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## **UN Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights**

**Expert Consultation on “The Notion, Characteristics, Legal Status and  
Targets of Unilateral Sanctions,” convened on 26 April 2021 by the Special  
Rapporteur on the negative impact of unilateral coercive measures on the  
enjoyment of human rights, Prof. Dr. Alena F. Douhan.**

### **I. Introduction**

Human Rights Council resolutions 27/21 and 45/5 and General Assembly resolution 74/154 request the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights to, inter alia, gather all information relevant to the negative impact of unilateral coercive measures on the enjoyment of human rights; to study relevant trends, developments and challenges; and to make guidelines and recommendations on ways and means to prevent, minimize and redress their adverse impact on human rights; as well as to draw the attention of the Human Rights Council, General Assembly and the High Commissioner to relevant situations.

Pursuant to these requests, the Special Rapporteur has taken note of the accelerating expansion of new and different forms, types and terms relating to unilateral means of pressure (unilateral coercive measures, sanctions, international sanctions, sectoral sanctions, secondary sanctions, etc.); the expansion of categories and number of targets (direct or indirect, primary or secondary, intended or unintended, etc.); the need to identify the actors involved (targeting and targeted States, source States, etc.); concerns relating to the legal grounds, particularities and legality of sanctions imposed on individuals and non-State entities, especially due to the proliferation of Magnitsky-like acts; and the extraterritorial application and effects of unilateral sanctions, which raise special concerns due to the increasing number of reported cases of human rights violations.

As the current uncertainty and ambiguity in the terminology makes it impossible to identify a legal framework and the applicable standards, which undermines the rule of law, the world order and the authority of the United Nations, the Special Rapporteur decided to undertake a study on

the “Notion, characteristics, legal status and targets of unilateral sanctions,” to be presented as a thematic report before the Human Rights Council at its 48th session in September 2021 and the General Assembly at its 76th session in October 2021. To assist in the gathering of information, she convened an expert consultation on 26 April 2021 involving academics and practitioners with the objective of producing recommendations that can assist her in the preparation of the report.

The discussion focused on the means of unilateral coercive pressure and their legality as concerns, *inter alia*, general international law, international economic law and human rights law; as well as on the extraterritorial aspects and effects of unilateral sanctions.

The experts included Dr. Ivan Timofeev, Director of Programs at the Russian International Affairs Council; Prof. Nicolas Rouiller, of Business School Lausanne and the Financial University, Moscow; Dr. Sergey Glandin, of Moscow State University named after Lomonosov and the law firm Pen and Paper; Prof. Tom Ruys, of the University of Ghent; Dr. Mojtaba Kazazi, International Law Practitioner and Arbitrator, Geneva; Michael Swainston QC, Barrister at Brick Court Chambers, London; Prof. Alfred de Zayas, Geneva School of Diplomacy; Prof. Dr. Ulrich G. Schroeter, of the University of Basel and the Lauterpacht Centre for International Law at the University of Cambridge; Prof. Mikhail Lebedev, of the Centre d’Etudes Diplomatiques et Stratégiques, Paris; Prof. Tarcisio Gazzini, of the University of East Anglia; Prof. Susan Emmenegger, of the University of Bern and New York University; Prof. Joy Gordon, of Loyola University, Chicago; and Prof. Michael Strauss, of the Centre d’Etudes Diplomatiques et Stratégiques, Paris.

## **II. Opening of the discussion**

During her opening remarks, the Special Rapporteur, Alena Douhan, explained the primary goals of her mandate, among them being to make it better understood and to raise awareness about the negative impact that unilateral coercive measures have on human rights. She observed that while much has been published about the impact of UN sanctions on human rights, very little has been published about the impact of unilateral sanctions on human rights, or about the legality of unilateral sanctions. She expressed a conviction that these activities should be brought within the rule of law but noted that challenges exist, including the inconsistent terminology that is used in reference to them. The Special Rapporteur noted that, *inter alia*, this impedes the ability to determine what qualifies as “sanctions” in a legal sense, which affects critical issues such as whether they constitute collective punishment. She further observed that the absence of an accepted body of legal terminology pertaining to these measures may be encouraging the emergence of new terms that could allow States imposing coercive measures to avoid legal restrictions.

## **III. Summary of the proceedings**

### **A. Contributions of the experts**

**Dr. Timofeev** began by distinguishing between multilateral and unilateral sanctions, observing that it is widely recognized that sanctions are considered multilateral if they result from UN

Security Council resolutions. He said sectoral sanctions can cause a company to be listed simply because it belongs to a particular economic sector. He noted that targeted sanctions are the subject of much discussion in Russia, notably the question of what the actual target is, as the state can end up as the target although it may not be what is written in the actual sanctions document. In this regard, Dr. Timofeev said targeted sanctions can have such a huge impact that they become comprehensive sanctions in practice. Secondary sanctions, or sanctions against violators of sanctions, are another critical concept, as is extraterritoriality, as in the case of the United States justifying its application of extraterritorial jurisdiction on grounds that US dollars are involved in foreign transactions.

