, para. 28.

519 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of the Special Representative of the SecretaryGeneral on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 2011, annex.

and results in the violation, rather than protection, of human rights (See commentary to paras. 8, 24).

Under international law, states are also required *"to refrain from and take a number of actions to prevent and punish genocide, war crimes, ethnic cleansing and crimes against humanity."* [520] Such obligations should be duly fulfilled by states and regional organisations also when taking any unilateral measures. Multiple reports refer to increases in suffering and mortality rates and reduced life expectancy for people with chronic and severe diseases. It is reported that every additional year of sanctions lowers life expectancy in sanctioned countries by as much as 0.3 years[521]. In its 2020 referral under Article 14 of the Rome Statute to the Office of the Prosecutor, Venezuela sought to qualify the consequences of the *"application of unlawful coercive measures adopted unilaterally by the government of the United States of America against Venezuela, at least since the year 2014"* [522] as crimes against humanity[523]. The need to assess the legal status of unilateral sanctions taken against Syria was reflected in the 2023 report on the country visit to Syria[524]. Therefore, the International Criminal Court can be a proper mechanism to ensure accountability if the consequences of the use of unilateral sanctions, means of their enforcement, and over-compliance reach the level of crimes against humanity.

If the adoption, implementation, compliance, or over-compliance with sanctions or unilateral sanctions constitutes a transnational crime in accordance with one or more criminal law conventions (the UN Convention against Transnational Organised Crime or the UN Convention against Corruption, etc.), the principle of *aut dedere aut judicare* could be applied. Since such conventions formulate the principle differently, the priority between the obligation to prosecute and the obligation to extradite is defined on the basis of the relevant convention. As the International Law Commission defined, such provisions fall into two main categories: (a) those clauses pursuant to which the obligation to prosecute is triggered only by a refusal to surrender the alleged offender following a request for extradition; and (b) those imposing an *ipso facto* obligation to prosecute when the alleged offender is present in the territory of the state, from which the latter may be liberated by granting extradition[525].

Even when a particular behaviour does not constitute a transnational crime or an international crime, the state must provide effective remedies for any harm caused by the acts of private per-

520 UNGA, Resolution 60/1, 2005, para. 138. Available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf.

521 A/HRC/54/23, paras. 22, 27.

522 Venezuela II, ICC-01/20, preliminary examination. Available at: https://www.icc-cpi.int/venezuela-ii.

523 See also A/79/183, paras. 38-39.

524 A/HRC/54/23/Add.1.

525 ILC, Working Group on the obligation to extradite or prosecute (aut dedere aut judicare), Final Report, 2014. A/CN.4/L.844, para. 23. Available at: https://documents.un.org/doc/undoc/ltd/g14/044/18/pdf/g1404418.pdf.

sons or entities to any human right prescribed by both Covenants on human rights. Such effective remedies may include, but are not limited to, criminal prosecution or administrative liability for private persons or entities who have negatively affected human rights through inadequate compliance, over-compliance, or zero-risk policies with respect to sanctions or unilateral sanctions; and access to civil law remedies.

States must fully ensure the implementation of the principle of due diligence to prevent, punish, investigate, or redress the harm caused by such acts by private persons or entities[526]. International organisations should exercise due diligence with respect to human rights violations in the context of compliance practices in accordance with the rules of such organisations. Each of these actors must comply with their international obligations independently, insofar as each of them enjoys international legal personality and bears international legal responsibility.

States or international organisations cannot invoke the responsibility of other actors or businesses as justification for their failure to perform their international obligations.

30. Indivisibility of responsibility

30.1 The existence of sanctions decisions by international organizations other than UN Security Council does not exclude the responsibility of States for complying with or enforcing them in accordance with the law of international responsibility.

30.2 A State's failure to act to ensure that businesses under its jurisdiction or control abide by international human rights law and avoid implementation/ compliance with unilateral coercive measures, or exercise over-compliance, which impact human rights negatively, constitutes a violation of its obligation to promote and protect relevant human rights.

Commentary

Any coercive measure taken by international organisations without the authorisation of the UN Security Council and that does not fall under the definition of countermeasures or sanctions adopted in relation to its member states for a breach of the internal rules of such organisation constitutes a unilateral coercive measure, which is illegal under international law.

