



General Assembly

Distr.: General
15 July 2022

Original: English

Human Rights Council

Fifty-first session

12 September–7 October

Agenda item 3

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Secondary sanctions, civil and criminal penalties for circumvention of sanctions regimes and overcompliance with sanctions

Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena F. Douhan

Summary

In the present report, the Special Rapporteur, Alena F. Douhan, provides an overview and assessment of secondary sanctions as a means of enforcing unilateral sanctions extraterritorially. She addresses how secondary sanctions, domestic enforcement measures and other factors have led to widespread overcompliance with unilateral sanctions, thus greatly expanding the scope of those sanctions and the related negative impact on people's human rights, from individuals to entire populations who are not directly targeted by the initial sanctions. She discusses the nature of these practices, their questionable legality and the various rights affected and makes recommendations to alleviate the resulting human rights violations.



I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolutions 27/21 and 45/5 and General Assembly resolution 74/154, in which the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights was requested, *inter alia*, to gather all relevant information relating to the negative impact of unilateral coercive measures on the enjoyment of human rights; to study relevant trends, developments and challenges; to make guidelines and recommendations on ways and means to prevent, minimize and redress the adverse impact of unilateral coercive measures on human rights; and to draw the attention of the Human Rights Council, the United Nations High Commissioner for Human Rights and the General Assembly to relevant situations and cases.

2. As unilateral sanctions proliferate, despite their dubious legality under international law, the Special Rapporteur highlights the increasing use of two general means of enforcement: the imposition of secondary sanctions against presumed violators of unilateral sanctions; and civil and criminal penalties. For numerous reasons, such means are known to deter even permitted interactions with targeted countries, sectors, entities and individuals by entities that lack the expertise or resources to ensure full compliance, or that fear the consequences of inadvertent breaches. This has resulted in considerable overcompliance with unilateral sanctions, including in third States as a result of the extraterritorial application of secondary sanctions.

3. Unilateral sanctions negatively impact the human rights of direct and indirect targets.¹ Voluntary overcompliance exacerbates this harm, while extraterritorial enforcement expands the geographic scope and consequently the number of individuals around the world whose rights are violated both by the sanctions and overcompliance. The present report provides an overview and critical assessment of this situation and its negative impact on human rights. The Special Rapporteur underlines that the focus on secondary sanctions and overcompliance cannot be interpreted as recognition or acceptance of the legality or legitimacy of primary unilateral coercive measures.

4. To prepare the present report, the Special Rapporteur invited submissions from States, United Nations agencies, regional organizations, human rights institutions, civil society, scholars, research institutions and others about secondary sanctions, civil and criminal penalties for circumvention of sanctions regimes and overcompliance with sanctions.² Responses were received from the Governments of Belarus, Cuba, the Islamic Republic of Iran, the Russian Federation, the Syrian Arab Republic and Zimbabwe. Responses were also received from the United Nations presence in the Syrian Arab Republic and a number of non-governmental organizations (NGOs), civil society organizations, business enterprises, academics and concerned individuals. The Special Rapporteur expresses her gratitude to all respondents.

II. Activities of the Special Rapporteur

5. In order to raise awareness about the mandate, the negative impact of unilateral sanctions on human rights, situations in countries under sanctions, findings from country visits and problems in the application of humanitarian exemptions, the Special Rapporteur was frequently interviewed by news and other media from around the world.

6. Her country visits to Zimbabwe (16–28 October 2021) and the Islamic Republic of Iran (7–18 May 2022) to assess the impact of unilateral sanctions on human rights entailed many meetings with government ministers and officials, civil society groups and other stakeholders and site visits in each country and concluded with press conferences.

¹ Alena F. Douhan, thematic report on targets of unilateral coercive measures (A/76/174/Rev.1).

² See <https://www.ohchr.org/en/calls-for-input/calls-input/call-input-reports-secondary-sanctions-civil-and-criminal-penalties>.

7. The Special Rapporteur also participated in thematic conferences, webinars and virtual meetings to discuss her work; met with representatives of permanent missions in Geneva, representatives of the Non-Aligned Movement and the Like-Minded Group of Countries Supporters of Middle-Income Countries and officials of the European Union to raise awareness of concerns involving overcompliance, extraterritoriality and access to humanitarian aid. She held meetings and consultations with academics, lawyers and officials from industry groups affected by sanctions on the effects of unilateral sanctions on humanitarian aid and on people living in vulnerable situations and on the development of criteria to assess the humanitarian impact of unilateral sanctions.

8. The Special Rapporteur has begun to develop a research platform as an electronic repository for articles on unilateral coercive measures and their impact on human rights.

9. Over the past year, she has sent numerous communications to States, banks, business entities and publishing houses, referring, inter alia, to the extraterritorial implementation of, or overcompliance with, unilateral sanctions.

10. A complete list of the activities of the Special Rapporteur in the past year may be found on the mandate website.³

III. Secondary sanctions and overcompliance with unilateral sanctions

A. Definitions and general descriptions

Secondary sanctions

11. Recalling the negative impact of unilateral sanctions on the enjoyment of human rights,⁴ the Special Rapporteur laments the proliferation of secondary sanctions as a means to enforce unilateral sanctions against States or key economic sectors, or to target foreign companies, organizations or individuals. Secondary sanctions are also applied to entities or individuals for their presumed cooperation or association with sanctioned parties or for helping them to circumvent sanctions. Foreign companies subject 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; while foreign individuals can be refused entry to the sanctioning country and have any assets there frozen. Secondary sanctions may also take the form of financial penalties in some circumstances.⁵

12. Secondary sanctions can be imposed against parties anywhere in the world. The sanctions applied by the United States of America under the Caesar Syria Civilian Protection Act of 2019 (the Caesar Act) against Syrian Arab Republic,⁶ for example, authorizes secondary sanctions against foreign companies and humanitarian operators, as well as their employees, if they engage in post-conflict reconstruction of infrastructure for the population's well-being on behalf of the Syrian Government.⁷ Moreover, the actual use of secondary sanctions generates fear of any interaction with targets of primary sanctions even

³ See <https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures/activities-special-rapporteur-negative-impact-unilateral-coercive-measures-enjoyment-human-rights-ms>.

⁴ OHCHR, "High Commissioner to Human Rights Council: sanctions can create severe and undue suffering for individuals who have neither perpetrated crimes nor otherwise borne responsibility for improper conduct", 16 September 2021 (available at <https://www.ohchr.org/en/press-releases/2021/09/high-commissioner-human-rights-council-sanctions-can-create-severe-and-undue>).

⁵ Tom Ruys and Cedric 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/advance-article/doi/10.1093/bybil/braa007/5909823>).

⁶ Caesar Syria Civilian Protection Act of 2019, Public Law 116-92, title LXXIV, sect. 7412, 20 December 2019 (available at <https://www.govinfo.gov/content/pkg/PLAW-116publ92/pdf/PLAW-116publ92.pdf>).

⁷ UN News, "UN rights expert urges United States to remove sanctions hindering rebuilding in Syria", 29 December 2020 (available at <https://news.un.org/en/story/2020/12/1081032>).

in countries where doing business with them is legal.⁸ This fear has consequences for human rights, such as the right to health in States targeted by primary sanctions. During the ongoing coronavirus disease (COVID-19) crisis, Cuba, the Islamic Republic of Iran, the Syrian Arab Republic and the Sudan have cited the fear of secondary sanctions for making manufacturers of medicine and medical equipment reluctant to ship supplies and causing reticence on the part of banks to handle related transactions.⁹

13. The Special Rapporteur joins the position of many States¹⁰ that the legality of secondary sanctions imposed extraterritorially is doubtful in international law, firstly in view of the questions that are often raised about the legality of unilateral primary sanctions;¹¹ secondly because 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;¹² and thirdly because of conflicts with the obligations of sanctioning States under international trade law, friendship and commerce treaties, international investment agreements and the International Covenant on Civil and Political Rights.

