PETER A. ALLARD SCHOOL OF LAW
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International Justice & Human Rights Clinic

SUBMISSION TO THE SPECIAL RAPPORTEUR ON UNILATERAL COERCIVE MEASURES' CALL FOR INPUT – GUIDING PRINCIPLES ON SANCTIONS, COMPLIANCE (OVER-COMPLIANCE) AND HUMAN RIGHTS

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About the International Justice and Human Rights Clinic

The International Justice & Human Rights Clinic is a legal clinic for upper-level law students at the Peter A. Allard School of Law at the University of British Columbia, Canada. The clinic works on pressing human rights and global justice concerns through hands-on work on international cases and projects. The clinic's Global Magnitsky team is part of an international consortium of lawyers working to develop submissions to countries with human rights and anti-corruption sanctions laws. The team has, since 2019, made human rights sanctions submissions to Canada, the United States, the European Union and the United Kingdom on 32 individuals and entities from different jurisdictions.

Executive Summary

The International Justice and Human Rights Clinic (IJHRC) at the Peter A. Allard School of Law, University of British Columbia (Canada) welcomes the Special Rapporteur on unilateral coercive measures' call for input on the draft Guiding Principles on Sanctions, Compliance (Over-Compliance) and Human Rights ["Guiding Principles"].[1] Our submission responds to key questions 3, 4, and 7 posed by the Special Rapporteur. Specifically, we propose the following definitions and guidance be incorporated into the Guiding Principles:

1. **The Guiding Principles should provide a definition of due process guarantees for unilateral sanctions.**

2. **The Guiding Principles should include guidance on protecting confidential information leading to sanctions, in order to protect whistleblowers, journalists, human rights defenders and civil society organizations who come forward with sensitive information.**

3. **The Guiding Principles should offer a precise definition of "focal points", the administrative bodies representing those imposing sanctions, and clearly define their advisory role on sanctions designations and implementation. This role should prioritize making sanctions compliance and delisting guidelines easily accessible to both civil society and the targets of sanctions.**

[1] This submission was written by Celine Xu, Farhia Mohamed and Valeriia Laut, clinicians in the IJHRC at the Peter A. Allard School of Law, University of British Columbia. IJHRC Director Nicole Barrett and Research Associate Vannie Lau supervised and edited the submission. This submission reflects the views of the IJHRC and should not be attributed to other parties. The submission does not represent the official position of the Peter A. Allard School of Law or the University of British Columbia.

1. The Guiding Principles should provide a definition of due process guarantees for unilateral sanctions.

Question 3 from the Special Rapporteur asks, *"…*What other notions and definitions may be added and which from those already included in the document could/should be amended?"

The absence of due process in targeted sanctions can undermine the legitimacy of sanctions regimes, potentially resulting in breaches of international treaty obligations and human rights standards, such as the guarantee of equality before the courts enshrined in Article 14(1) of the *International Covenant of Civil and Political Rights* ("ICCPR")[2]. To ensure adherence to upholding due process rights, it would benefit the Guiding Principles to define the content of due process and establish an international standard for compliance.

Due process is referenced in paragraph 32.1 of the Guiding Principles, which states,

> "Access to justice, including access to legal services with regards to unilateral sanctions, including sanctions' policy implementation, shall be granted without constraints and timely manner to all persons, natural and legal, in full conformity with the presumption of innocence, in respect of due process and fair trial guarantees, in line with international law.[3]"

Currently, there is no widely agreed upon international definition of due process, particularly regarding unilateral sanctions. The right to equality before the courts and tribunals set out in article 14(1) of the ICCPR can therefore serve as "a key element of human rights protection and… a procedural means to safeguard the rule of law."[4] Article 14(1) is commonly cited with regards to general due process rights, which states,

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[5]"

[2] International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, Treaty Series, vol 999, p 171 at art 14(1) ["ICCPR"].
[3] Mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Draft Guiding Principles on Sanctions, Compliance and Human Rights at para 32.1.
[4] UN Human Rights Committee, General Comment No. 32, 23 August 2007, UN Doc CCPR/C/GC/32 at para 2 ["General Comment No. 32"].
[5] ICCPR, *supra* note 2 at art 14(1).