Regarding enforcement, Dr. Timofeev said punitive enforcement measures for sanctions are a widespread practice that is “quite often underestimated” in reports, and that even the threat of enforcement action can have huge effects on human rights and in a humanitarian sense more generally. He said this creates a strong incentive for businesses to abstain from doing business out of fear of administrative or criminal enforcement penalties. Dr. Timofeev further observed that Russian concepts on the legality of unilateral sanctions have evolved: prior to 2014 the Russian Federation considered them to be illegal, but since then it has reconsidered its approach with legislation on unilateral retortion and retaliation as “special economic measures” and a 2018 law authorizing sanctions as countermeasures.

**Prof. Rouiller** also distinguished between UN Security Council sanctions as “international sanctions” and others as “unilateral sanctions.” He observed that problems arise from the ease with which governments can adopt sanctions, allowing them to proliferate, and that human rights problems arising from sanctions are similar regardless of whether the sanctions are international or unilateral. He noted that the risk is smaller for UN Security Council sanctions to proliferate due to the number of countries that must approve them.

Summarizing his key points, Prof. Rouiller said: “Coercive measures or sanctions – also unilateral ones – can obviously serve legitimate purposes and be proportionate. Concentrating the analysis on unilateral sanctions which target individuals or legal bodies by freezing their assets, it is clear that, as regards their substance, these sanctions have *practical effects* that deprive a person from his or her property and are (from the viewpoint of the targeted person) *functionally equivalent* to conservatory measures ordered in criminal proceedings. Procedural guarantees and the substantial principle of proportionality should be taken into account, or simply respected.

“Several judicial decisions have implemented a corresponding approach. However, a large number of recent decisions (2016-2020) appear to renounce confronting *in an actual manner* the scrutinized sanctions to the legal principles at stake: although these are formally mentioned in the decisions, they do not appear to be actually dealt with (in particular, as regards proportionality, the arguments whether sanctions are able and necessary to reach the purpose of the sanctions seem to be dealt with in a purely formal manner, the legal reasoning resembling a standardized façade).

“As regards other aspects of the impact of unilateral sanctions, there are regrettable examples of – strikingly – counterproductive effects. Besides, the phenomenon of “overcompliance” by financial institutions is a reality that can be clearly observed; its consequences can be particularly dramatic for the targeted persons.”

Prof. Rouiller also stated with respect to targeted sanctions that there is no initial legal way of challenging them, and that the impossibility of challenging punitive measures is difficult to accept in a democratic society. As for the counterproductive effects that are possible from sanctions, he said they can produce harm that is much broader than the sanctions' intended impact. He also noted that one practical result of US and EU sanctions imposed against Russia following its annexation of Crimea in 2014 was that companies which could no longer get financing from abroad turned to state banks – and in some cases were appropriated by these state banks for a very low value due to the impossibility of refinancing the debt because of the lack of alternative providers of credit – thereby enriching these state banks. Finally, Prof. Rouiller noted that countersanctions imposed against a sanctioning state can have the same impact as the initial unilateral sanctions.

**Dr. Glandin** made the following assessment: “Sanctions is not an integral and coherent concept. The essence of sanctions could be studied and examined from various perspectives, i.e. economic, legal, political, international relations, etc. There is no footing in international law to hold unilateral sanctions illegal or assess these so. There is no rule or principle within the UN Charter preventing member states to introduce their own coercive measures. The UN Charter does not prohibit member states from adopting their own sanctions legislation and introducing restrictive measures on that basis. Moreover, there is no principle, international custom or treaty precluding member states from introducing peaceful coercive measures or sanctions. The Judgment of International Court of Justice of 27 June 1986 in *Nicaragua vs United States of America* supports this rationale – that economic coercion does not run contrary to international law. Trade embargoes and restrictive measures were not held illegal by the ICJ if they are not followed by the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN.”

Dr. Glandin further stated: “‘Sanctions’ as a legal concept is too broad. Even in the ambiguity of views, it is unlikely to be possible to crystalize some unique or sole stance. It is not only legally difficult to seek harmonisation of national laws on the application of sanctions, but because of a lack of consensus, it would be inappropriate to impose one exclusive code in their respect that denies any other. While assessing sanctions, some ideas have to be taken from politics and some from the legal domain or from other approaches, but to deny their legality – it is the same as denying domestic jurisdiction that stems from the principle of sovereign equality of UN member states. Sanctions are not a fiction, they do not exist in isolation from the legal landscape. They are being imposed following special procedures governed by the law. Sanctions are a result of competent decision-makers applying legislation to pursue their goals. The legislation at stake is the same as any other domestic legislation. Therefore, to contest or dispute the unilateral sanctions regulations or orders is comparable to contesting any other branch of domestic legislation, i.e. tax, administrative, family, etc.”