14. She highlights that foreign targets of secondary sanctions are generally not charged with crimes or tried, and are thereby denied the due process rights enshrined in articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). Despite this, given the enormous expansion in the use of primary sanctions in recent years, the use of secondary sanctions has grown considerably¹³ and the fear of being targeted by them has reinforced a global trend of overcompliance with primary sanctions.¹⁴ Moreover, she notes that the growing use of secondary sanctions raises the prospect for overcompliance with them as well,¹⁵ indeed, the potential for tertiary sanctions against parties that trade with the targets of secondary sanctions has already been reported.¹⁶

Civil and criminal penalties

15. The Special Rapporteur observes that States that impose sanctions often provide, in domestic law, for civil and criminal penalties for the circumvention of sanctions regimes. In distinction to secondary sanctions against third country nationals and companies, domestic measures towards its own nationals provide for some access to judicial proceeding and due process guarantees. The Special Rapporteur notes, however, that as the legality of primary

⁸ Andrea 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>).

⁹ Alena F. Douhan, statement at the virtual seminar on unilateral coercive measures in the context of COVID-19 pandemic situation, 30 November 2020.

¹⁰ See, for example, submissions from Belarus and the Syrian Arab Republic.

¹¹ See, for example, submissions from Cuba and the Russian Federation.

¹² Julia Schmidt, “The legality of unilateral extra-territorial sanctions under international law”, *Journal of Conflict and Security Law*, vol. 27, No. 1 (2022), pp. 53–81; Sascha 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/>).

¹³ Justine Walker, “The public policy of sanctions compliance: A need for collective and coordinated international action”, *International Review of the Red Cross*, IRRC No. 916–917 (2022), p. 711.

¹⁴ See, for example, the statement by the Special Rapporteur in the webinar “The impact of unilateral coercive measures on national health systems of targeted countries and well-being of women, children and people in vulnerable situations”, 3 June 2021 (available at <https://media.un.org/en/asset/k1o/k1olchwcxg>); see also “Overcompliance with US sanctions harms Iranians’ right to health”, 19 October 2021 (available at <https://www.ohchr.org/en/press-releases/2021/10/over-compliance-us-sanctions-harms-iranians-right-health>).

¹⁵ Office of the United Nations High Commissioner for Human Rights (OHCHR), “High Commissioner to Human Rights Council: Sanctions can create severe and undue suffering for individuals who have neither perpetrated crimes nor otherwise borne responsibility for improper conduct”, 16 September 2021 (available at <https://www.ohchr.org/en/press-releases/2021/09/high-commissioner-human-rights-council-sanctions-can-create-severe-and-undue>).

¹⁶ Justin D. Stalls, “Economic sanctions”, *University of Miami International and Comparative Law Review*, vol. 11, No. 2 (2003), pp. 142–143; Mercédeh Azeredo 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).

sanctions is dubious, the status of measures aimed at their enforcement, including such civil and criminal proceedings, is highly controversial.

16. With regard to secondary sanctions applied extraterritorially, she highlights that the legality of domestic civil or criminal penalties for violating them is dubious because the legality of the sanctions themselves is doubtful. It is reported that the fear of such penalties, combined with factors such as the lack of clarity about enforcement, can induce overcompliance with sanctions by domestic parties.¹⁷ Thus, while not endorsing or justifying unilateral sanctions, the Special Rapporteur notes that the development of clear guidance¹⁸ would provide some clarity and certainty and would potentially minimize overcompliance.

Overcompliance

17. Because of the violence to human rights arising from unilateral sanctions, the Special Rapporteur expresses deep concern about the rapid expansion of overcompliance worldwide. Overcompliance consists of self-imposed restraints that go beyond the restrictions mandated by sanctions, either as part of a de-risking process, to minimize the potential for inadvertent violations or to avoid reputational or other business risks, or as a means to limit compliance costs. Overcompliance 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, and that the overall effect on human rights of overcompliance alone can be enormous.¹⁹ She notes that information about the impact of specific cases of overcompliance can be a sensitive matter, which it is sometimes shared with her on an informal basis only.

18. The Special Rapporteur takes note that overcompliance has become a widespread practice on a global scale,²⁰ and must be recognized as a significant new danger to international law and human rights. She notes that the provision of authorized humanitarian goods and services to sanctioned States often involves an extensive chain of participants in multiple countries, and that overcompliance by any of them, including manufacturers, exporters, financial service providers and transportation companies, can prevent essential goods from reaching persons in need.

19. She has received information that overcompliance with unilateral sanctions has prevented, delayed or made more costly the purchase and shipment to sanctioned countries of food, medicine, medical equipment and parts for such equipment, even when the need is urgent. Citing the example of Novo Banco, a Portuguese bank that reportedly declined to process payments for vital medicines and medical supplies ordered by the Bolivarian Republic of Venezuela as a result of sanctions imposed by the United States, and the case of epidermolysis bullosa patients in the Islamic Republic of Iran, she notes that such

¹⁷ Anila Haleem, "Strict liability fines for inadvertent sanctions breaches", *UK Finance* blog, 6 June 2022 (available at <https://www.ukfinance.org.uk/news-and-insight/blog/strict-liability-fines-inadvertent-sanctions-breaches>).

¹⁸ Government of the United Kingdom, Office of Financial Sanctions Supervision, "OFSI enforcement and monetary penalties for breaches of financial sanctions: Guidance" (2022) (available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1083297/15.06.22_OFSI_enforcement_guidance.pdf).

¹⁹ OHCHR, "Statement by Ms. Alena F. Douhan Special Rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights at the meeting of NAM countries", 18 September 2020 (available at <https://www.ohchr.org/en/statements/2020/09/statement-ms-alena-douhan-special-rapporteur-negative-impact-unilateral-coercive>).

²⁰ See, for example, Gibson Dunn, "Economic and trade sanctions developments in response to COVID-19", 29 April 2020 (available at <https://www.gibsondunn.com/economic-and-trade-sanctions-developments-in-response-to-covid-19/>); Erica Moret, "Time to act: Harmonizing global initiatives and technology-based innovations addressing de-risking at the interfacing sanctions-counterterrorism-humanitarian nexus", in *International Sanctions: Improving Implementation Through Better Interface Management*, Sascha Lohmann and Judith Vorrath (eds.) (Berlin, Stiftung Wissenschaft und Politik, August, 2021), pp. 74–82.

overcompliance has had a devastating effect on the rights to health and other rights of nationals of the Bolivarian Republic of Venezuela and the Islamic Republic of Iran.²¹

20. The Special Rapporteur further notes that overcompliance has prevented NGOs working in humanitarian fields from transferring funds to pay their workers in sanctioned countries²² and has prevented non-targeted individuals from accessing their property and meeting their financial obligations, undermining many of their rights, including their rights to housing, employment, education and health.

21. She considers that overcompliance also entails measures that are inspired by sanctions, or are linked to them, but that precede their introduction or continue after they are lifted, and thus harm human rights outside of the time period when the sanctions are formally in effect, possibly in ways that the sanctions themselves do not. Measures taken in advance of unilateral sanctions reflect risk management based on expectations,²³ which can lead to “private actors taking the initiative to roll back commercial engagement in anticipation of new rounds of sanctions”.²⁴ Similarly, overcompliance can persist after sanctions end. Large international banks operating in the Islamic Republic of Iran prior to sanctions against the country declined to restore activities there after the sanctions were eased in 2016,²⁵ hindering the country’s economic revival²⁶ and affecting the right to development while prolonging the human rights problems associated with economic hardships.

22. The Special Rapporteur further observes that overcompliance does not appear to accelerate the lifting of unilateral sanctions, despite heightening their impact on a society, leading to the conclusion that overcompliance does not inherently help sanctions achieve their stated objectives.

23. Moreover, as overcompliance can now be anticipated when sanctions are introduced, States may at times design sanctions more narrowly in the knowledge that overcompliance will supplement them;²⁷ one aim may be to shift some of the legal responsibility for the resulting human rights problems.

B. Types of overcompliance

24. Overcompliance with unilateral sanctions takes many forms, ranging from the complete refusal by a company to engage with a sanctioned country or its nationals in any way, to more specific restrictions affecting certain business activities or services.

Refusal to do business not prohibited by sanctions

25. The Special Rapporteur observes that companies often decide to halt all business with a sanctioned country, entity or individual, or with a country in which specific entities or individuals are sanctioned, even while the primary sanctions regimes allow certain activities

²¹ Communication by the Special Rapporteur and other special procedures mandate holders to Banco Novo SA (12 July 2021, OTH 207/2021) and to Mölnlycke (14 October 2021, OTH 230/2021).