The DARIO explicitly stipulates that decisions of international organisations that are contrary to international law entail the international responsibility of such organisations[527]. If an international organisation coerces a State or another international organisation to comply with decisions that are contrary to international law, and does so knowing that the act is illegal under international

526 CCPR/C/21/Rev.1/Add. 13, para. 8.

527 DARIO, art. 3.

law, the organisation can be held responsible for the violation[528]. If an international organisation circumvents its international obligations through decisions and authorisations addressed to members, this entails the international responsibility of such organisation[529].

Decisions of international organisations cannot be used by states as a justification for the use of unilateral sanctions and do not preclude responsibility for relevant violations of international obligations. Only decisions of the UN Security Council under Chapter VII of the UN Charter take priority over any other international obligations of states[530]. At the same time, measures taken by states to implement decisions of the UN Security Council must be taken within the limits of authorisation only. Measures taken by states beyond the authorisation of the UN Security Council are unilateral in character and give rise to international responsibility if any international obligations of the corresponding states are affected, including those in human rights law and humanitarian law.

Moreover, Part Five of the DARIO prescribes the international legal responsibility of a state for aid or assistance in the commission of an internationally wrongful act by an international organisation (Article 58), direction and control exercised by a State over the commission of an internationally wrongful act by an international organisation (Article 59), coercion of an international organisation by a State (Article 60), and circumvention of international obligations of a State member of an international organisation (Article 61). The DARIO also stipulates that a State member of an international organisation is responsible for an internationally wrongful act of that organisation if: (a) it has accepted responsibility for that act towards the injured party; or (b) it has led the injured party to rely on its responsibility (Article 60(1)).

As noted in the Commentary to paras. 4, 29, shifting the responsibility for human rights violations to businesses, citing the freedom of contract or freedom of business activity, has no basis in international law and results in serious humanitarian consequences. For example, European companies comply with United States sanctions and refuse to sell or deliver even purely humanitarian goods (food and medicine) due to the fear of penalties from the US, whether real or non-existent. Both the EU and its member states refer to the freedom of business and do not intervene to ensure delivery. Humanitarian actors are obliged to bear the burden of proof of the purely humanitarian nature of humanitarian deliveries to countries under sanctions[531]; businesses must prove that they fully complied with unilateral sanctions regimes in accordance with compliance or monitoring of supply chains guidance. All of the above hinders the possibility of identifying the accountable actor and competent court and results in impunity for human rights violations, preventing victims from accessing effective remedies and redress.

528 Ibid, art. 16.

529 Ibid, art. 17.

530 UN Charter, art. 103.

531 A/78/196, paras. 9, 71, 77.

The use of the term "unintended"[532] with regard to the humanitarian consequences of unilateral sanctions is misleading and even dangerous, as it could imply the legitimacy of such measures. When unilateral sanctions are taken without the authorisation of the Security Council, or exceed it, and do not meet the criteria for retortion and countermeasures, sanctioning States are responsible for the ensuing violations of international law and for any negative consequences, regardless of their intentions. States, as subjects of international law, cannot act unconsciously. Therefore, the criteria of intention or guilt are not applicable[533].

Failure to ensure that business conduct does not violate the rights prescribed in both Covenants, and failure to establish mechanisms to prevent such violations, including extraterritorially, constitute violations of the human rights obligations of such states as part of their due diligence obligations, regardless of their form (act or omission)[534].

VIII. REMEDY

31. Remediation

31.1 Businesses shall develop and make available complaint mechanisms to enable people negatively affected by compliance with sanctions to challenge the conduct of the business and seek compensation. This is without prejudice to the right of people affected to access to justice.

31.2 Adverse impact on human rights and humanitarian action shall be addressed by the businesses in a measure compatible with the degree of involvement. Businesses are responsible for putting in place processes to enable the remediation of the adverse impact they cause, to which they contribute, or that is directly linked due to their business relationships.