With respect to the domestic legal treatment of foreign sanctions, Dr. Glandin stated that the application of foreign sanctions on the territory of the Russian Federation is contrary to the legal order. He noted that “it is not for Russian courts to determine the legality of foreign sanctions, but the application of foreign sanctions legislation in Russia is not penalized in Russia.”

**Prof. Ruys** elaborated on the problem of terminology, noting inter alia that the term “sanctions” does not have a singular established meaning in international law, while the term “extraterritorial” is also applied inconsistently, citing as an example how the European Commission refers to the new EU “Magnitsky” sanctions as not applying extraterritorially. He observed that “retortions” may refer to acts that are unfriendly but do not breach the international legal obligations of States that adopt them. Prof. Ruys noted three elements of the terminology problem: first, the lack of the legal articulation of terms by the “sanctions senders,” which may stem from a reticence by States to use wording in which they could be admitting to breaches of their international obligations; second, the complexity of a terminology in which differences exist in the usage of terms; and third, underlying substantive uncertainties about the legality of coercive measures under international law, including with respect to the scope of the non-intervention principle and the permissibility of so-called third-party countermeasures.

Prof. Ruys said that it would be of great benefit for the Special Rapporteur to attempt to define a more refined typology for coercive measures. He also supported the Special Rapporteur’s proposal to develop an informational sanctions tool and favored extending the notion of State reporting obligations to the realm of sanctions, so that States would be obliged to articulate the supposed legal basis of the measures concerned. He additionally said there is a need for further judicial precedents that can reduce the uncertainties about the legality of coercive measures; and suggested that the International Court of Justice could be requested to make an advisory opinion in this regard (dealing, for instance, specifically with the legality of certain aspects of the US Helms-Burton Act).

**Dr. Kazazi** stated that there should be a presumption of legality for sanctions authorized by the UN Security Council, but that the possibility to challenge their legality and the correctness of the sanctions’ underlying facts should also exist. He assessed all other sanctions (i.e., unilateral and secondary sanctions) were generally against international law on several grounds, including: the application of extraterritorial jurisdiction, and violation of the principles of sovereign integrity and non-intervention. Therefore, there should be a presumption of illegality for any sanctions not authorized by the Security Council, with the consequence of the burden of proving the legality of such sanctions being on the sanctioning state, and imposition of liability on the sanctioning state to compensate damage resulting from unlawful sanctions.

On secondary sanctions: Noting that corporations in third states can be typically vulnerable to secondary sanctions imposed by a powerful state, he said these sanctions increase the damage done by initial sanctions, and added that their negative aspects are not often sufficiently considered. One is that they encourage corruption to circumvent the sanctions, for example by hiding the destination of goods or their origin, while another is that they disrupt contracts and projects between entities in a third state and those in the targeted state. He said there are many cases of the latter, in which contracts with targeted state companies and government entities are broken without justified reason, and this leads to commercial disputes, and disruption of development projects in the targeted state. Secondary sanctions also significantly increase the price of imported goods and materials from the third states to the targeted state due to the involvement of multiple intermediaries who provide services to circumvent the sanctions, and due to increased costs of banking operations, insurance and transportation.

Dr. Kazazi added that overcompliance with sanctions can be abusive, citing a number of examples: the practice of some banks in third states to close the accounts of individuals and corporations from the targeted states; a national of a targeted state being blocked in a Zoom webinar even when he/she is located in a third country; and in the case of Iran, some European arbitration institutions not processing requests of Iranian entities to initiate contractual arbitration even when the applicant for filing an international arbitration has managed to make the required initial cost payments in spite of the secondary banking sanctions. He also noted that abuse sometimes happens when a bank or entity in a third state simply uses the sanctions as a pretext for withholding a due payment, for the purpose of benefiting from the situation.

**Mr. Swainston** made the point that sanctions fall into two broad categories – legal sanctions, notably UN sanctions, and other sanctions that are “very probably illegal” because they conflict with States’ obligations under the WTO Agreement and their obligations of non-intervention in the affairs of other States. That status that should be reflected in their nomenclature – for example, “UN sanctions” and “unauthorized sanctions.” The latter are likely to be illegal for contravention of the WTO Agreement and breach of the non-intervention principle. Noting that the objective of a coercive act would be a factor in its classification, he stated that unilateral sanctions imposed to displace a constitutional government would be illegal.