²² Confidential submission.

²³ Emmanuel Fagnière and George Sullivan, *Risk Management: Safeguarding Company Assets* (Boston, Thomson NETg, 2007), p. 93.

²⁴ Richard L. Kilpatrick, Jr., “Self-sanctioning Russia”, *European Journal of International Law*, “EJIL: Talk!”, 11 May 2022 (available at https://www.ejiltalk.org/self-sanctioning-russia/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2).

²⁵ Benjamin Raynor, “In the shadow of sanctions: reputational risk, financial reintegration, and the political economy of sanctions relief”, paper submitted to the International Studies Association, 2020 (available at <http://web.isanet.org/Web/Conferences/ISA2021/Archive/74d6810f-bf9c-4f0d-8748-180fc7de5a04.pdf>).

²⁶ Jonathan Saul and Parisa Hafezi, “RPT-INSIGHT-Iran’s global banking problems deepen with rise of Trump, Brexit”, Reuters, 29 July 2016 (available at <https://www.reuters.com/article/iran-banking-idUSL8N1AF6IM>).

²⁷ Statement by Natasha de Terán, House of Commons Treasury Committee, “Oral evidence: Russia: effective economic sanctions, HC 1186”, 7 March 2022 (available at <https://committees.parliament.uk/oralevidence/9834/html/>).

or provide for humanitarian exemptions, including in the process of implementing Security Council sanctions.

26. A company may make this decision due to a perceived business benefit or because essential intermediaries, such as its bank, may refuse to carry out relevant transactions. The Special Rapporteur draws attention to the Swedish medical products manufacturer Mölnlycke, which stopped all exports to the Islamic Republic of Iran after the United States reimposed sanctions against the country in 2018. The halt in exports included exempt products, including bandages made only by that company which were vital for patients with epidermolysis bullosa, a horrendous chronic skin disease. This led to greater suffering and even deaths among those children, compromising their rights to health and to life. Mölnlycke decided to halt its dealings with the Islamic Republic of Iran after it became impossible to find a bank or other institution to handle the necessary financial transactions.²⁸ During her country visit to the Islamic Republic of Iran, the Special Rapporteur received reports of similar obstacles in procuring and delivering life-saving medicines and medical devices to treat other rare and severe diseases due to overcompliance by foreign companies. She was informed that insurance companies were reluctant to insure air cargos to the Islamic Republic of Iran and about significant delays that caused deliveries of medicines close to their expiration dates.²⁹

27. Similarly, when unilateral sanctions were imposed against the Russian Federation in 2022 amidst the conflict in Ukraine, many large foreign companies stopped working with Russian individuals and entities designated by the sanctions, and some companies stopped interacting with all Russian individuals and entities, regardless of whether they were designated or not.³⁰

28. The Special Rapporteur understands that such caution is a substitute for careful vetting that a company may not perform due to insufficient resources, expertise or willingness, and which can cause business to be denied when there is no link to the sanctioned country. It was reported that the Internet e-commerce platform Etsy removed items from sale and suspended sellers' accounts because they listed products such as Persian dolls or a computer mouse pad designed to look like a Persian rug, although neither product had any connection with the Islamic Republic of Iran.³¹ Even State-owned enterprises that presumably have access to resources for such vetting may decide to halt business with a sanctioned country entirely; the joint Swedish-Danish State postal service PostNord suspended all Swedish postal interchanges with the Russian Federation and Belarus on the basis of sanctions imposed by the European Union against both countries,³² although postal services in other member States of the European Union maintained such activities.

29. Thus, "companies may decide, after conducting a cost-risk analysis, that it is in their best interests to sever all links with a sanctioned country or designated individuals rather than bear the costs of a more detailed legal analysis that will not necessarily give them absolute certainty that no legal risk is involved".³³ The Special Rapporteur adds that legal risk is not the only business risk that can prompt such a decision.

²⁸ Submission from the Iranian Centre for International Criminal Law.

²⁹ OHCHR, "Preliminary findings of the visit to the Islamic Republic of Iran by the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights", 18 May 2022 (unofficial translation) (available at <https://www.ohchr.org/sites/default/files/2022-05/Iran-country-visit-conclusions-SR-UCM-17May2022%20-EnglishPersian.docx>).

³⁰ Submission from the Russian Federation.

³¹ Submission from the Miaan Group.

³² "PostNord in Sweden suspends all postal items to and from Russia and Belarus", 24 March 2022 (available at <https://www.postnord.se/en/about-us/press-releases/2022/postnord-in-sweden-suspends-all-postal-items-to-and-from-russia-and-belarus>).

³³ Emmanuel Breen, "Corporations and US economic sanctions: the dangers of overcompliance", in *Research Handbook on Unilateral and Extraterritorial Sanctions*, Charlotte Beaucillon (ed.) (Cheltenham, Edward Elgar, 2021), p. 262.

Overcompliance by the financial sector

30. The Special Rapporteur notes with concern that excessive de-risking by banks and other financial actors impedes the flow of humanitarian goods and services permitted under unilateral sanctions. This overcompliance includes, inter alia, refusing to conduct authorized transactions; deterring authorized transactions by requiring onerous documentation or certification, charging higher rates or additional fees or imposing delays; freezing assets that are not targeted by sanctions; and denying individuals the possibility to open or maintain bank accounts or to conduct transactions on grounds that they are nationals of a sanctioned country, even if they are refugees from that country or because they were born there.

31. The Special Rapporteur refers to a statement by a former employee of the Office of Foreign Assets Control, which administers and enforces sanctions imposed by the United States: “If you’re involved in the underlying financing of an impermissible transaction and you are a few layers removed from where that potential violation occurs, you still can be held liable”. He also added that “Correspondent banking due diligence has always been hard enough. This situation makes it impossible”.³⁴

32. The Special Rapporteur notes a report that banks in numerous countries that were essential for transactions involving the Bolivarian Republic of Venezuela have stopped providing correspondent services, in one case blocking the transfer of \$200 million from the Government of China.³⁵ She observes that the extreme caution applied by banks with respect to sanctions also reflects harsh penalties. For example, the United States fined the French bank BNP Paribas \$9 billion in 2014 for processing transactions involving sanctioned countries. She also notes requirements to comply with banking regulations aimed at minimizing financial risks and avoiding involvement in financial crimes, as well as the need on the part of banks to preserve their reputations and the trust of clients. As stated by a previous Special Rapporteur, “An inadvertent violation, leading to a public investigation, can be devastating, even if the bank is eventually cleared of any wrongdoing”.³⁶

33. The Special Rapporteur regrets that some States seem comfortable with overcompliance, as when the State Secretariat for Economic Affairs of Switzerland said that “banks are free to take measures that go further than the minimum legal requirements for reasons of risk and reputation”.³⁷ By contrast, she takes positive note of the concern expressed by an official of the European Union that after it imposed sanctions against Belarus and the Russian Federation in 2022, banks in member States were discontinuing deposits by Russian customers even if they were resident in the European Union and not subject to the sanctions.³⁸ In France, it was reported that one bank refused to credit housing funds from the French Government to the account of a Russian student at a French university, citing “European sanctions”, while another bank blocked a Russian employee at its Paris headquarters from accessing her salary.³⁹

34. Overcompliance occurs regardless of whether sanctions are comprehensive or limited. In Zimbabwe, which is subject to mostly targeted sanctions, non-sanctioned individuals and entities have had long-established accounts closed by banks in Australia, the United Kingdom of Great Britain and Northern Ireland and the United States due to their nationality, and only

³⁴ Daniel Tannebaum, consultant at Oliver Wyman, quoted in Sanne Wass, “Banks face hidden sanctions risk amid complex correspondent banking system”, *S&P Global*, 13 April 2022 (available at <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/banks-face-hidden-sanctions-risk-amid-complex-correspondent-banking-system-69743257>).

³⁵ Submission from Sures Derechos Humanos.

³⁶ Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights on his mission to the Syrian Arab Republic”, 8 October 2018, *A/HRC/39/54/Add.2*, para. 37.

³⁷ “Elan de générosité freiné par la frilosité des banques suisses”, *20 Minutes* (Lausanne), 16 March 2022.