Commentary

The right to a meaningful remedy and access to justice, alongside the right to a fair trial and the presumption of innocence, constitute a primary system for the protection of all categories of human rights, including economic, social, and cultural rights, in all situations, including in the face of all types of unilateral sanctions. The right to judicial protection, including the right to access justice for the protection of violated rights, is not limited to situations of criminal charges against

532 "The unintended consequences of US-led sanctions on Iranian industries"; See also S/PV.8962. Available at: https://documents.un.org/doc/undoc/pro/n22/244/25/pdf/n2224425.pdf; and Aita S, "The Unintended Consequences of U.S. and European Unilateral Measures on Syria's Economy and Its Small and Medium Enterprises".

533 A/HRC/54/23, para. 84.

534 A/78/196, para. 28; A/79/183, para. 10.

the individuals concerned.[535]

The commented principle is connected to the principle of transparency and constitutes part of the due diligence obligations of businesses. As the GPBHR stipulate, "*Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.*" [536] All principles on remediation in the GPBHR should be fully applicable to situations where human rights are violated as a result of businesses' compliance or over-compliance with unilateral sanctions.

Simultaneously, states must take appropriate steps to ensure, through judicial, administrative, legislative, or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to an effective remedy[537]. Both the substantive and procedural aspects of the right to a remedy must be ensured.

The process of informing businesses may take several forms: offline and online. Both should be available to people negatively affected by compliance with sanctions. Offline reporting includes paper complaints, which should be answered by businesses within a reasonable time, either offline or online. Moreover, businesses should change their respective practices if they are informed of the adverse human rights effects of their compliance with sanctions, since "*addressing adverse human rights impacts requires taking adequate measures for their prevention and mitigation.*" [538] This derives directly from the responsibility to respect human rights prescribed in Principle 13 of the GPBHR.

The requirements for paper complaints must be available to any person and could be uploaded to the official websites of businesses. In particular, paper complaints might be required to include the name, address, email address, and phone number of the complainant; the date and details of how a particular person was affected; a description of the relevant facts (including names of alleged victims, dates, locations, and other evidence), with as much detail as possible; not be manifestly politically motivated or based exclusively on reports disseminated by mass media; and not contain abusive or insulting language.

Taking into account the extraterritorial effects of unilateral sanctions, compliance, and over-compliance practices, businesses are required to provide an online communication process. This can be implemented via email or a dedicated online procedure carried out through the submission of a specific online form.

A business enterprise can cause or contribute to an adverse human rights impact through its

535 A/79/183, para. 58.

536 The UN Guiding Principles on Business and Human Rights.

537 Ibid, principle 25.

538 Ibid, P. 14

compliance practices, or be involved in such an impact solely because it is directly linked to its operations, products or services by a business relationship[539].

In particular, possible forms of over-compliance include decisions by companies to halt all business with sanctioned countries, entities, or individuals of a certain nationality or origin; excessive de-risking by banks and other financial actors; over-compliance in the transportation and insurance sectors, and other related service providers; refusals to conduct authorised transactions; the deterrence of authorised transactions by requiring onerous documentation or certification, charging higher rates or additional fees, or imposing delays; freezing assets that are not targeted by sanctions; denying individuals the possibility to open or maintain bank accounts or conduct transactions based on their having the nationality, one of multiple nationalities, or a place of birth in a sanctioned country; being shut out of critical markets or financial systems; and reputational damage, contract terminations, and loss of business opportunities, among others[540]. Such practices directly and negatively affect human rights.

Thus, businesses are expected to enable remediation for all adverse human rights effects for which they are responsible. Such processes can be introduced into business policies, approved at the senior level, and made publicly available.

The remedy provided by businesses can include apologies, punitive sanctions taken against those responsible for the reported violation, financial and non-financial compensation, restitution, discounted or free supply of essential goods that were not delivered because of over-compliance, etc. The choice of a particular remedy depends on the circumstances of the case and takes into account the scale and effects of the damage caused by compliance practices to the enjoyment of human rights. Where it is impossible to provide remediation directly, especially in the context of crimes committed, businesses are required to cooperate with competent authorities and judicial mechanisms.