Mr. Swainston also provided the following remarks: “There is a proliferation of terminology to describe sanctions. However, the most important distinction is between UN sanctions – authorised by the Security Council – and sanctions imposed by States or groups of States without such authorisation. It is important to avoid terms like “retortions” that presume legality, because most measures not authorised by the UN will be illegal. Illegality is likely to arise because unilateral measures often conflict with the obligations of the imposing State.

“One example is the obligations of States under GATT, which is part of the WTO Agreement and binds 164 countries. It prohibits quantitative restrictions of trade (including “other measures”) aimed at particular countries and it prohibits discrimination: see e.g. Articles XI and XIII. There is an exception (Art. XXI) for measures that must be implemented under the UN Charter: i.e. UN sanctions. The implication is that only the UN can direct sanctions. States cannot take unilateral measures.

“Another exception (also Art. XXI) allowing measures that a State considers necessary for the protection of its essential security interests is narrow. It is confined to measures concerning fissionable materials, trade in weapons and trade in time of war or other emergency in international relations. Moreover, the assessment of necessity is an objective one which WTO tribunals should be able to test: see *Nicaragua v United States* in the ICJ at e.g. paragraph 282. The WTO cannot deal with unilateral sanctions because the United States has blocked appointment of replacement members to the WTO Appellate Body, which is no longer quorate. This should not obstruct conclusions elsewhere on the illegality of unilateral measures having regard to WTO/GATT. Indeed, it may reinforce them.

“Unilateral sanctions designed to coerce or displace target governments contravene the UN Charter and customary public international law because they disregard the sovereign equality of

nations and the principle of non-intervention. Most States take that view. The US has accepted an “intention” not to apply economic pressure (Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, etc.), and undertook not to do so in the Charter of the Organisation of American States.

“Unilateral sanctions cannot be justified as countermeasures because they are rarely framed as such, they are not generally based on prior breaches of public international law by Target States and because the imposing State(s) can rarely claim injury. Also, per the International Law Commission, countermeasures must not violate fundamental human rights. Unilateral sanctions do. They kill. Witness their known impact on Venezuela and Iran during the COVID crisis. They amount to collective punishment without trial, under law that is usually retrospective and vague. Indeed, the measures are often deliberately vague in their impact to maximise uncertainty and ‘overcompliance.’ None of this is consistent with the Rule of Law.”

**Prof. de Zayas** similarly noted that sanctions mandated by the UN Security Council are presumed to be legal and legitimate in international law, although they cannot extend beyond the Security Council’s competence as specified in the UN Charter. Unilateral coercive measures, on the other hand, are not to be considered legal or legitimate except in narrow circumstances, such as arms embargoes that have the effect of furthering peace.

He offered the following assessment: “Unilateral coercive measures (UCM) raise multiple issues of international law and ethics that should be defined in precise legal language, excluding loopholes and weasel words. The definition must take into account empirical evidence drawn from decades of abuse by powerful countries and the human consequences endured by populations affected. The normative exercise must give due weight to the UN Charter as a kind of world constitution (supremacy clause, article 103), core principles of international law including sovereignty, sovereign equality, the prohibition of interference in the internal affairs of states, as reflected in GA resolutions 2131, 2625, 3314, 31/91, and the jurisprudence of the International Court of Justice in the *Corfu Channel* and *Nicaragua v. United States* cases. Since the entry into force of the UN Charter, the international legal order is multilateral and makes provision for economic sanctions only with regard to Security Council decisions under Chapter VII, which, pursuant to article 24 of the Charter, must conform with the Purposes and Principles of the UN, namely the promotion of peace, development and human rights (see Human Rights Committee “Views” in *Sayadi v. Belgium*). By contrast, unilateral coercive measures have no legitimacy, and possible exceptions in cases of justified retorsion must be evidence-based, due process supported and subject to *ex ante/ex post* impact assessments. Under no conditions can sanctions be used for purposes of ‘punishment’ but only as an inducement to the targeted state to cease specific illegal conduct.

“Unilateral coercive measures have been examined by United Nations instances and found to be inconsistent with international human rights treaty obligations. (See the 1997 General Comment 8 of the Committee on Economic, Social and Cultural Rights; the 2000 Sub-Commission report by Professor Marc Bossuyt, which established criteria and concluded that UCM must be reviewed every 6 months and lifted if ineffective in inducing change; High Commissioner Navi Pillay who condemned them in her 2012 report (A/HRC/19/33), and the first UN Special Rapporteur on UCM the late Dr. Idriss Jazairy who demonstrated their incompatibility with human rights law in

specific cases. General Assembly has adopted 28 resolutions demanding the lifting of the US embargo against Cuba. Yet, these GA and HRC Resolutions have been ignored. Thus, the ICJ should be requested to issue an Advisory Opinion declaring UCMs contrary to international law and fixing State responsibility for reparations to victims. Similarly, the ICC should examine whether UCMs constitute “crimes against humanity” under article 7 of the Rome Statute, when it is established that they have led to the untimely deaths of tens of thousands of persons due to lack of food, clean water, medicine and medical equipment, especially during times of pandemic.”