³⁸ Martin Arnold and Sam Fleming, “Banks push Brussels for clarity to avoid ‘overcompliance’ with sanctions on Russia”, *Financial Times*, 7 April 2022 (available at <https://www.ft.com/content/a2fcd6e9-6b1a-4bd8-b035-047eb0791a94>).

³⁹ David Fontaine, “Ruses anti-Russes”, *Le Canard Enchaîné*, 11 May 2022, p. 4.

6 of 27 commercial banks in Zimbabwe still have foreign correspondent banks willing to handle transactions.⁴⁰

35. The Special Rapporteur notes that overcompliance by banks also impedes sanctioned States from carrying out sovereign functions; they face difficulties paying membership dues to international organizations and accessing debt markets to finance activities that can be critical to protecting the human rights of their nationals.⁴¹ Many banks around the world recently suspended operations involving Cuba due to United States sanctions, “including legitimate transfers for purchases of food, medicines and goods for the population”, refused to carry out transactions to support broader distribution of COVID-19 vaccines; and ended relationships with Cuban diplomatic missions around the world due to the fear of reprisals by the United States Government.⁴² Moreover, “Cubans living abroad are prevented from opening bank accounts, using certain credit cards or carrying out transactions normally, just because they are Cuban nationals”⁴³ – a situation that affects, inter alia, Cuban medical personnel sent abroad to ensure the right to health in many countries.

36. With respect to banking overcompliance, the Special Rapporteur refers to Security Council resolution 2615 (2021) relating to United Nations sanctions against individuals, groups and entities associated with the Taliban in Afghanistan,⁴⁴ in which the Council declared that “humanitarian assistance and other activities that support basic human needs in Afghanistan are not a violation” of the freeze on Taliban assets “and that the processing and payment of funds, other financial assets or economic resources, and the provision of goods and services necessary to ensure the timely delivery of such assistance or to support such activities are permitted” as long as “reasonable efforts” are made to minimize the accrual of any benefits to the sanctioned individuals and entities. The concerns of and often inaction on the part of banks thus infringe upon Security Council sanctions.

Overcompliance by other entities and States

37. The Special Rapporteur observes that overcompliance occurs by companies that are vital for deliveries of humanitarian and other goods and services that are formally exempt from sanctions. Transportation providers and insurers often decline to provide services out of fear of secondary sanctions “for inadvertent, unintentional or even small-scale violations of primary sanctions”.⁴⁵ The sanctions imposed by the United States against the Syrian Arab Republic thus impede authorized shipments of medicine to the country and increase the costs involved.⁴⁶

38. The Special Rapporteur notes that States too sometimes engage in overcompliance when a regional organization is the sanctioning party. Member States of the European Union are responsible for administering European Union sanctions, and differences in their interpretations of sanctions against the Russian Federation in 2022 prompted an official of the European Union to remark that excessive compliance by member States, which might be excessively cautious, was a matter of concern.⁴⁷

⁴⁰ Submission from Zimbabwe.

⁴¹ Andrea Shalal, “Russia, Belarus squarely in ‘default territory’ on billions in debt – World Bank”, *Reuters*, 10 March 2022 (available at <https://www.reuters.com/markets/europe/russia-belarus-squarely-default-territory-billions-debt-world-bank-2022-03-09/>).

⁴² Submission from Cuba.

⁴³ *Ibid.*

⁴⁴ See <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/413/83/PDF/N2141383.pdf?OpenElement>.

⁴⁵ Ioannis Prezas, “From targeted states to affected populations: exploring accountability for the negative impact of comprehensive unilateral sanctions on human rights”, in *Research Handbook on Unilateral and Extraterritorial Sanctions*, Charlotte Beaucillon (ed.) (Cheltenham: Edward Elgar, 2021), p. 388.

⁴⁶ Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights on his mission to the Syrian Arab Republic”, *A/HRC/39/54/Add.2*, para. 45.

⁴⁷ Martin Arnold and Sam Fleming, “Banks push Brussels for clarity to avoid ‘overcompliance’ with sanctions on Russia”, *Financial Times*, 7 April 2022 (available at <https://www.ft.com/content/a2fcd6e9-6b1a-4bd8-b035-047eb0791a94>).

C. Extraterritorial jurisdiction and enforcement

39. The Special Rapporteur expresses concern that the enforcement of unilateral sanctions outside the sanctioning State, primarily by the United States, relies on legal principles whose precise scope is unclear. As noted by one scholar, recent examples in United States sanctions law showed a troubling tendency to overstretch traditional jurisdictional principles.⁴⁸

40. She understands that two types of connection to United States territory provide the basis for the country to assert the legal authority to impose penalties for violations of its sanctions: when a foreign transaction with a party sanctioned by the United States involves an intermediary located physically within the United States, such as a correspondent bank; and when a foreign transaction with a sanctioned party involves a system or process under the control of the United States, such as the United States financial system in which transactions in United States dollars are cleared.⁴⁹

41. While sanctions imposed by some States allow for extraterritorial enforcement – for example, the Arab League’s boycott of Israel, which originated in the 1940s and which the United States deems to constitute sanctions,⁵⁰ permits the blacklisting of third-country companies that do business with Israel⁵¹ – only the United States currently pursues its extraterritorial claims vigorously.

42. Fears of exposure to United States penalties are a key driver of foreign overcompliance with sanctions imposed by the United States. After the 2018 restoration of United States sanctions against the Islamic Republic of Iran, a French legislator remarked that all European businesses with economic and commercial interests in the United States had chosen to withdraw from the Islamic Republic of Iran, including those whose goods were not covered by the sanctions.⁵²

D. Reasons for overcompliance

43. The Special Rapporteur notes that de-risking policies are responsible for extensive overcompliance with unilateral sanctions, particularly in the financial sector. They are generally designed for companies to comply with numerous other regulatory obligations besides sanctions, such as minimizing financial risk and avoiding transactions related to money-laundering, terrorist financing and other financial crimes, while also taking into account reputational and other business-related risks, including de-risking pressures from shareholders.⁵³ As the due diligence necessary to address risks with precision can be labour-intensive, time-consuming, costly and demand investigative expertise that many institutions lack,⁵⁴ and as legal and business penalties for insufficiently addressing risks can be high, de-

⁴⁸ Susan Emmenegger, “Extraterritorial economic sanctions and their foundation in international law”, *Arizona Journal of International & Comparative Law*, vol. 33, No. 3 (2016), pp. 631–659; Danielle Ireland-Piper, *Accountability in Extraterritoriality* (Cheltenham, Edward Elgar, 2017), pp. 1–4.

⁴⁹ Consultation with a United States sanctions attorney.

⁵⁰ United States International Trade Commission, “Effects of the Arab League Boycott of Israel on U.S. Businesses: Investigation No. 332–349”, publication 2827, 1994 (available at https://www.usitc.gov/publications/332/pub2827_0.pdf).

⁵¹ This policy is no longer actively pursued by most member States of the Arab League. See George E. Shambaugh, *States, Firms, and Power: Successful Sanctions in United States Foreign Policy* (Albany, State University of New York Press, 1999), p. 24; Martin A. Weiss, “Arab League Boycott of Israel”, United States Congressional Research Service, 2017, p. 2.

⁵² Philippe Bonnacerrère, “What European response to American extraterritoriality?”, Fondation Robert Schuman, 4 February 2019 (available at <https://www.robert-schuman.eu/en/european-issues/0501-what-european-response-to-american-extraterritoriality>).

⁵³ Mark S. Bergman, “The state of the global capital markets – 2014 update”, Euromoney Institutional Investor: Expert Guides, 15 April 2014 (available at <https://www.expertguides.com/articles/the-state-of-the-global-capital-markets-2014-update/ARTIXBTA>).

⁵⁴ Richard L. Kilpatrick, Jr., “Self-sanctioning Russia”, *European Journal of International Law*, “EJIL: Talk!”, 11 May 2022 (available at https://www.ejiltalk.org/self-sanctioning-russia/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2).

risking policies are often excessively cautious, overcomplying with numerous regulations at once.