Access to remedy for adverse impacts on human rights and humanitarian situations must be part of the State-based grievance mechanism in the sense of Principle 25 of the GPBHR[541]. All other non-judicial grievance mechanisms, both state-based and non-state-based, must be available to the victims of compliance practices, including those affected extraterritorially[542]. States must ensure that their judicial mechanisms are effectively available to those negatively affected by the compliance practices of businesses and reduce legal, practical, and other relevant barriers that could lead to a denial of access to remedy[543]. States must ensure that all types of legal liability (administrative, civil, and criminal) can be applied to businesses or individuals responsible for the

539 Ibid, principle 19 b(i).

540 Ibid, principle 19 b(i).

541 The UN Guiding Principles on Business and Human Rights.

542 Ibid, principle 30.

543 Ibid, principle 26.

harm caused by compliance practices to the enjoyment of human rights, including extraterritorially.

32. Adequacy and efficacy

32.1 States must ensure, through judicial, administrative, legislative or other appropriate means, that when violations of human rights due to unilateral coercive measures, means of their enforcement and over-compliance occur within their territory or jurisdiction, those affected have access to justice and effective remedy.

32.2 States shall not purport to provide any form of immunity to businesses for complying or purporting to comply with unilateral coercive measures including unilateral sanctions.

32.3 Where human rights are contravened by unilateral coercive measures and/or over-compliance, States imposing or enforcing them shall ensure that those affected have access to justice and effective remedies within their respective jurisdictions, without prejudice to any other remedies that they may have elsewhere.

Commentary

In accordance with para. 26 of the GPBHR *"States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy."*

As evaluated in the Commentary to para. 27, access to justice for those affected by unilateral sanctions or sanctions-related processes is usually very limited, especially for those who are not directly designated but are affected by the comprehensive effects of all types of sanctions and their enforcement or over-compliance[544].

Due to the devastating, comprehensive effect of sanctions regimes on the entire population of affected countries[545], violating a broad range of civil, economic, social, and cultural rights, multiplying mortality rates, and reducing life expectancy[546], in some cases, affected people might be qualified as victims of gross human rights violations[547]. In such cases, states are obligated to ensure meaningful remedies for the victims of such violations, including: the adoption of appropri-

544 A/79/183, paras. 22-31.

545 A/78/196; A/HRC/51/33; A/HRC/54/23. Add. 1; A/HRC/51/33 Add.1; A/HRC/51/33 Add.2; A/HRC/4859 Add. 2.

546 A/HRC/54/23.

547 UNGA, Resolution 60/147, 2005, paras. 2(b-d), 3(c-d), 11, 13.

ate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective, and prompt access to justice; adequate, effective, prompt, and appropriate remedies, including reparation; and the provision of at least the same level of protection for victims as required by their international obligations[548].

Attempts by countries under sanctions to develop national legislation providing for the possibility of appealing to national courts to protect rights affected by sanctions clauses or any other impact of UCMs on the performance of private contracts are usually unsuccessful due to the refusal of sanctioning states to apply agreements on mutual recognition of judicial decisions, recognise and enforce judicial and arbitration decisions[549], and provide anti-suit injunctions[550] *"to prevent circumvention of sanctions regimes by judicial means."* [551]

At the same time, enforcement of decisions of national courts of states under sanctions is usually not possible, or is very complicated in sanctioning states, as many sanctioning states have reportedly stopped applying agreements on mutual enforcement of judicial decisions, even if such agreements were in force between the two states. In accordance with the principle of pacta sunt servanda, states are obliged to implement international treaties in good faith, including bilateral treaties on mutual assistance or mutual enforcement of judicial decisions. If access to justice is properly guaranteed, there will be no need to change the place of adjudication identified in the relevant contracts. As this practice affects the rights of those directly affected by unilateral sanctions extraterritorially, and they do not have any feasible possibility of accessing justice for the protection of their rights in sanctioning states, preventing the implementation of such decisions from the countries under sanctions can also be classified as a violation of the right to access justice and a breach of relevant treaties (treaties on recognition and mutual enforcement of judicial decisions, treaties of amity, treaties on cooperation in civil, criminal, and other matters, etc.).