The guarantee of equality before the courts under article 14(1) is however limited to the determination of criminal charges or rights and obligations in a suit at law. While the penal nature of sanctions means they may be regarded as a criminal charge "because of their purpose, character, or severity,"[6] the UN Human Rights Committee in *Sayadi v Belgium* has held that "although the sanctions regime has serious consequences for the individuals concerned…this regime does not concern a 'criminal charge' in the meaning of article 14, paragraph 1,"[7] thereby finding that Belgium's request for listing of Mr. Sayadi did not go on to violate article 14. *Sayadi* therefore illustrates that recourse to article 14 may not be available in the context of unilateral sanctions.

European courts have outlined sanctions-specific due process guarantees by ruling that targeted individuals have a right to judicial review to ensure that their listing is not arbitrary,[8] and a right to defence.[9] The latter includes a state obligation to communicate the reasons for a sanctions listing such that the sanctioned individual may have "full knowledge of the relevant facts" and "evidence used against them" prior to challenging their listing. Incorporating these specific rights within a due process definition in the text of the Guiding Principles will serve to bolster the clarity and applicability of due process guarantees.

Canada's Magnitsky sanctions regime provides another example. In 2017, Canada passed the *Justice for Victims of Corrupt Foreign Officials Act* ("JVCFOA"), also known as the *Sergei Magnitsky Law,* and amended its *Special Economic Measures Act* ("SEMA"). Both acts can be used to impose unilateral sanctions in response to human rights violations.[10] Unlike the US and the EU, Canada does not notify individuals when they are listed, or inform sanctions targets of the procedure for delisting.[11] This lack of transparency raises concerns regarding the procedural fairness rights of sanctioned individuals. Due process rights therefore require the establishment of a transparent and procedurally fair delisting procedure, clearly outlining the criteria and steps for delisting.[12]

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[6] General Comment No. 32, *supra* note 4 at para 15.

[7] UNHRC, Communication No. 1472/2006, Sayadi v Belgium, UN Doc CCPR/C/94/D/1472/2006 at para 10.11.

[8] *Al-Dulimi & Mont. Management Inc. v. Switzerland* (Judgement), no. 5809/08, ECHR 2016 at para 151.

[9] *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 at paras 336-349.

[10] *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law),* SC 2017, c 21 ["*JVCFOA"*]; Special Economic Measures Act, SC 1992, c. 17 ["*SEMA"*].

[11] Canada, Parliament, Senate, The Standing Senate Committee on Foreign Affairs and International Trade, *Strengthening Canada's Autonomous Sanctions Architecture: Five-Year Legislative Review of the Sergei Magnitsky Law and the Special Economic Measures Act*, 44th Parl, 1st Sess, No 10 (May 2023) at 42, online: <https://sencanada.ca/en/info-page/parl-44-1/aefa-magnitsky-law/>.

[12] Sanctions would also be more effective at changing the behaviours of targeted human rights abusers if there is a reasonable prospect that proven, substantial positive behavioural change could lead to the lifting of sanctions. Those imposing sanctions should clearly outline the criteria and stringent evidential requirements necessary to prove such positive behavioural change. For instance, the delisting criteria outlined in UN Security Council, Resolution 2255 (2015). S/RES/2255. Distr.: General. 22 December 2015. 15-22614 (E). 1522614, para 31 & 34,

Incorporating guidance on delisting procedures in the Guiding Principles can help clarify a sanctions-specific concept of due process.

2. The Guiding Principles should include guidance on protecting confidential information leading to sanctions to protect whistleblowers, journalists, human rights defenders and civil society organizations who come forward with sensitive information.

Question 4 from the Special Rapporteur asks, "What other principles should be added to the draft to ensure solidarity and a human rights-based approach?"