44. The accounting firm Ernst & Young Global reports that “de-risking can be problematic, as it can undermine basic legal banking services, to which every individual is in principle entitled”.⁵⁵ The Special Rapporteur reaffirms that the ability to conduct financial transactions is critical to the enjoyment of a broad range of human rights. In this context, she welcomes the recent advice provided by the European Banking Authority that de-risking of entire categories of customers, without due consideration of individual customers’ risk profiles, can be unwarranted and a sign of ineffective risk management.⁵⁶ She also welcomes calls such as that by the National Bank of Belgium for banks to “repeal (...) as soon as possible” de-risking policies that exclude business interactions with potential or existing customers “on the basis of general criteria such as, *inter alia*, their belonging to a particular economic sector or a link to a high-risk country”.⁵⁷

Complex, unclear and evolving sanctions

45. Factors routinely cited as promoting overcompliance in de-risking policies include the complexity of many sanctions regimes and a lack of clarity in their provisions. This may be attributable at times to the speed at which sanctions are created and imposed in response to a geopolitical event, or to their drafting without sufficient detail. The United States adjusted its 2022 sanctions against the Russian Federation soon after they were imposed as they prevented the Government from conducting some of its own transactions.⁵⁸

46. The frequency with which sanctions are changed also drives overcompliance as unstable regulations can generate confusion and make due diligence more challenging for companies and other actors. In this regard, the Special Rapporteur cites sanctions that were decided by the Economic Community of West African States (ECOWAS) against Mali one day after a coup in August 2020.⁵⁹ ECOWAS eased the sanctions after several days when negotiations for a transitional government began,⁶⁰ eased them further six weeks later after a transitional government was agreed,⁶¹ then tightened them in January 2022 when the

⁵⁵ Filip Bogaert and Ly Chheng Chhor, “How to manage financial crime compliance risk without de-risking”, Ernst & Young Global, 10 May 2022 (available at https://www.ey.com/en_be/financial-services/how-to-manage-financial-crime-compliance-risks-without-de-risking).

⁵⁶ European Banking Authority, “Opinion of the European Banking Authority on ‘de-risking’”, document EBA/Op/2022/01, 5 January 2022 (available at https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Opinions/2022/Opinion%20on%20de-risking%20%28EBA-Op-2022-01%29/1025705/EBA%20Opinion%20and%20annexed%20report%20on%20de-risking.pdf).

⁵⁷ National Bank of Belgium, “Prudential expectations on de-risking”, document NBB_2022_03, 1 February 2022 (available at https://www.nbb.be/doc/cp/eng/2022/20220201_nbb_2022_03_EN.pdf).

⁵⁸ United States, Department of the Treasury, “Fact Sheet: Preserving Agricultural Trade, Access to Communication, and Other Support to Those Impacted by Russia’s War Against Ukraine”, 19 April 2022 (available at https://home.treasury.gov/system/files/126/russia_fact_sheet_20220419.pdf).

⁵⁹ ECOWAS, press release on the situation in Mali, 18 August 2020 (available at https://araa.org/sites/default/files/news/pdf/Eng_Communique%CC%81%20Mali%2022h50_V2ENG_LISHMALI%202.pdf).

⁶⁰ Ilana Zelmanovitz Axelrod and Kwesi Aning, “Mali, Democracy and ECOWAS’s Sanctions Regime”, Policy Brief 9, October 2020, Kofi Annan International Peacekeeping Training Centre (available at <https://www.kaiptc.org/wp-content/uploads/2020/11/20201028-Final-Policy-Brief-9-Axelrod-Aning.pdf>).

⁶¹ ECOWAS, Declaration of ECOWAS Heads of State and Government on Mali, 5 October 2020 (available at https://www.ecowas.int/wp-content/uploads/2020/10/Eng_Declaration-levee-de-sanctions-Mali-October-2020.pdf).

transitional government was deemed too slow in restoring democratic rule to Mali.⁶² Eleven weeks later, a court declared some of the sanctions illegal and ordered their suspension.⁶³

47. Unilateral sanctions also evolve for other reasons, such as new listings and delistings of sanctioned parties. Sometimes a sanctions regime is graduated and expanded if the initial sanctions fail to achieve their goals.

48. As for the lack of clarity as an overcompliance factor, the Special Rapporteur refers to an assessment of European Union sanctions by the law firm Baker Botts, which stated that the “sanctions use many broad and undefined concepts, there is little official guidance on the interpretation of these concepts, and precedents are rare”.⁶⁴ She also refers to a report by the Atlantic Council highlighting the unclear nature of sanctions imposed by the United States, as when the vague term “significant transaction” is the threshold for determining when a violation occurs; the report notes the “lack of a mechanism for a non-United States person to secure formal clarity that a transaction or activity is permissible”.⁶⁵

49. Extraterritorial enforcement of sanctions, notably by the United States, and the variety and harshness of penalties, as well as the threat of enforcement action and the fear resulting from it, also contribute to overcompliance. The Special Rapporteur notes that besides secondary sanctions, fines and criminal or civil prosecution, penalties can include being shut out of critical markets or financial systems, such as the ability to engage in transactions in United States dollars or to use the Society for Worldwide Interbank Financial Telecommunication (SWIFT) service, the dominant system for communicating instructions and data relating to international financial transactions. Penalties also include those not imposed by the sanctioning State, such as reputational damage, contract terminations, lost business opportunities, a reduced ability to attract desirable employees and other responses from current and potential counterparties.

Costs of due diligence

50. Finally, the Special Rapporteur notes that companies have the responsibility to perform human rights due diligence relating to the entire scope of their activities and relationships,⁶⁶ in addition to the due diligence necessary to adhere to the rules of unilateral sanctions as they constantly evolve, although these can entail prohibitive costs.⁶⁷ As the cost of violating sanctions can also be high, many companies favour overcompliance despite the human rights concerns. As noted by one academic, the “more sophisticated and nuanced a compliance programme is, the more expensive it becomes for the company to implement and monitor. This is why a company may be tempted to use simplistic and operational decision-making criteria and processes that generate forms of overcompliance”.⁶⁸ Indeed, “the legal

⁶² ECOWAS, 4th Extraordinary Summit of the ECOWAS Authority of Heads of State and Government on the political situation in Mali, final communiqué, 9 January 2022 (available at <https://reliefweb.int/report/mali/final-communique-4th-extraordinary-summit-ecowas-authority-heads-state-and-government>).

⁶³ “West African court orders lifting of some sanctions against Mali”, Reuters, 24 March 2022 (available at <https://www.reuters.com/world/africa/w-african-court-orders-suspension-some-sanctions-against-mali-2022-03-24/>).

⁶⁴ Baker Botts LLP, “Economic sanctions and export controls (EU)”, (available at <https://www.bakerbotts.com/services/practice-areas/enforcements-and-investigations/economic-sanctions-and-export-controls-eu>).

⁶⁵ Samantha Sultoon and Justine Walker, “Secondary sanctions’ implications and the transatlantic relationship”, Atlantic Council, Issue Brief, September 2019 (available at https://www.atlanticcouncil.org/wp-content/uploads/2019/09/SecondarySanctions_Final.pdf).

⁶⁶ OHCHR, *Guiding Principles on Business and Human Rights* (available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf).

⁶⁷ UBS Group, Annual Report 2021, p. 70.

⁶⁸ Emmanuel Breen, “Corporations and US economic sanctions: the dangers of overcompliance”, in *Research Handbook on Unilateral and Extraterritorial Sanctions*, Charlotte Beaucillon (ed.) (Cheltenham, Edward Elgar, 2021), pp. 262–263.

costs associated with undertaking due diligence and acquiring a license may in some instances be higher than the value of the goods and services”.⁶⁹

51. The Special Rapporteur observes that differences between unilateral sanctions regimes targeting the same country, entity or individual also produce overcompliance when adherence to the strictest sanctions exceeds what is necessary to comply with milder ones. The sanctions imposed against the Russian Federation in 2022 by the United Kingdom, the United States and the European Union illustrate this: “the United Kingdom does not consider secondary trades in shares of a sanctioned company as breaching sanctions, but the United States does and the European Union does in some cases”.⁷⁰ One large international bank, Credit Suisse, explained that when differences in substance or scope exist between the globally applied sanctions, it applies the more restrictive regulation when lawfully permitted.⁷¹

E. Consequences of overcompliance for the enjoyment of human rights

Range of rights affected

52. The Special Rapporteur stresses that overcompliance occurs with all types of unilateral sanctions (targeted and sectoral), making them less targeted, sometimes to the point of equalling comprehensive sanctions that impact an entire population. She highlights the serious consequences of this outcome by recalling that the Security Council introduced targeted sanctions after it became evident that its comprehensive sanctions, notably against Iraq in the 1990s, were devastating for human rights.⁷² Overcompliance with all types of unilateral sanctions ensures that the rights of large numbers of individuals will be negatively affected regardless of how targeted the sanctions may be.

