Input for the Special Rapporteur on Unilateral Coercive Measures (SR UCM)’s Guiding Principles (GP) on Sanctions, Compliance (Over-Compliance) and Human Rights

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**Summary**

Financial and economic sanctions are political, foreign policy tools that are deployed when diplomacy fail but military action is not yet required or desired. Its impact on human rights was not apparent, as evidenced when the UN sanctioned Iraq in the 1990s. Nevertheless, in a globalised, interconnected, developing world, financial and economic access and opportunities are crucial to the enjoyment of human rights for people in different levels of prosperity in the 21st century.

My input for the SR UCM’s call on the GP are divided into 3 sections. The first clarifies my personal view on sanctions based on practical experience in different fields. I hope my perspective complements the SR UCM’s work from academic and legal angles, so the GP stands a strong chance of being respected and implemented meaningfully in the private sector, where most of the (over-)compliance occurs. The second section answers the SR UCM’s questions from the call (where I have a meaningful opinion). The third provides comments on specific paragraphs in the draft GP.

1. Sanctions from a practitioner’s perspective

First and foremost, it cannot be understated that the success of sanctions in achieving its foreign policy objectives depends on implementation in and by the private sector. Policymakers set the directions and enforcement agencies enforce. Sanctions as an economic and financial tool however is largely used where economic activities and financing actually occur. In non-communist economies, that is the capitalist free market.

Naturally, with this huge privilege comes with huge responsibilities. On one hand, businesses need to comply with laws and regulations where they operate. On the other hand, businesses want to do the right thing, not just because it is a moral good, also because it is good for business. In this backdrop, it should be understood that when it comes to human rights, most businesses take it seriously and are receptive on receiving more guidance from international standard-setting bodies – as long as such guidance are practical and relevant.

In the preface of the draft GP, a picture was painted where “sanctions…oblige…humanitarian organizations…to look for alternative ways to procure necessary goods and services…even when it comes to the implementation of the UN Security Council humanitarian carve-outs”. I understand that the SR UCM has collected extensive evidence, and from a practitioner’s perspective, I wish more evidence had been provided by the private sector. Businesses with serious sanctions compliance programmes understand that there are humanitarian carve-outs in all UN and unilateral sanctions regimes. In financial institutions, where there is evidence or comfort that a particular client or transaction is genuine humanitarian activity, even in sanctioned jurisdictions, that financial institution is always willing and bound to facilitate such client relationship or transaction. It should therefore be clarified that the nature of problems with private sector’s sanctions compliance damaging human rights is with only certain parts of the private sector where (1) the business lacks a sophisticated understanding on sanctions, or (2) the business lacks comfort that the client/ transaction is legitimate humanitarian activity, or (3) the balance between sanctions compliance and facilitating humanitarian activity is too costly (such as controls, governance and audit procedures needed to ensure that humanitarian carve-outs are adhered to).

It should also be reminded that compliance and enforcement are two distinct concepts. Compliance is reactionary to the policy while enforcement is proactive. With regards to UN sanctions, both states (governments) and businesses comply, and states (governments) also enforce. (States “comply” with UN sanctions by way of transposing the UNSC resolution to national law, so for all practical purposes, states’ compliance is more of an “enforcement” nature.) With regards to unilateral sanctions, only businesses comply – actions taken by states (governments) are enforcements, not mere compliance. Due to states’ role in making unilateral sanctions, it should be distinguished or highlighted in the GP that some principles apply when states are *making* unilateral sanctions (e.g. legal certainty), while some apply when states are *enforcing* unilateral sanctions (e.g. rule of law).

One thing that is rarely examined in the field of sanctions, even by academics, is the time horizon of sanctions policies, regimes and implementation. On one hand, sanctions take a bit of time to “work”, i.e. achieve their policy objectives. On the other hand, sanctions may cause collateral damage such as to human rights because of its long-term existence, rather than purely because of its expansive or extraterritorial or coercive nature. When sanctions are put in place, it does not only prohibit certain activities today or tomorrow, it also discourages businesses to engage with a certain country/ entity/ individual for a foreseeable future. This time horizon of sanctions is often overlooked by those who make, comply with, and evaluate sanctions; even if it arguably has the most impact on the enjoyment of human rights and right to development for those who live in states targeted by sanctions.