Prof. de Zayas subsequently added that “We should also draw attention to the tortious and penal implications of sanctions. Both common law and civil law jurisdictions recognize a ‘duty to rescue’ and penalize the ‘omission of help’ or ‘abandonment of persons.’ (...) If sanctions prevent a country from obtaining medicines or medical equipment, people may die as a direct consequence. Creating an artificial scarcity of medicines can be considered under the rubric ‘reckless endangerment’ or failure to assist a person in distress,” which he noted is a crime in jurisdictions such as France. “Under no conditions can a sovereign State allow the criminal extra-territorial application of foreign legislation in its territory. If responsibility to protect means anything, it must include a responsibility to protect persons put in distress and danger of death by the imposition of unilateral coercive measures. This is a matter that the International Court of Justice could clarify in an Advisory Opinion,” he said.

**Prof. Dr. Schroeter** commenced by pointing out that there is no basis in current international law for a broad statement that all unilateral sanctions are illegal. He said that it is often difficult to determine from the perspective of public international law where the limits for sanctions run, whether a particular sanction is an ‘extraterritorial’ measure and whether it interferes in the exclusive jurisdiction of another State, and whether it is nevertheless justified.

According to Prof. Schroeter, two aspects can make the identification of public international law limits for sanctions and their application particularly challenging: One is the traditional concept of territoriality as a basis for a State’s jurisdiction, which was primarily developed with local regulatory matters in mind and is less easily applied to “delocalized” issues occurring in more than one State or no particular State at all. He said that resulting challenges in construing territorial jurisdiction can appear both in the context of the reasons for sanctions (as, for example, issues concerning global climate change) and of the “delocalized” nature of tools used by sanctioning States, as for example the restriction of access to the SWIFT system for executing international payments. A second challenge in assessing unilateral sanctions’ legality under international law follows from the necessity of taking into account the way in which a given measure works: A prohibition of certain behavior that occurs entirely outside of the sanctioning State’s territory, for example, may be more difficult to justify legally than an imposition of conditions on the access to the sanctioning State’s (financial) markets, given that a sanctioned State generally has no preexisting right to such access under customary international law. He also said a case can be made that the inclusion of humanitarian exemptions may be an important determinant of whether a sanctions regime complies with international law.

Prof. Schroeter observed that unilateral sanctions may in certain cases interfere with treaty obligations of the sanctioning State. In this context, some uncertainty surrounds the national security exception in the World Trade Organization (Article XXI of the General Agreement on Tariffs and Trade), which allows members of the WTO to derogate from their obligations and



restrict trade for reasons of national security. He pointed out that this exemption has been relatively narrowly construed in recent WTO panel practice by largely equating ‘emergencies in international relations’ with situations of actual or latent armed conflict. He doubted whether this interpretation was in accordance with the WTO members’ historical intention and the purpose of the treaty, given that it would only allow unilateral economic sanctions in times of war, but not instead of war. One solution to this dilemma is to interpret the security exception more broadly, while another is to simply accept that the GATT neither addresses nor excludes trade restrictions that, as many unilateral sanctions, are not imposed by States with the goal to protect their domestic producers from foreign competition, but for political reasons unrelated to the production or trade in goods.

**Prof. Lebedev** questioned the idea that sanctions such as those applied by the United States and the European Union must be presumed to have an illegal character. “They are perfectly legal because they are adopted under sovereign law,” which is a projection of state sovereignty, he said. Referring to the negative impact of sanctions on human rights, he said it is an indirect impact rather than a direct one. Prof. Lebedev supported the notion of drafting an international document that could serve as a potential UN General Assembly resolution or Human Rights Council declaration that defines the problem, elaborates relevant terminology and asks States to refrain from such practices on grounds that they have an adverse impact on human rights. He said the adoption of a binding convention on sanctions would be a positive act, although he believes that sanctions will nonetheless remain as an instrument of coercion.

**Prof. Gazzini** commented about the terminology relating to unilateral coercive measures, observing that the expression is new and that a clear definition is indispensable. He noted that the term “coercive” has a negative connotation that suggests subordination, and that there is a risk of conflating sanctions with intervention. He also said it is assumed, but not demonstrated, that the measures involved are internationally wrongful acts.