National judicial and other bodies must ensure that any interpretation of domestic legislation and practice is conducted in good faith, is clear, uniform and consistent, does not violate the international obligations of states, and is consistent with customary business practices. States of residence must guarantee businesses' obligation not to comply with sanctions imposed by third states and provide valid mechanisms of protection, including, but not limited to, relevant development of national legislation, economic and legal support, assistance in bringing international claims, bringing claims for international adjudication against sanctioning states, and diplomatic protection.

In view of states' obligation, under the principle of due diligence, to take all necessary measures

548 A/79/183, para. 30.

549 A/HRC/57/55/Add. 1.

550 *Renaissance Securities (Cyprus) Ltd v Chlodwig Enterprises Ltd & Others* [2023] EWHC 2816.

551 *EU responds to Russia's anti-suit injunctions with transaction ban*; EU Council regulation 2024/1745, art. 5ab.

to ensure that activity (including business activity) under their jurisdiction and control does not affect human rights, as established by relevant human rights treaties and customary norms, states must take all necessary legislative, judicial, administrative, and other measures to ensure that individuals and entities affected by unilateral sanctions implemented or enforced in their territory have effective means of protection within their domestic system, including through judicial means.

Traditional blocking statutes aimed at preventing the extraterritorial application of sanctions, mostly those imposed by the US, in particular the EU Blocking Statute[552] requiring residents and nationals of the European Union not to implement US sanctions, have been recognised as ineffective[553]. The possibility of applying to relevant authorities within a state for permission to comply with foreign sanctions due to the high risk to business activity[554] is a possible mechanism but must be accompanied by guarantees for those whose rights will be violated in the state of residence due to such compliance.

33. States and businesses cooperation

33.1 States, international organizations, non-governmental organizations and businesses must use their best endeavors to cooperate in good faith in order to integrate a human rights-based approach to avoid any sanctions-induced humanitarian impact and to implement efficient judicial/administrative remedies.

33.2 All actors shall cooperate in order to eliminate or minimize over-compliance and redress any adverse human rights effects caused by such conduct, as well as to implement efficient judicial/administrative remedies.

33.3 Banks and businesses shall cooperate with States in relation to the principles set forth by the Guiding Principles.

Commentary

Collective action through multilateral institutions greatly contributes to awareness-raising, deeper understanding, and full, timely, and systematic implementation of all of these Guiding Principles. Cooperation between States, multilateral institutions, and other stakeholders also plays an

552 Council Regulation (EC) No. 2271/96 of 22 November 1996.

553 A/HRC/51/33, para. 73.

554 Template for application. Available at: https://finance.ec.europa.eu/document/download/1a5bf6a5-6941-48e9-92ab-f2b4bc31ce35_en?filename=template-applications-authorisations-comply-foreign-laws_en.docx.

important role[555].

All actors must cooperate to prevent, mitigate, and remediate any negative effects of the application of unilateral sanctions. States, international organisations, international non-governmental organisations, and businesses must not only respect human rights in their activities but also cooperate on this matter. This derives mainly from the foundational principle of cooperation set forth in the UN Charter and reiterated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[556] and the Helsinki Final Act[557], which stipulates that *"States shall cooperate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all."* [558] The binding character of the principle is generally accepted [559] and prevails over any other treaty obligations of states[560]. The principle is applicable to all subjects of international law, since *"the central importance of Art. 2 lies in this listing of legal principles uniting the Organisation, its members, and partially even non-members, as the legal expression of an 'international community' that has left the state of nature and aspires to establish the rule of law in international affairs."* [561]

States must ensure that all entities incorporated in their territory, including not only businesses but also non-governmental organisations, respect human rights. Therefore, the responsibility to respect human rights is a global standard of expected conduct not only for all business enterprises wherever they operate but also for non-governmental organisations.

This article sets forth three main goals for the cooperation of all actors: (a) to avoid any sanctions-induced humanitarian impact; (b) to eliminate or minimise over-compliance and adverse human rights effects caused by such conduct; and (c) to establish efficient judicial/administrative remedies (see principles 20, 27-31).

Sanctions may induce direct (e.g., when an increase in child mortality is directly caused by the lack of basic vaccines)[562] and indirect negative humanitarian impacts (e.g., due to the deteriorating economic situation and insufficient resources, sanctioned States are forced to discontinue

555 The UN Guiding Principles on Business and Human Rights, P. 12.

556 UNGA, Resolutions adopted on the reports of thw sixth committee, P. 123. Available at: https://digitallibrary.un.org/record/202170/files/A_RES_2625%28XXV%29-EN.pdf?ln=ru.