53. In the Syrian Arab Republic, where some unilateral sanctions target the State while others target specific individuals or companies, it has been noted that the impacts of these measures and related overcompliance are equal and identical, and in some cases they cannot be distinguished or separated from each other.⁷³ It has also been asserted that the Caesar Act sanctions imposed by the United States relied on overcompliance to spread the fear of secondary sanctions among those working to supply construction and engineering services, technology, spare parts and other goods and services to Syrian Arab Republic, in order to put an end to the supplies in those areas.⁷⁴

54. In 2021, during her official visit to Zimbabwe, a country affected by some general sanctions but mainly targeted ones, the Special Rapporteur received information that overcompliance was harming the population’s access to health, food, safe drinking water, education and employment, while also limiting Zimbabwe’s ability to ensure essential services, maintain key infrastructure and make progress toward achieving the Sustainable Development Goals, thus undermining the people’s right to development.⁷⁵ She reiterates that when sanctions affect the rights of an entire population, the impact is greatest on vulnerable groups, including women, children, people with disabilities or with chronic or severe diseases, the elderly, refugees, internally displaced persons, migrants, people living in poverty and others who depend on social or humanitarian assistance.

⁶⁹ Justine Walker, “Risk management principles guide for sending humanitarian funds into Syria and similar high-risk jurisdictions”, European Commission et al., 2020, p. 26 (available at https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/200526-risk-management-guide_en_0.pdf).

⁷⁰ Martin Arnold and Sam Fleming, “Banks push Brussels for clarity to avoid ‘overcompliance’ with sanctions on Russia”, *Financial Times*, 7 April 2022 (available at <https://www.ft.com/content/a2fcd6e9-6b1a-4bd8-b035-047eb0791a94>).

⁷¹ General policy communicated in response to the call for submissions.

⁷² Abbas Alnasrawi, “Iraq: economic sanctions and consequences, 1990–2000”, *Third World Quarterly*, vol. 22, No. 2, 2001, pp. 205–218.

⁷³ Submission from the Syrian Arab Republic.

⁷⁴ Ibid.

⁷⁵ See <https://allafrica.com/stories/202110280420.html>.

55. Overcompliance with unilateral sanctions by international academic publishers also affects the rights to freedom of expression, to education and to benefit from scientific progress when editors are instructed to decline or discourage articles and texts from sanctioned countries.⁷⁶

56. The Special Rapporteur expresses concern about reports that NGOs and other providers of humanitarian assistance have encountered frequent difficulties when working in countries affected by sanctions, causing some to withdraw from those countries.⁷⁷ She notes that essentially all of the problems faced by such groups are attributable to overcompliance because their work involves the provision of goods and services that are exempted from sanctions for humanitarian reasons. Consequently, deliveries of food, medicine, vaccines and other essential goods are not reaching vulnerable populations in sanctioned countries. An NGO operating in the Islamic Republic of Iran reported that attempts to deliver aid to the Iranian Red Crescent Society following destructive floods in 2019 were blocked by the denial of banking services, and that two banks in the Republic of Korea refused to accept money transfers from an Iranian bank for the purchase of authorized medical and laboratory equipment from companies in the Republic of Korea.⁷⁸ The obstacles created by overcompliance to the work of NGOs are particularly critical as NGOs often do what Governments are unable to do because of the sanctions. The Government of the Islamic Republic of Iran notes that secondary sanctions and overcompliance affecting banking, transportation, oil, electricity, telecommunications and other technologies have impeded its ability to respond to emergencies, including the COVID-19 pandemic.⁷⁹

57. The Special Rapporteur has received information that an NGO undertaking humanitarian work in Cuba could not access foreign public-sector funds because banks refused to transfer it to Cuba, while funds that the NGO held in a European bank were frozen by the bank because it feared a “backlash” from the United States. Another NGO reported the need to engage third parties to ensure funds transfers for 13 per cent of its awarded grants.⁸⁰ Such situations reduce the amount of donor funds that can be devoted to humanitarian work, while causing delays in carrying it out.

58. In addition to the inability of humanitarian NGOs to access donations already made, they may lose potential donations because of the fear among some donors that secondary sanctions could be applied to them if the funds are used in a sanctioned country, or because the donors themselves have been prevented from making the donations by banks that declined to provide services to NGOs working in sanctioned countries. One NGO reported that some donors are unable to transfer funds, or are reluctant to do so, amidst concerns that the funds will be frozen. Another NGO that sought to send a delegation to a briefing on the COVID-19 vaccine development programme in Cuba, having taken the steps to ensure compliance with United States sanctions regulations, found that donations for the project were blocked by several banks and by PayPal. During the Special Rapporteur’s country visit to Zimbabwe, many NGOs referred to the fear of even talking to her about the impact of unilateral sanctions and overcompliance for fear of losing donations.

59. According to the Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic, “Despite humanitarian exemptions, much more is required to mitigate consequences on the daily lives of civilians brought about by overcompliance, causing shortages and impeding aid”.⁸¹

⁷⁶ See, for example, Wiley, “Editorial office guidelines for applying international sanctions”, (available at <https://www.wiley.com/network/archive/editorial-office-guidance-for-applying-international-sanctions.AL>).

⁷⁷ OHCHR, “Unilateral sanctions hurt all, especially women, children and other vulnerable groups – UN human rights expert”, 8 December 2021 (available at <https://www.ohchr.org/en/press-releases/2021/12/unilateral-sanctions-hurt-all-especially-women-children-and-other-vulnerable>).

⁷⁸ Submission from the Organization for Defending Victims of Violence.

⁷⁹ Submission from the Islamic Republic of Iran.

⁸⁰ Submission from Access Now.

⁸¹ OHCHR, Statement by Paulo Pinheiro, Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic to the forty-ninth session of the United Nations Human Rights Council,

States and international organizations

60. The Special Rapporteur highlights that overcompliance with unilateral sanctions also harms the ability of States to comply with their international obligations, including to ensure that human rights are protected, as well as with domestic legal obligations. She refers to the situation of more than 9,000 retired nationals of Belarus living abroad – their rights to property and to a decent standard of living are being breached by the reticence of foreign banks to transfer funds from Belarus for their pensions, usually their main and sometimes their only source of income. Moreover, the right to freedom of information is being harmed by the inability of Belarusian media to transfer funds to their offices abroad. The blocking of funds by foreign banks also makes it impossible for Belarusian broadcasters to make timely payments to acquire foreign content, to secure rights to broadcast international events and to use satellites and other technical services.⁸²

61. States similarly face difficulties in paying diplomatic personnel and conducting State business abroad, in addition to payments that ensure their participation in international organizations. The right of the Islamic Republic of Iran to vote in international organizations, including the United Nations, has been suspended because the State could not pay its dues.⁸³ Similar suspensions are faced by the Bolivarian Republic of Venezuela and Zimbabwe.

62. Overcompliance also impedes the work of intergovernmental organizations to aid people in sanctioned countries. The Special Rapporteur notes that the humanitarian, development and other operations of the United Nations country team in the Syrian Arab Republic, for example, are obstructed by overcompliance, primarily by banks, thus harming the rights of the population, inter alia, to health, life, a decent standard of living and development. According to the information received, bank transfers to United Nations consultants and contractors have been blocked or delayed, which has hindered the ability to secure international expertise to work in Syrian Arab Republic and has affected the interest of bidders to work with the United Nations in the country. It was also reported that an NGO which implements United Nations projects has not been able to receive its core funds from the global budget for the last three years due to the refusal of international banks to transfer money to its account in the Syrian Arab Republic, seriously undermining its capacity to provide life-saving reproductive health services to women in the country. Finally, it is reported that payments to some United Nations international staff are being withheld by their respective banks due to the fact that they are working in the Syrian Arab Republic.⁸⁴ The Special Rapporteur is aware that similar situations have been reported in connection with United Nations employees in Cuba, the Islamic Republic of Iran and Zimbabwe.