The use of confidential evidence is particularly salient to Magnitsky regimes because whistleblowers can provide non-publicly available information in sanctions submissions, often in the form of sensitive evidence related to serious corruption and human rights abuses. Courts and judicial institutions should implement clear protocols governing the utilization of confidential evidence within sanctions legislation to safeguard and prevent retaliation against whistleblowers, journalists, human rights defenders and civil society organizations who provide sensitive, non-public evidence related to serious corruption and human rights abuses. The introduction of well-defined procedures within the sanctions legislation is imperative to strengthen safeguards regarding release of sensitive sanctions-related evidence.

The repercussions caused by non-disclosure of confidential information are evident on both the domestic and global stage. The EU General Court's ruling in *Commission and Others v Kadi* highlighted the adverse impact of withholding confidential information or evidence from the affected individual. Withholding confidential evidence used to justify sanctions afrom the target individual, deprives them of the opportunity to challenge incorrect evidence. This deprivation infringes upon the right to defence and to fair process, such as judicial review.[13]

To balance the need to protect individuals who come forward with confidential information and the sanctioned individual's right to defend themselves, the Rules of Procedure of the EU's General Court provide guidance for a party to disclose a minimum amount of information in court proceedings. Article 105 of the Rules of Procedure stipulates that the party submitting confidential information shall apply for its confidential treatment, thereby initiating a court

state that the sanctioned individuals must demonstrate that they are not active supportors or participants in acts that threaten the peace, stability and security of Afghanistan; or that the individuals must show that they have reconciled and have no links to international terrorist organizations, respect human rights, and are willing to join in building a peaceful Afghanistan.

[13] *Commission and Others v Kadi,* C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, at para 129.

procedure which prompts the court to balance judicial protection and security interests and sets procedures such as making non-confidential versions of evidence or summaries of information.[14]

Closed hearings and special advocate procedures are two further potential solutions to address the disclosure and handling of confidential evidence while preserving the confidentiality of evidence. These mechanisms effectively strike a balance between upholding the sensitivity of information and ensuring fair proceedings. Closed hearings minimize exposure of confidential information by involving only the directly involved parties, their legal representatives, and the presiding judge. Special advocate proceedings, as employed in the UK and Canada, appoint independent lawyers to represent the interests of excluded parties in closed hearings. It is noteworthy that Canada already employs special advocate procedures in the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act,[15] as well as provisions regarding the protection of confidential or special operational information under the Security of Information Act.

Canadian jurisprudence provides further insights on the merits of special advocate proceedings and closed hearings. In *Charkaoui v Canada,*[16] the Supreme Court of Canada discussed the merits of special advocate proceedings among some of the alternatives they considered in reconciling national security protections with the right to a fair hearing guaranteed by the *Charter.*[17] The Court states that "special advocates constitute one example of an approach that is a more proportionate response to reconciling the need to keep some information secret and the need to ensure as much fairness and adversarial challenge as possible."[18] The Supreme Court in *Canada v Harkat* additionally placed a significant emphasis on ensuring a fair process while protecting sensitive information such as utilizing special advocates in a closed hearing.[19] Sanctions regimes could therefore integrate special advocate proceedings and closed hearings to further safeguard confidential information.

In addition, under the UK sanctions regime, one main policy consideration that influences the UK's decision to impose sanctions is the risk of retaliation against whistleblowers, journalists, human rights defenders, and civil society organizations. While similar policy considerations are not adopted by other sanctions regimes such as those in the US and Canada, implementing such

[14] Rules of procedure of the General Court (2015) 58 OJEU 1 at art 105, online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015Q0423%2801%29>.

[15] *Canadian Security Intelligence Service Act,* RSC 1985, c C-23, s 18.

[16] *Charkaoui v Canada (Citizenship and Immigration)* 2007 SCC 9.

[17] *Ibid*, at para 82.

[18] *Ibid*.

[19] *Ibid* at para 70.

considerations could offer an additional layer of protection for whistleblowers, particularly in situations where the risk of reprisal is high.

3. The Guiding Principles should offer a precise definition of "focal points", the administrative bodies representing those imposing sanctions, and clearly define their advisory role on sanctions designations and implementation. This role should prioritize making sanctions compliance and delisting guidelines easily accessible to both civil society and the targets of sanctions.