1. Answers to the SR UCM’s questions

*3. In a view of the vague, complicated and confusing terminology of sanctions/ unilateral coercive measures, is the glossary provided in the draft comprehensive and clear enough? What other notions and definitions may be added and which from those already included in the document could/should be amended?*

* With regards to the term “Unilateral sanctions”, there are also restrictive measures taken by a state (US, UK) or group of states (EU) that target human rights abusers. As the current definition in the draft GP addresses its status from an international law perspective, it would not be a fair characterisation if the legal nuance of unilateral sanctions targeting human rights abusers in third countries are not addressed in the GP.
* The term “Due diligence” has drastically different practical meaning in the field of sanctions enforcement and compliance. Due diligence/ Know your customer (KYC) is a legal requirement from states to regulated businesses (or “relevant firms”) to collect information on client relationships and activities in order to comply with anti-financial crime laws and regulations. Solely within the private sector, conducting due diligence is also an age-old, industry best practice before engaging in new relationships or transactions. If the GP would like to include the concept of state obligation to comply with human rights, terms like “supervision” or “audit” would make better intuitive sense to practitioners.
* The term “Compliance” as it relates to states’ role in sanctions have little practical relevance. As previously mentioned, states don’t “comply” with their own sanctions, they enforce it. With regards to states’ role, “enforcement” is a better term.
* The term and concept of “Zero-risk policy” refers to positions or conduct adopted by companies in face of expansive sanctions regulations. As previously mentioned, I wish more evidence had been provided by the private sector in the SR UCM’s collection. In reality, companies exist to make a profit, where there would be none without risk-taking behaviour. Sanctions also do not work in a way to make companies fully “disengage” with a target. For instance, the obligation to freeze a sanctions target’s funds require that there are funds to be frozen in the first place. Financial institutions where the obligation becomes relevant are required to, as an active process, maintain frozen accounts and, in some cases, credit such accounts with a reasonable interest rate. When complying with sanctions, a financial institution is still engaging with a sanctioned target and that in itself is a litigation risk (from the sanctions target). What the GP is referring to, and a more widely understood term, should therefore be “De-risking” – conduct adopted by companies in face of sanctions where the cost of compliance is too high for any activity, albeit legal from a sanctions perspective, to be profitable or make commercial sense.
* The definition of “Humanitarian carve-outs” in the draft GP included the subjective opinion that “They are often characterized by complex and vague wordings, as well as costly or lengthy approval procedures that deter their use, undermine their effectiveness, while at the same time may exacerbate over-compliance and de-risking.” One can argue that humanitarian carve-outs are hard to understand, one can also argue that those who find it hard to understand simply do not have enough experience or competence. Point being, to facilitate meaningful discussions, omission of such subjective characterisations may be more productive.

*5. What format of discussion of the draft and commentary is preferable: diplomatic conference/ academic conference/ consultations and banks and businesses any other option?*

* As previously mentioned, sanctions (over-)compliance is largely a result of private sector actions in response to sanctions policies and regulations created by states. A forum engaging a wide range of stakeholders under Chatham House rules would be most preferable. If the GP intends to affect more paradigm shift in sanctions making, more government representatives should be invited. If the GP intends to affect more behavioural change in sanctions implementation, more private sector representatives should be invited.
* Similar to certain financial regulatory institutions, the SR UCM can also consider a standing forum/ committee where invited participants or interested parties meet regularly to discuss, debate and review the impact of the GP.

*6. Whether the provisions on delivery of humanitarian assistance and protection of humanitarian actors seeking to deliver humanitarian assistance in accordance with resolutions of the UN Security Council as well as those working in the face of unilateral sanctions are sufficient? If not, what measures shall be added?*

* Provisions as written in sanctions regulations are clear and sufficient. The problem arises when actors in its practical implementation are incompetent, unable to gain comfort, or faces information asymmetry (see above section I). In my professional experience, there has been multiple instances of a peculiar situation where state aid agencies, export credit agencies or development banks do not themselves understand their government’s sanctions, and as such face difficulties with financial institutions, when dealing with sanctioned countries. This is a symptom of a bigger, long-time, global problem of government entities operating in silos and not talking to each other.

For good governance, there should be a suggestion in the GP where states should also facilitate the awareness amongst different government agencies, as well as “plumbing” of humanitarian funds, goods or services reaching their targeted destination when they make sanctions policies. States should actively engage with their banks, transporters, insurers and any other facilitators, so that their state-mandated humanitarian aid can be facilitated in the backdrop of state sanctions also being imposed. Without states bearing this active responsibility, the private sector is caught between the rock and a hard place – either they blindly let pass anything that comes from the state (which is not without its negative consequences), or put the administrative burden on the state aid agencies, export credit agencies or development banks.