Prof. Gazzini summarized his assessment as follows: “Unilateral coercive measures’ have not been defined, but merely assumed to violate international law and possibly affect the sovereign rights of the target State. This is unfortunate and terminology has been identified as an issue that needs to be clarified.

“It is argued that a fundamental distinction must be introduced between measures adopted against States and against individuals. With regard to measures adopted against States, there is no reason to depart from the well-settled terminology consistently used in international law. ‘Counter-measures’ are measures adopted by States that imply a conduct otherwise inconsistent with their international obligations, but that are nonetheless permitted in reaction to a prior violation of international law by the target State, provided that the limits and the conditions established in international law are respected (including proportionality and respect of *fundamental* human rights). These measures may and indeed are meant to have a negative impact on the target State. Yet, they may play an important role in enhancing compliance with international law and human rights in particular. A different terminology must be employed to refer to measures adopted against individuals or government officers that are not necessarily responses to breaches of international law or conducts that trigger the international responsibility of any State. These measures are intended to suppress and punish certain conducts by individuals (i.e. torture or

corruption), rather than compelling a State to comply with its international obligations. States adopting these measures, however, must respect the human rights of those concerned.

“Both categories of measures remain unilateral and therefore unavoidably open not only to deliberate abuse, but also to unintended misuse. Hence, there is a need to ensure the existence of effective mechanisms of control. The focus of the inquiry should be on (a) the conditions for the lawful adoption of these measures; (b) the consequences of disregarding the rules governing these measures; (c) the adequacy of existing control mechanisms; and (d) the need to introduce more effective control mechanisms.

“In conclusion, the expression ‘unilateral coercive measures’ is at best vague, divisive, and potentially misleading. Its use reveals a partial, deformed and largely ideological perception of counter-measures.”

**Prof. Emmenegger** said one must distinguish between the terminology, the legality and the impact of coercive measures, so that, for example, “sanctions” as a legal term should not inherently include an assessment of the legality of sanctions: the terminology must be neutral, and the legality must be considered separately. She observed, however, that this runs counter to a natural human bias toward making moral judgments when examining measures.

Prof. Emmenegger said principles of international law must be weighed when considering coercive measures, and that it is not clear, for example, whether the GATT takes precedence over customary international law. She noted that extraterritorial measures are problematic, as when the United States uses the US dollar to justify applying its jurisdiction abroad while calling its own measures “territorial” when they may in fact be extraterritorial.

**Prof. Gordon** focused on US unilateral sanctions. Referring to the claim that the United States has employed targeted sanctions for the last twenty years, she disagreed with this characterization and said the United States has always used sanctions that are systemic or sectoral, or that are overbroad and indiscriminate in some other way. She noted that US sanctions, either systematically or through the effects they have, are generally oriented toward impeding access to fuel, preventing imports and exports, undermining major productive sectors, undermining infrastructure, bankrupting or paralyzing the state via specific targets, and/or impeding the target country’s access to international financial transactions.

Prof. Gordon also discussed what she described as the shifting of agency to the private sector as a way of deflecting criticism of US policy. She then elaborated on the chain of decisions and impacts involved in “de-risking” by banks: the conditions that commercially compel banks to withdraw from markets; and the consequences for financial inclusion, and in turn, for economic and social development, particularly in the Global South. She asserted that overcompliance with sanctions, especially by banks, is in significant measure the result of two factors: the standards of the US Treasury Department’s Office of Foreign Assets Control are not fully explicit; and the penalties for violators of sanctions are draconian.

**Prof. Strauss** observed that a key challenge to developing coherent legal terminology is the rapid expansion in the types, means, uses and targets of unilateral coercive measures and their enforcement, as the terminology must be stable while encompassing a phenomenon that is

quickly evolving and mutating. Describing recent developments, he cited the spread of Magnitsky-like targeted sanctions, in which the justification for using them, the target's alleged action, is not necessarily linked to a specific State; as the target may be anywhere, such sanctions can affect nationals of many States at once. Moreover, he said, this phenomenon can be replicated at another level through secondary sanctions, such that persons in third states are listed for their interactions with foreign persons sanctioned by the United States without violating the laws of either the third state or the state where the sanctioned party is located. He noted that basing sanctions on acts that are not tied to locations has led to an expansion in the nature of the acts for which sanctions are imposed, as with US sanctions against investigators and other personnel of the International Criminal Court.