Question 7 from the Special Rapporteur asks, "Shall the status and role of focal points be addressed in the draft? What can be added to the draft in order to make a proposal on focal points be practical and enforceable as much as possible?"

Paragraph 19.1 of the Guiding Principles states

> "All sanctioning actors shall create enabling environments and maintain open channels for communication on human rights and humanitarian aspects relevant to sanctions and their implementation (establishment of focal points with adequate financial and human resources).[20]"

Establishing well-resourced administrative structures representing the sanctioning actors that impose sanctions, known as focal points, has been found to have the potential to improve coordination among government departments responsible for sanctions designation and implementation.[21] In addition, focal points could enhance consultation with civil society and human rights organizations, deepening the comprehension of the objectives and criteria guiding sanction implementation and decisions.[22] Focal points could also update publicly available resources and guidance on sanctions, aiding financial institutions, businesses, and targets of sanctions in understanding the regime. Focal points, as administrative bodies within government structures, could therefore be defined in the Guiding Principles as "administrative structures representing the sanctioning actors, which provide information, clarification, and advisory services to the public on sanctions designations and implementation,"[23] which offers clarity regarding the function and role of focal points.

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[20] *Supra* at note 2, 19.1.

[21] Canada, Parliament, House of Commons, Standing Committee on Foreign Affairs and International Development. A Coherent and Effective Approach to Canada's Sanctions Regimes: Sergei Magnitsky and Beyond, 42nd Parliament, 1st Sess (April 2017) (Chair Robert D Nault), 38-39.

[22] *Ibid*, at para 5.

[23] The proposed definition of focal points adopts the language from Lorion, S., & Lagoutte, S., "What are Governmental Human Rights Focal Points?" (2021) 39:2 Netherlands Quarterly of Human Rights at 80, which defines governmental human rights focal point as "administrative structures mandated to provide the human

Additionally, paragraph 19.4 of the Guiding Principles states

> "Focal points shall provide detailed information, clarification and advisory services free of charge and in a timely manner regarding licensing, the scope of humanitarian carve-outs and relevant procedural matters, including administrative and legal procedures for de-listing of designated individuals and entities." [24]

Focal points can play a critical role in providing guidance surrounding legal procedures for delisting individuals and entities. The UN Security Council, for example, has established a Focal Point for Delisting mandated to receive delisting requests, ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.[25] A lack of effective communication on delisting procedures can lead to unnecessary litigation. For instance, in the Canadian Federal Court case, *Gómez v Canada,* Mr. Gómez sought a judicial review of the refusal to delist him from a sanctions designation.[26] The Federal Court dismissed his appeal, stating that while the refusal to delist must be supported by credible and reliable open-source information, descriptions of specific human rights violation or corruption need not be provided to the sanctions target, highlighting the extent of deference accorded to the Minister in considering a delisting application.[27] Aligned with paragraph 19.4 of the Guiding Principles, by offering clearer procedural guidance on the delisting process, country focal points have the potential to reduce the necessity for sanctions targets to file for judicial review if clear guidance surrounding delisting procedures and requirements is provided.[28]

By embracing the advisory role advocated for in the Guiding Principles, focal points have the potential to enhance not only the transparency of sanctions regimes but also to alleviate the financial burden and time invested in seeking clarification and guidance on sanctions compliance and delisting information. Paragraph 19.4 of the Guiding Principle is therefore crucial in outlining the advisory role of focal points on sanctions compliance and procedures, ensuring clarity regarding the focal point's functions.

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rights response of the executive power and to ensure human rights implementation at the national level." A more specific context of sanctions is formulated based on the functions a focal point is expected to perform.

[24] *Supra* at note 2, para 19.4.

[25] United Nations, Security Council, S/RES/1730 (2006), Distr.: General, 19 December 2006, 06-67131 (E), 0667131, Resolution 1730 (2006)

[26] *Gomez v Canada (Attorney General)*, 2021 FC 1300.

[27] *Ibid* at para 22.

[28] *Ibid*.