*8. What regional context may be important with regards to the draft? What examples of regional institutions practice, regional case-law are advisable for analysis and, probably, inclusion into the commentary?*

* Reference is made to the use of sanctions clauses in the draft GP. There have been cases in Singapore (Kuvera Resources Pte Ltd v JP Morgan Chase Bank NA [2022] SGHC 213) and UK (RTI Ltd v MUR Shipping BV; Mamancochet Mining Limited v Aegis Managing Agency Limited [2018] EWHC 2643; Lamesa Investments Ltd v Cynergy Bank Ltd [2019] EWHC 1877) where the respective supreme courts ruled on a business’ use of sanctions clause as a rationale for annulling legal obligations in a contract.
* Reference is also made in the draft GP of a state’s responsibility to “protect businesses under their jurisdictions and/ or control against any means of enforcement from the side of sanctioning countries”. The first and only ruling so far on the EU’s blocking statue should be analysed (C-124/20 Bank Melli Iran v Telekom Deutschland GmbH).

*9. To what extend shall the Guiding Principles address the issue of accountability, remedies, responsibility and redress? What methodology for identifying and assessing damage may be used in order to provide remediation in cases of sanctions-related impact?*

* The most notable, current case of sanctions possibly harming the enjoyment of human rights is arguably US sanctions on Iran. While US sanctions played a large role in the slow and limited economic development of Iran, there has been no consensus that US sanctions is the sole contributing factor. From Iran’s perspective, any claim on international courts that US sanctions damaged their citizens’ human rights would also have its credibility be undermined by widespread, longstanding human rights abuses committed by its own ruling elite; continuous efforts to develop a nuclear programme; and recent diplomatic relationships with other US-sanctioned countries like Venezuela and China.

If the GP shall address accountability and remedy of the negative impact of sanctions on the enjoyment of human rights, it should start a recommendation to track, document, and quantify such impact with a robust and auditable methodology, in both the private and public sectors. As a risk management tool, regulated businesses such as financial institutions already have methodologies in place to quantify credit, liquidity, market and operational risks in compliance with prudential regulations. These tools are transferable in the management of risks of sanctions compliance harming a financial institution’s commitment to human rights.

Borrowing the example of how global anti-money laundering laws come to exist and mature, accountability and remedy of the negative impact of sanctions on the enjoyment of human rights is also a conversation that states need to have amongst themselves, in order to set a global standard. The GP should start with recommending that governments come together and discuss this as a foreign policy priority.