Other current trends entail a broadening of the reasons for declaring national emergencies that are used as the domestic legal basis to justify new sanctions; the fact that relatively small States are now imposing sanctions, sometimes as countermeasures against larger ones; the lowering of the apparent threshold for coercion in imposing sanctions, as with Ukraine's sanctions against Nicaragua; and the accelerating speed at which sanctions are proposed and adopted, as this now sometimes occurs within a day of an event, leaving little time for any assessment of their legality or potential human rights impact, as occurred with sanctions against Mali and Myanmar after their respective coups d'état in 2020 and 2021. "Sanctions are becoming a first choice rather than a last resort," he said.

With regard to determinations of the legality of unilateral coercive measures, Prof. Strauss noted that numerous factors must be taken into account besides relevant principles of international law; these include whether the measures have a lawful objective; whether they are imposed in a context permitted by international law; whether the content of the measures complies with international law; whether the domestic enabling legislation or other act that authorizes the measures complies with international law; whether the way the measures are enforced complies with international law; and whether the impact of the sanctions on the targeted party and on other parties complies with international law.

## **B. Experts discussion**

After each of the sessions in which the experts presented their contributions, the Special Rapporteur chaired discussions about their content and various issues that were raised. Among questions she posed were how free are States to act within their own territory, such as in regard to a domestic entity that violates another State's sanctions; what means of enforcement of unilateral sanctions are legal in international law; and what legal mechanisms are relevant. With respect to assessing legality, she raised the issue of burden of proof and whether it should lie with the sanctioning State or another party, as well as the issue of whether some extraterritorial measures are 100% illegal.

As concerns the humanitarian effects of sanctions, the Special Rapporteur noted that the enormity of the impact led the Security Council to move away from comprehensive sanctions, and posed the question of whether the humanitarian impact should always be taken into account when assessing sanctions, and what methodology should be used to address it.

Regarding the burden of proof, Mr. Swainston referred to the GATT. He said an injured State that brings a case to the WTO dispute settlement process would show the injurious act to be prima facie contrary to the WTO agreement and then the respondent State must justify the act.

Dr. Glandin questioned whether a State should be obliged to show the legality of sanctions when there is a presumption of legality.

Prof. Strauss asserted that the humanitarian impact should always be taken into account when assessing the legality of sanctions, noting that a humanitarian impact is the only constant among the variable results of sanctions, and that the international community has recognized this to be a substantial problem in multiple ways: by the Security Council's move away from comprehensive sanctions, by the creation of the Special Rapporteur's mandate and by the importance that the Geneva Conventions afford to the humanitarian impact of actions taken by States. He said that while the latter considers this impact in the context of armed conflict, the impact in the context of sanctions may at times be greater.

With regard to extraterritoriality, Prof. Emmenegger said she would consider it illegal under customary international law for US primary sanctions to be imposed against a Turkish company that trades with Iran, which is the subject of comprehensive US sanctions.

Prof. Rouiller raised the issue of proportionality with respect to assigning the burden of proof about the legality of sanctions, noting that an individual subjected to targeted sanctions is unable to analyse the proportionality of the sanctions relative to their objective in terms of factors such as adequacy and necessity, while a State is capable of doing so.

Prof. Gordon remarked that if a European bank challenges US coercive measures that affect it, there is a lack of clarity as to who could be a viable plaintiff. She also noted that the Office for the Coordination of Humanitarian Affairs has promulgated a methodology for measuring the humanitarian impact.

Prof. de Zayas made reference to a number of recommendations pertaining to unilateral coercive measures that were included in UN documents but not implemented. He also urged that a human rights impact assessment be legally mandated in connection with sanctions, with periodic reviews.

Following this part of the discussion, the Special Rapporteur posed additional questions to consider about the application of human rights standards to targeted individuals in the context of sanctions imposed with good intent (to achieve a common good); whether there should be parameters for measuring the legality of countersanctions; and the role of private law in determinations regarding public-private contracts. With respect to individuals subject to targeted sanctions, she asked whether a criminal law procedure should occur first; and she raised the issue of targeting individuals for things other than crimes, such as having a certain job or being a relative of a targeted individual.

With respect to targeted sanctions, Prof. de Zayas said due process rights are essential. As for countersanctions, he stated that they rely on the presence of initial sanctions, and that a dialogue between the parties should be mandated instead because of the humanitarian impact of the

sanctions. He further said that when sanctions are determined to be illegal, this should trigger a discussion on reparations.

Prof. Gordon called for a more refined articulation of intent with sanctions, noting that in cases when sanctions result in a negative humanitarian impact, the sanctioning government typically asserts that it meant no harm. She also referred to the potential for targeted sanctions to have a negative impact at the level of the state, citing the example of an individual sanctioned in the Democratic Republic of Congo because a relative was accused of having an association with Hezbollah; the individual was the largest producer of bread in the DRC. As to the issue of responsibility for the burden of proof, Prof. Gordon said this can be problematic as some sanctions are preventative rather than being imposed in response to crimes. She said all aspects of due process and the rule of law must be considered.