F. Extent of overcompliance

63. While overcompliance with unilateral sanctions is difficult to measure because policies and practices vary by company and are often confidential, partly due to enforcement-related fears, the Special Rapporteur highlights that it is a global phenomenon and its magnitude is very considerable, even pervasive in some sectors, such as banking.⁸⁵ Based on

18 March 2022 (available at <https://www.ohchr.org/en/statements/2022/03/statement-paulo-pinheiro-chair-independent-international-commission-inquiry>).

⁸² Submission from Belarus.

⁸³ Alena F. Douhan, country visit to the Islamic Republic of Iran by the Special Rapporteur, draft preliminary report, May 2022.

⁸⁴ Submission from the United Nations country team in the Syrian Arab Republic.

⁸⁵ See, for example, Daniel Meagher, “Caught in the Economic Crosshairs: Secondary Sanctions and the American Sanctions Regime”, *Fordham Law Review*, vol. 89, No. 3, 2020, p. 1015, (available at <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5792&context=flr>); Grégoire Mallard, Farzan Sabet and Jin Sun, “the humanitarian gap in the global sanctions regime”, *Global Governance*, vol. 26 (2020), p. 131 (available at https://www.graduateinstitute.ch/sites/internet/files/2021-09/GG_026_01_007_s003_Mallard_proof-final.pdf); Gibson, Dunn and Crutcher LLP, “Economic and trade sanctions developments in response to COVID-19”, 29 April 2020; Jason Bartlett and Megan Ophel, “Sanctions by the numbers: spotlight on Venezuela”, Center for a New American Security, 22 June 2021 (available at <https://www.cnas.org/publications/reports/sanctions-by-the->

a large and growing body of reports about instances of overcompliance resulting in human rights or other problems, and on available information about sanctions compliance policies of some companies, assessments of the situation by law firms that help companies with sanctions compliance, numerous academic studies and also input received for the present report, one may conclude that overcompliance occurs in all business sectors and tends to magnify the scope and impact of sanctions regimes substantially rather than slightly.

64. The Special Rapporteur cannot rule out that the negative impact of overcompliance on human rights may be broader or more severe than the impact of unilateral sanctions themselves. This is particularly likely when companies stop doing business with an entire country, or when a bank declines to handle transactions involving a country because of targeted sanctions against designated individuals or entities there.

65. The Special Rapporteur highlights the breadth of the negative human rights impact of overcompliance as further evidence of its magnitude. Apart from affecting rights that are basic for human survival, such as the rights to health, housing and life, her country visit to the Islamic Republic of Iran revealed the extent to which overcompliance also harmed the rights to education, freedom of expression and to benefit from scientific progress. Information she received indicated how overcompliance affected transfers of technology, knowledge and intellectual and cultural cross-fertilization, as Iranian researchers, scientists and people in sports and culture were shut out of international meetings and competitions. Moreover, Iranian research was often not considered for publication abroad due to policies reflecting academic publishers' fear of secondary sanctions. The Special Rapporteur stresses that this also harms the rights of people in other countries to benefit from Iranian scientific advances.⁸⁶

IV. Countering overcompliance

A. Actions by sanctioning States

66. The Special Rapporteur notes that States, in addition to protecting human rights domestically, are required under the International Covenant on Economic, Social and Cultural Rights to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction, and that customary international law prohibits a State from allowing its territory to be used to cause damage on the territory of another State. These extraterritorial obligations follow from the fact that the obligations of the Covenant are expressed without any restriction linked to territory or jurisdiction.⁸⁷

67. In this regard, she welcomes initiatives by some States towards requiring companies over which they have jurisdiction to adhere to elements of the Guiding Principles on Business and Human Rights. She nonetheless recognizes such efforts as currently insufficient and ineffective, and that not all efforts encompass problems arising from overcompliance. In Sweden, for example, the State's Agency for Public Management proposed in 2018 that the Government consider introducing legislation to make human rights due diligence a statutory requirement for Swedish companies, with "the possibility to investigate and take legal proceedings against company-related violations of human rights by Swedish companies that

numbers-3); *Leitbetriebe Austria*, "Austrian companies 'overcompliant' with international sanctions", 20 May 2016 (available at <https://leitbetriebe.at/en/austrian-companies-overcompliant-with-international-sanctions/>); statement by Natasha de Terán, House of Commons, Treasury Committee, "Oral evidence: Russia: effective economic sanctions, HC 1186", 7 March 2022 (available at <https://committees.parliament.uk/oralevidence/9834/html/>).

⁸⁶ Alena F. Douhan, country visit to the Islamic Republic of Iran by the Special Rapporteur, draft preliminary report, May 2022.

⁸⁷ Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), paras. 26–27.

occur outside of Sweden”.⁸⁸ Numerous Swedish companies have voiced support for such a project,⁸⁹ but progress to date appears extremely limited.

68. In early 2022, the European Commission proposed a European Union directive that would require member States to establish national rules on corporate human rights due diligence as it pertains to their value chains, although it does not appear to address human rights issues arising from companies’ compliance and overcompliance with European Union or other unilateral sanctions. The proposed directive nonetheless recognizes the disproportionate expertise and cost burdens that small and medium-sized enterprises face relative to larger ones in conducting due diligence, and calls for lighter or no due diligence requirements for smaller companies as well as graduated enforcement through “a proportionate enforcement process” in each State.⁹⁰ The Special Rapporteur notes that the latter concept, if transposed to the enforcement of unilateral sanctions, could have potential for alleviating overcompliance by smaller companies.

69. The Special Rapporteur also welcomes efforts by some sanctioning States to minimize overcompliance with respect to goods and services covered by humanitarian exemptions, notably by issuing clarifications to the sanctions or guidance for using the exemptions. Nonetheless, she notes that the effectiveness of such actions is nearly non-existent. The United States and the European Union, for example, have produced documents to encourage the use of humanitarian exemptions to their sanctions during the ongoing COVID-19 crisis, yet the sanctions have nevertheless impeded the ability of sanctioned countries to obtain supplies and services to fight the pandemic.⁹¹

70. The Special Rapporteur notes that initiatives by States to diminish overcompliance have been sporadic and modest, and there is no indication that sanctions are being designed to minimize it. Indeed, four key drivers of overcompliance remain in place: the complexity of sanctions regimes; the vagueness of their provisions; tough enforcement measures; and threats of secondary sanctions or criminal or civil penalties. As earlier sanctions remain unclear, evidence that more recent sanctions also lack clarity is the overcompliance that occurs with them as well, all while enforcement has become harsher.⁹²

71. The Special Rapporteur observes that the potential for overcompliance to support the objectives of unilateral sanctions may restrain sanctioning States from acting more forcefully to curtail the practice. Whether they tacitly accept overcompliance or intentionally provoke it is unknown, but the latter cannot be ruled out in view of the weakness of their efforts to fight it. The United States has been suspected of making sanctions deliberately unclear to increase their impact,⁹³ and one scholar has noted that “one may reflect on whether the

⁸⁸ Swedish Agency for Public Management, “The UN Guiding Principles on Business and Human Rights – challenges in the work of the government (2018:8)” (available at <https://www.statskontoret.se/in-english/publications/2018/the-un-guiding-principles-on-business-and-human-rights--challenges-in-the-work-of-the-government-20188/>).

⁸⁹ Business & Human Rights Resource Centre, “Swedish mandatory due diligence campaign launched, with support from 42 companies”, 29 September 2020 (available at <https://www.business-humanrights.org/en/latest-news/swedish-mandatory-due-diligence-campaign-launched-with-support-from-42-companies/>).

⁹⁰ European Commission, proposal for a directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, document COM(2022) 71 final, 23 February 2022 (available at https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF).

⁹¹ OHCHR, Negative impact of unilateral coercive measures on the enjoyment of human rights in the coronavirus disease pandemic (A/75/209).

⁹² “Global sanctions – compliance and enforcement trends”, *Financier Worldwide*, October 2017, (available at <https://www.financierworldwide.com/global-sanctions-compliance-and-enforcement-trends#.Yo92I6hBzIV>).