1. Comments to specific paragraphs in the draft GP

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| **Paragraph addressed**  | **Comment**  |
| *3. Legal uncertainty around the scope and legal status of the sanctions regulations, which are often based on “clarifications”, Q&As and other recommendatory instruments, framing incompatible conduct with vague wording like “red flags”, “expectations” and other restrictive terms, as well as the seriousness of liability imposed, “frozen” accounts, civil and criminal penalties and reputational costs create a feeling of fear and result in “zero risk” or de-risking policies, encouraging businesses to break contracts in violation of their terms and leaving markets and regions, without any assessment of their humanitarian and human rights impact.* | While all of the factors mentioned are possible contributors to de-risking, it should be highlighted that it is the cost of compliance that motivates businesses to de-risk. Doing business in today’s globalised world is inherently costly, especially if a company wants to do business properly in adherence to all applicable laws and regulations, which may be at times conflicting with one another. Should the sanctions policymaker not provide clarifications or alert the private sector on possible criminal red flags if sanctions violation is a strict liability offence? Clarifications provide a feeling of comfort of assurance, not fear, to businesses, where there may be grey areas in sanctions regulations that were not explicitly addressed at the time of policymaking. Where businesses do “break contracts” because of sanctions, I cannot imagine any sensible business organisation that actually does it without serious legal counsel and consideration. Even if contracts are “broken”, counterparties always have a choice of bringing it to court for arbitration or litigation (which some companies have done). Furthermore, the vast majority of commercial contracts have very little or extremely indirect impact on the type of human rights that the GP is aiming to address. Whether related to the “breaking” of contracts or not, companies do make assessments when they exit markets and regions, if they have a reason to believe that their exit will cause a direct humanitarian impact, as it is also a reputational risk. Companies are however under no legal obligation to disclose these assessments to the public if they are not listed or if their exits are not material. With my comments to this paragraph, I hope to convey observations that are shared by many in the private sector who may see the situation in a different light than the SR UCM. For the GP to be meaningfully respected and effectively implemented, it requires that the private sector acknowledges the reality or at least perspective of the SR UCM. Therefore, nuances should be acknowledged and verbiage such as “**may** create…, **may** encourage…, without **comprehensive** assessment…” would prove more inviting to conversations that should take place.  |
| *8. To achieve this main objective the Guiding Principles set forth the minimum standards of human rights precaution and protection in the course of implementation of sanctions of the UN Security Council, principles and rules of businesses` behavior in a sanctions compliance strategy.*  | This is a rather limited scope, as the negative impact of sanctions on human rights that the GP would like to address is clearly on unilateral sanctions, not compliance with UN sanctions. Is the SR UCM implicitly acknowledging that the mandate of the GP does not actually have the possibility to extend to sanctions-making behaviour of states?  |
| *9. To protect the most vulnerable groups of people the Guiding Principles set forth the fundamental requirements for all concerned businesses for complete elimination of any adverse impact of their compliance policies on essential goods, including medicines and food, as well as on critical infrastructure and other related services. The Guiding Principles define the minimal standards of behavior of States and regional organizations of registration and/or functioning of such businesses.*  | As previously mentioned, behaviour of states should be distinguished from behaviour of businesses. States make and enforce sanctions, businesses comply. Furthermore, environmental protection should be added after “critical infrastructure”. Sanctions should not inadvertently affect access to natural environments, biological diversity, marine safety, and rights to sustainable development.  |
| *10. States, groups of states and regional organizations, their organs and institutions should apply the Guiding Principles, also when acting to implement sanctions of the UN Security Council, in order to avoid the occurrence of unlawful unilateral coercive measures, or over-compliance, and to mitigate negative effects of any sanctions and similar restrictive measures – both those already imposed as well as those planned to be imposed – on human rights of individuals and people.*  | This is a rather limited scope, as the negative impact of sanctions on human rights that the GP would like to address is clearly on unilateral sanctions, not compliance with UN sanctions. Is the SR UCM implicitly acknowledging that the mandate of the GP does not actually have the possibility to extend to sanctions-making behaviour of states? Furthermore, it is unclear how the GP can replace or complement international law in governing how states may make sanctions as part of their independent foreign policy.  |
| *13.2 All actors shall respect and treat all persons, individually and in community with others, with due respect to their fundamental human rights and with dignity, without discrimination or distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*  | This may prove a particularly debatable point, when one’s political opinion (and actions) are often the reason why one is subjected to sanctions. This relates to the nature of sanctions as mentioned at the very beginning, where sanctions bridge between diplomacy and military action. A state can impose sanctions on an individual or organisation precisely because their conduct may amount to a “political opinion” at best, just short of violating international law of humanity or other norms. It should be discussed whether one’s “political opinion” can be a reason for one to be subject to sanctions, whether that opinion is democratic or authoritarian.  |
| *17.1 Business shall take all appropriate measures to elaborate, monitor and implement the compliance policy aligned to human rights-based approach on non-discriminatory basis also extraterritorially.* | It is not clear nor convincing why businesses should actively concern themselves with human rights “extraterritorially”. Businesses should of course respect human rights globally. It would however be unrealistic to expect that businesses actively invest resources in elaborating, monitoring or implementing human rights compliance in jurisdictions where they do not operate or have any nexus such as via their supply chain.  |
| *19. Access to information and focal points* | In the normal course of sanctions compliance in any company, personal information is collected from natural persons to determine whether they are subject to sanctions, e.g. in sanctions screening and transaction monitoring. Within the boundaries of financial crime prevention laws, natural persons, especially those who are not targeted by sanctions, should be afforded the same rights they would in the public sector by companies in alignment with local personal data protection laws. The GP should recommend that states determine an approach and clarify to the private sector on e.g. how long personal data should/ could be kept.  |