Regarding targeted sanctions, Prof. Rouiller noted that most individuals subjected to them are not accused of crimes but rather have political influence; and that in the case of crimes the response should take the form of criminal procedures. On other matters, he said individuals subject to countersanctions must have their human rights protected, and that legal responsibility for overcompliance should rest with the State that is the author of the relevant sanctions as “companies are not overcompliant for the pleasure of it.”

The Special Rapporteur observed that in some States, governments are considering criminalizing calls by opposition parties for the imposition of sanctions against them.

### **C. Suggestions relating to terminology**

A number of the experts participating in the consultation, in their presentations or in written submissions, offered suggestions for specific definitions of terminology that can apply to acts that may be qualified as, or are related to, unilateral coercive measures, sanctions and the like. The Special Rapporteur took note of these for consideration as she elaborates her report.

## **IV. Conclusions**

The following conclusions and recommendations have been agreed by the Special Rapporteur and the experts:

The terminology pertaining to unilateral coercive measures, sanctions, etc. is vague and the invention of new terminology would have a negative impact. There is a need to qualify each type of unilateral activity from the perspective of international law. Any unilateral measures can only be taken by States or regional organizations (retortion, countermeasures, etc.) if they are allowed and in compliance with international law standards.

The goals of any measures taken by States and regional organizations without authorization of the UN Security Council must be legal and legitimate, but this fact is without any prejudice to the legality of the measures taken. Any unilateral measure must be taken in conformity with the principles of international law, including the prohibition of the use of force, non-intervention into

domestic affairs of States, non-discrimination, sovereign equality, promotion and protection of human rights as well as other relevant treaty law and customary norms of international law.

The legality of unilateral measures shall be assessed within various aspects of international law: the law of international security, international criminal law, international humanitarian law, international trade law, international human rights law and the law of international responsibility. Spheres of international law that are more specific, such as international maritime law and international air law, shall also be considered when they are relevant. Any action that States take must be in conformity with the 1969 Vienna Convention on the Law of Treaties.

The use of unilateral sanctions shall not / cannot be positioned and justified as a “better alternative” to the use of armed force.

The burden of proof of the legality of unilateral sanctions shall lay on the States and regional organizations which impose them.

Declarations of national emergencies shall always be taken in full conformity with the rules of Article 4 of the International Covenant on Civil and Political Rights.

Countermeasures are to be considered as an important mechanism to guarantee international responsibility. All countermeasures must comply with international law with due account to proportionality (to the breaches of international law by a delinquent State), necessity (no other means are available), goal (to restore observance of international law) and limitations (prohibition to violate peremptory norms of international law, including the obligation to refrain from the threat or use of force; obligations for the protection of fundamental human rights; and obligations of a humanitarian character, prohibiting reprisals);

Any unilateral measures shall be provisional in nature; they shall not be imposed with an intent to make them permanent. They shall have specified end dates, after which there must be grounds for renewal. There shall be clear criteria and mechanisms for the removal of sanctions.

The ease of imposing unilateral sanctions shall not be a reason that justifies their use. Sanctions shall not be a substitute for criminal or other legal processes simply because they are easier to implement. When imposing targeted sanctions against an individual in connection with a crime, existing criminal procedures shall always prevail, with the burden of proof and the standards of evidence being observed.

Universal jurisdiction shall be exercised by International Criminal Court and States if international crimes are committed.

The rule of law shall always be applied without discrimination. Everyone, including listed individuals, shall enjoy all guarantees of fair trial and access to justice, including all procedural guarantees. No sanctions shall be imposed without guarantees of due process and access to justice (the possibility to appeal them to an independent and impartial body).

The humanitarian impact of unilateral sanctions shall be assessed, as has already been done in some cases by OCHA and UNICEF with respect to Security Council sanctions. States shall

become subject to reporting obligations when imposing sanctions, with appropriate monitoring by UN institutions for their humanitarian impact.

International adjudication as well as competent international quasi-judicial and human rights protection bodies shall be used for consideration of sanctions cases. A sufficient body of legal cases in disputes will help to reinforce the rule of law with regard to sanctions.

Access to information and to the internet shall not be used as a means to impose pressure on the government; it shall be assured for all by public providers.

Humanitarian concerns shall always be taken into account by States when deciding on the application or implementation of any unilateral measures, including countermeasures (humanitarian precaution), as well as in the course of their implementation. Such measures shall be an integral part of applying the principles of proportionality and non-discrimination.

An academic and humanitarian database (academic publications, international and national court decisions, quantitative data on the humanitarian impact of sanctions) pertaining to sanctions shall be established at the webpage of the mandate.