⁹³ Statement by Natasha de Terán, House of Commons, Treasury Committee, “Oral evidence: Russia: effective economic sanctions, HC 1186”.

policies of United States regulators may in certain instances encourage overcompliant behaviour by companies”.⁹⁴

B. Actions by third-party States

72. The Special Rapporteur notes that some States prohibit individuals and entities over which they have domestic jurisdiction from complying with other States’ unilateral sanctions against third states, individuals or entities. An early example was the United States Export Administration Act of 1969, amended in 1977 to prohibit United States companies from participating in other countries’ boycotts against third countries that are friendly to the United States or against entities or individuals blacklisted under those boycotts.⁹⁵

73. More recent laws to obstruct compliance with foreign sanctions and protect individuals and entities from harm resulting from compliance were spurred mainly by the extraterritorial enforcement of United States sanctions, including blocking statutes promulgated by the European Union in 1996 and subsequently updated,⁹⁶ by the Russian Federation in 2018,⁹⁷ and by China in 2020 and 2021, most recently with the Anti-Foreign Sanctions Law. The European Union blocking statute has been recognized as ineffective and in 2021 the European Commission announced plans to amend it,⁹⁸ while recent European Union case law may also strengthen it.⁹⁹

74. The Special Rapporteur highlights that such laws were enacted to address situations related to compliance with unilateral sanctions by other States but not to overcompliance with those sanctions, raising questions about whether and to what extent the laws might be adequate to counter any aspects of overcompliance.

V. Conclusions and recommendations

A. Conclusions

75. Secondary sanctions are used in enforcing unilateral primary sanctions against foreign entities and individuals that are presumed to have interactions with the targets of primary sanctions. The extraterritorial jurisdiction claimed by sanctioning States when imposing secondary sanctions is not recognized as legal under international law, but the use of secondary sanctions is expanding as States impose more primary sanctions.

76. Secondary sanctions and civil and criminal penalties are deemed illegal on various grounds, notably their imposition in support of primary sanctions whose own legality is dubious under international law. Secondary sanctions also violate due process rights.

77. The fear of being targeted by secondary sanctions or subjected to civil suits and criminal penalties leads to widespread overcompliance with primary sanctions to minimize the risks of inadvertent violations arising from their complexity, lack of clarity, frequent

⁹⁴ Emmanuel Breen, “Corporations and US economic sanctions: the dangers of overcompliance”, *Research Handbook on Unilateral and Extraterritorial Sanctions*, Charlotte Beaucillon (ed.) (Cheltenham: Edward Elgar, 2021), p. 263.

⁹⁵ See United States Government, *Restrictive Trade Practices or Boycotts, Commerce and Foreign Trade*, (15 CFR, part 760).

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

⁹⁷ 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 4 June 2018.

⁹⁸ 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>).

⁹⁹ 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).

changes and extraterritorial enforcement in order to minimize reputational risks or because of the high cost of due diligence relating to compliance. The growing use of secondary sanctions creates the prospect for overcompliance with them as well.

78. The use or threat of secondary sanctions or civil and criminal penalties constitutes de facto a new form of reprisal towards individuals, States and companies considered to circumvent unilateral sanctions regimes, despite the recognized illegality of this application of extraterritorial jurisdiction by States.

79. Overcompliance harms many human rights by impeding purchases and shipments to sanctioned countries of food, medicine, medical equipment and replacement parts, while also preventing intergovernmental organizations and humanitarian NGOs from transferring funds for aid programmes and to pay employees in sanctioned countries. Overcompliance also blocks non-targeted individuals from accessing their property and meeting their financial obligations, jeopardizing their rights to, inter alia, housing, employment, education and health.

80. Overcompliance magnifies the negative impact of sanctions on human rights by extending the sanctions to additional targets, ranging from individuals to entire populations. It has become very widespread and even pervasive in some sectors such as banking. The impact of overcompliance on human rights may at times exceed the impact of the associated sanctions.

81. Overcompliance sometimes takes the form of halting business with a country that is not itself a target of sanctions. Overcompliance by banks includes refusing to conduct authorized transactions; deterring persons from sanctioned countries to carry on 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 to have bank accounts or to conduct transactions on grounds that they are nationals of a sanctioned country, even if they are refugees from that country.

82. Overcompliance prevents States from meeting obligations such as pension payments to retired nationals abroad, from making payments that ensure their participation in international organizations and from carrying out diplomatic and other sovereign functions. The right to freedom of information is also harmed by the inability of State broadcasters to make payments for foreign content.

83. Overcompliance may occur outside of the time period in which sanctions are in force. It also heightens the impact of unilateral sanctions but does not help them achieve their objectives or accelerate the lifting of them.

84. Some States complying with the obligation to exercise due diligence with respect to human rights are moving towards making it mandatory for businesses to perform their own human rights due diligence, but this process lags behind the expansion of overcompliance and the resulting harm to human rights. Such efforts generally do not encompass human rights issues arising from sanctions.

85. Sanctioning States sometimes issue clarifications or guidance for their sanctions to make compliance easier, but such efforts are weak relative to the magnitude of overcompliance. This may indicate a willingness to tolerate overcompliance as it may support the objectives of their sanctions.

86. Blocking statutes by some States to restrict the extraterritorial enforcement of unilateral sanctions do not take overcompliance into consideration, and it is unknown if those laws would be adequate to address it.

B. Recommendations

87. While reminding all States of the fact that any unilateral coercive measure can only be taken without authorization of the Security Council if it does not violate international law or its wrongfulness can be excluded in conformity with the law of international responsibility, and that the overwhelming majority of unilateral sanctions being applied today do not correspond to those criteria, and should therefore be lifted, the Special Rapporteur

nonetheless makes the following recommendations to minimize overcompliance with unilateral sanctions. These recommendations shall in no way be understood or interpreted as legitimizing unilateral coercive measures from a legal perspective.

88. States should act to eliminate or minimize overcompliance with unilateral sanctions by any appropriate means, including legislation, regulations or financial or other incentives, to remove or offset risks that lead to overcompliance.

89. States should make it compulsory for companies under their jurisdiction to carry out human rights due diligence and to address any negative impact of their sanctions compliance or overcompliance. States already making efforts to require due diligence should accelerate them.

90. States should ensure that domestic laws or regulations of any sort do not create incentives for companies to over comply with sanctions or to otherwise infringe on their obligation to protect human rights. They should engage in consultations with businesses to identify aspects of existing laws and regulations that induce overcompliance, and to make appropriate adjustments.

91. Sanctioning States should engage in consultations with businesses and other entities to identify aspects of existing sanctions regimes and enforcement processes that encourage overcompliance, with a view toward eliminating this result.

92. Sanctioning States should refrain from threats of secondary sanctions or criminal or civil penalties for the circumvention of sanctions regimes as they are illegal under international law.

93. 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.

94. Sanctioning States should adapt their sanctions enforcement procedures and penalties to take into account, inter alia, the relative resources of individuals, companies and other entities, particularly humanitarian organizations, in response to suspected violations, to alleviate any pressures and burdens that encourage overcompliance.

95. In no circumstances should a sanctioning State intentionally encourage overcompliance through the design of its sanctions or through threats or any other means adopted to enforce them.

96. Companies should view human rights comprehensively when conducting due diligence and elaborating human rights policies. They should examine how their sanctions compliance, and any overcompliance, may negatively impact human rights, including abroad, and take corrective action.

97. Companies should regularly monitor the human rights impact of their compliance and overcompliance with unilateral sanctions and adjust their practices to eliminate or mitigate any negative impact that is identified.

98. Companies should engage with the Governments of sanctioning States about aspects of sanctions that prompt overcompliance through a lack of clarity, complexity or any other reason, with a view towards adjusting the relevant features of sanctions to avoid that result.

99. Companies should engage in consultations with their respective Governments when they deem overcompliance 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.

100. Banks should engage with the Special Rapporteur, OHCHR, the Financial Action Task Force and others in a multilevel initiative to draft guiding principles on secondary sanctions, overcompliance and human rights, as follow-up to her recent guidance note.¹⁰⁰

¹⁰⁰ Special Rapporteur on unilateral coercive measures, “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>).