557 P. 7. Available at: https://www.osce.org/files/f/documents/5/c/39501.pdf.

558 UNGA, Resolutions adopted on the reports of thw sixth committee, P. 123.

559 Jurisdictional Immunities of the State (Germany v Italy), ICJ, Judgment of 3 February 2012, paras. 57ff. Available at: http://www.icj-cij.org.

560 UN Charter, art. 103; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya / United Kingdom), paras. 37, 39.

561 UN Charter: A Commentary, Vol. I (3rd Edition), P. 132.

562 A/HRC/57/55, para. 27.

or reduce the coverage of healthcare-related social support programs, including free medical examinations, treatment, and medicine)[563], and even unpredictable consequences, including, for example, adverse impacts on the environment.[564]

The principle of good faith here should be understood at least in the context of its main manifestations, such as the principle of pacta sunt servanda, estoppel, acquiescence, equity, and the inadmissibility of the abuse of rights.[565]

Forms of cooperation between states and international institutions may include regular dialogue within the UN, UN entities, and other international organisations; engagement in monitoring and evaluating the negative impact of unilateral sanctions on human rights under the initiative of the mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights[566]; capacity-building and awareness-raising through such institutions to ensure that states fulfill their duty to protect against any human rights violations arising from compliance with UN sanctions, the adoption and enforcement of unilateral sanctions, and over-compliance.

Voluntary over-compliance exacerbates the negative humanitarian impact of UCMs, while extraterritorial enforcement expands their geographic scope and, consequently, the number of individuals around the world whose rights are violated both by the sanctions and over-compliance[567]. Unilateral sanctions and over-compliance with unilateral sanctions hinder the implementation of humanitarian resolutions of the UN Security Council. Humanitarian assistance, even if delivered, may be rendered ineffective owing to serious delays, operational impediments, financial obstacles, and, finally, over-compliance by concerned actors[568].

States must not impede any humanitarian activities of NGOs by adopting unilateral sanctions or applying penalties to such organisations. States must not create impediments or apply penalties to NGOs for their activities to monitor and assess the negative impact of UCMs and over-compliance on human rights. Any negative effects of over-compliance should be eliminated or minimised through respective policies and processes, in accordance with Principle 16 of the GP-BHR[569] .

563 A/HRC/54/23, para. 52.

564 Do sanctions affect the environment? The role of trade integration. Available at: https://www.sciencedirect.com/science/article/pii/S2590051X23000813.

565 Andreas R. Ziegler, Jorun Baumgartner, “Good Faith as a General Principle of (International) Law”. Available at: https://academic.oup.com/book/26905/chapter-abstract/195980127?redirectedFrom=fulltext.

566 Submission form. Available at: https://survey.ohchr.org/762521?lang=en.

567 A/HRC/51/33, para. 3.

568 A/78/196, para. 79.

569 Guiding Principles on Business and Human Rights.

Banks are specifically mentioned in this principle because their over-compliance produces tremendous negative effects on the enjoyment of human rights (both directly and indirectly). Over-compliance by banks includes refusing to conduct authorised transactions; deterring persons from sanctioned countries from conducting business by requiring onerous documentation; charging higher rates or additional fees, or imposing delays; freezing assets that are not targeted by sanctions; and denying individuals the possibility of having bank accounts or conducting transactions on the grounds that they are nationals of a sanctioned country, even if they are refugees from that country[570]. For example, the humanitarian, development, and other operations of the United Nations country team in the Syrian Arab Republic are obstructed by over-compliance, primarily by banks, thus harming the population' s rights to health, life, a decent standard of living, and development, *inter alia*[571]. Therefore, banks are expected to specifically engage with their governments to avoid any risk of over-compliance. They must also engage in dialogue with relevant NGOs on matters of compliance with unilateral sanctions to avoid any negative impacts on their humanitarian activities.

570 A/HRC/51/33, para. 81.

571 A/HRC/51/33, para. 62.