| *19.3 States and international and regional organizations shall provide transparency, timeliness, adequacy of all information on matters related to sanctions, and free and non-discriminatory character of access thereto. Access to IT-platforms shall be guaranteed by operator.* | It is unclear what is meant by “Access to IT-platforms shall be guaranteed by operator.” IT-platforms serving what purpose? What is meant by an “operator”?  |
| *21.1 States and relevant regional organizations shall provide for a legal certainty in scope and methods for compliance policy of companies within their jurisdiction or control.* | States should of course provide legal certainty to private sector when they make sanctions. The real problem is however the lack of competence and market knowledge on the part of sanctions policymakers when they design sanctions. Sanctions policymakers do not understand the complexity of many markets, such as financial, insurance, and shipping. Uncertainty therefore arises when operators are unclear in nuanced situations who should bear the onus of complying with specific sanctions regulations. If sanctions policymakers are not subject matter experts in markets where they want sanctions to be implemented, it is irresponsible for them to also design compliance policies and mandate them as legally binding requirements. This is why most sanctions authorities currently advocate for a “risk-based approach” – companies know best the risk that they take and their sanctions compliance programme should be proportionate to the risks.  |
| *21.2 Requirements for compliance policy of companies must be clear, certain and foreseeable, accessible, and adopted in the form of the legally binding document.* | If requirements of compliance policy are adopted as a legally binding document, this is much more likely to encourage de-risking as it will directly increase the cost of compliance within the private sector. Sanctions as they are today are already written into law, and businesses have a direct legal responsibility to comply with them. Companies adopt “voluntary” and risk-based measures to comply with sanctions, such as employing screening tools, collecting KYC information, and performing risk assessments; but these measures are not prescribed as legal requirements. Should states start to make, say, sanctions screening a legal requirement, smaller companies with less sophisticated sanctions compliance programmes are much more likely to stop doing business in “high risk” countries altogether so they could avoid the cost of hiring a screening vendor or implementing list management and alerts disposition in-house. Live examples are new EU and UK reporting requirements in their December 2023 sanctions on Russia, where private operators have to disclose a wide range of information such as 100k deposits, transfer of funds, services provided to the Central Bank of Russia, etc. These are real costs to even the largest financial institutions which the industry is already seeing repercussions.  |
| *21.3 Interpretation of sanctions compliance requirements shall take place in good faith. All sanctions regulations shall be interpreted in the narrowest possible way. Humanitarian exemptions and relevant notions and terminology shall, on the contrary, be interpreted in the broadest possible manner, with due account to the principle of humanity.*  | Currently, the sentence “Interpretation of sanctions compliance requirements shall take place in good faith” has the practical meaning of what is opposite to the GP. In EU sanctions, it is written in the legal instrument that actions taken to comply with sanctions in good faith shall not face claims brought to a court. This provides comfort to the private sector that there is a guiding principle when situations are nuanced. For the effect of the GP to materialise, it is recommended that states make human rights a priority in their sanctions making, NOT for the private sector to interpret sanctions prioritising human rights over its responsibility to comply with national laws and regulations. The GP should acknowledge this reality and encourage civil society discussions on human rights in sanctions compliance and protection from legal recourse. This is especially relevant in situations where local courts interpret sanctions within their national laws and sets precedents for compliance to be wide in order to align with policy objective.  |
| *23.1 States and regional organizations shall bear the burden of proof in sanctions compliance procedures.*  | It is unclear what states can prove in sanctions compliance since they do not comply, they force sanctions.  |
| *24.3 Humanitarian actors shall not bear the burden of proof of the pure humanitarian character of their work, and shall not be hold responsible for any alleged non-compliance or circumvention of unilateral sanctions regimes while performing their humanitarian work.*  | It is not clear nor convincing why humanitarian actors shall not bear the burden of proof. Humanitarian actors are not immune to corruption, negligence, or any other actions leading to malicious outcomes that damage human rights. The fact that societies have blanket trust over humanitarian organisations also allowed for some of these to happen, as well as malign actors abusing charities for improper purposes. If the GP advocates for due diligence at the state and business levels, it should equally apply to other actors involved in ensuring the enjoyment of human rights in targeted communities, including but not limited to humanitarian actors.  |
| *27.1 Businesses shall undertake due diligence procedures and methods in interpreting and implementing all requirements, exemptions, exceptions and derogations.* | In practical sense, businesses do not interpret or implement derogations. Derogations are legal instruments from the EU Commission to the member states’ National Competent Authorities so they can issue authorisations for activities that would otherwise violate the EU restrictive measures. Here it shall be reminded of a previous point that “due diligence” means different things in the practical business world.  |
| *30.1 Businesses shall provide prompt and full review of the measures undertaken while implementing / complying with sanctions policies.* | To whom should business provide such review and why?  |
| *VI. Access to justice* | The GP should only be relied upon as an argument when there is no legal recourse for the sanctions target. The GP should avoid appearing to allow an interpretation by sanctioned persons who still have the funds and resources to hire e.g. expensive lawyers in the UK to help them de-list or apply for licenses.  |
| *36.1 Businesses shall develop and make available complaint mechanisms for the negative impact of compliance with sanctions. This might be put in place as a standalone tool or as an integrated element of the grievance mechanisms of that particular business, sector or territory.* | Businesses can develop these mechanisms but for them to be effective, states and national courts should be the enforcement body.  |

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