**Draft Guiding Principles on Sanctions, Compliance (Over-Compliance) and Human Rights**

Draft Comments by the Office of the High Commissioner for Human Rights

Objective and scope

*Objective*

The objective of the Draft Guiding Principles set in paragraph 7 is defined as follows:

*7. The Guiding Principles on sanctions, compliance and human rights (hereinafter the Guiding Principles) are developed to establish the guidelines and benchmarks for States, international organizations and businesses to avoid and /or minimize over-compliance and to ensure promotion and protection of human rights and fulfill obligations under international law.*

The objective focuses on avoiding and/or minimizing over-compliance as such and could be further clarified by explicitly linking it to its adverse impact on human rights. The formulation “to ensure promotion and protection of human rights and fulfill obligations under international law” diverges from the accepted framework whereby States are obligated to *respect, protect and fulfil* human rights, and business enterprises are expected to *respect* human rights.

*Scope*

The scope of application of the Guiding Principles is mainly defined in paragraph 10, as follows:

*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.*

The use of the term “should apply” is not appropriate for Guiding Principles unless they are based on existing legal obligations. The term “restrictive measures” is not defined in the Glossary.

Status and approach of the Guiding Principles

*Status of the Guiding Principles*

In her call for input, the Special Rapporteur included a question: “*What shall be the status of the Guiding Principles?”.* By definition, Guiding Principles should not create new international law obligations.

As an illustration, some principles such as in paragraphs 20.3 and 22.3 could be interpreted as creating new obligations for States:

*20.3 States are under obligation to refrain from implementing unilateral coercive measures imposed by third States and organizations and are obliged to ensure that businesses under their jurisdiction and/ or control do not comply and/or over-comply with such unilateral coercive measures as a part of the rule of law standards.*

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

In addition, in the Chapter on the scope of application of the Guiding Principles, the paragraph 11 notes:

*11. Nothing in these Guiding Principles should be read as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regards to human rights.*

In their chapter on General Principles, the [Guiding Principles on Business and Human Rights](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf) affirm:

*Nothing in these Guiding Principles should be read* ***as creating new international law obligations****, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.*

Paragraph 11 omitted the term “as creating new international law obligations”, compared to the formulation included in several Guiding Principles, and in particular in the Guiding Principles on Business and Human Rights. The Office recommends to *explicitly* highlight that the Guiding Principles should not be read as creating new international law obligations.

*Approach of the Guiding Principles*

In the Preface of the Guiding Principles, the document defines the general approach of the document in paragraph 6:

*6. These Guiding Principles are based on the Charter of the United Nations, fundamental principles of international law, the International Bill of Human Rights, generally recognized principles and norms of international law, international customary rules of humanity, with due account of the general principles of law recognized by all nations (ex injuria jus non oritur, bona fide, etc.) and seek to draw from and expand on the Guiding Principles on Business and Human Rights 2011, the Articles on responsibility of States for international wrongful acts 2001, the Draft articles on responsibility of international organizations 2011 implementing the United Nations “Protect, Respect and Remedy” Framework, calls for cooperation, humanity, solidarity and inclusion of the “Our Common Agenda” report of the UN Secretary General, 2021, […]*

The term “seek to draw from and expand” could be further clarified. The Office recommend using wording that could not be interpreted as undermining the instruments mentioned in this paragraph 6. In particular, the Office would like to express its concern that several principles in the document draw from the Guiding Principles on Business and Human Rights without aligning with the agreed language and concepts, such as:

* “26.1 Business enterprises should respect human rights. Businesses ***shall refrain from acting in violation of human rights***, including extraterritorially, and ***shall take all necessary measures to eliminate or drastically mitigate any adverse human rights impact*** while implementing sanctions measures including extraterritorially.
* “26.2 Businesses ***shall avoid human rights infringements and mitigate the consequences, if adverse effects on human rights occur due to their actions/ failure to act***.”
	+ GP BHR 11: “Business enterprises should respect human rights. This means that they ***should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved***.”
	+ GP BHR 13: “The responsibility to respect human rights requires that  business enterprises: (a) Avoid ***causing or contributing*** to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) ***Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts***.”
	+ GPs 15(b) and 17-21 on ***human rights due diligence*** and what is expected of business enterprises to identify, prevent, mitigate and account for how they address adverse human rights impacts with which they are involved.
* “36.1 Businesses ***shall develop and make available complaint mechanisms*** for the negative impact of compliance with sanctions…”
	+ GP 29: “business enterprises ***should establish or participate in effective operational-level grievance mechanisms*** for individuals and communities who may be adversely impacted”
* “36.2 Adverse impact on human rights and humanitarian action shall be addressed by the business enterprise in a measure compatible with the degree of involvement. Businesses are responsible for putting in place processes to enable the remediation of the adverse impact they cause, to which they contribute to ***or are directly linked due to their business relationships***.”
	+ GP 15(c): “In order to meet their responsibility to respect human rights, business enterprises should have in place … Processes to enable the remediation of any adverse human rights impacts ***they cause or to which they contribute***.”
	+ GP 22: “Where business enterprises identify that ***they have caused or contributed to adverse impacts***, they should ***provide for or cooperate in their remediation*** through legitimate processes.” The commentary specifically states “***Where adverse impacts*** have occurred that the business enterprise has not caused or contributed to, but which ***are directly linked*** to its operations, products or services by a business relationship, ***the responsibility to respect human rights does not require that the enterprise itself provide for remediation***, though it may take a role in doing so.”

Glossary and terminology

*Glossary*

The glossary introduces several definitions, including unilateral coercive measures and unilateral sanctions. The definition of unilateral coercive measures is based on the Special Rapporteur’s report on ‘Unilateral coercive measures: notion, types and qualification” ([A/HRC/48/59),](https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F48%2F59&Language=E&DeviceType=Desktop&LangRequested=False) in particular its paragraph 100:

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

This proposed definition builds on another definition by the Human Rights Council included in the same report (A/HRC/48/59) in paragraph 95:

*95. In accordance with the Human Rights Council resolution 34/13, unilateral coercive measures are viewed as any type of measure, including but not limited to economic or political measures, to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.*

The HRC resolution 34/13 mentions, in its operative paragraph 10:

*10. Recalls that, according to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and to the relevant principles and provisions contained in the Charter of Economic Rights and Duties of States, proclaimed by the General Assembly in its resolution 3281 (XXIX) of 12 December 1974, in particular article 32 thereof, no State may use or encourage the use of economic, political or any other type of measure to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind;*

Thus, based on these references, the glossary proposes the following definition of unilateral coercive measures:

*Unilateral coercive measures – any type of measures or activity applied by States, groups of States or regional organizations without or beyond authorization of the UN Security Council, not in conformity with international obligations of the sanctioning actor or the illegality of which is not excluded on grounds of the law of international responsibility, regardless of the announced purpose or objective. Such measures or activities include but are not limited to economic, financial, political or any other sort of State-oriented or targeted measures applied to another State or an individual, company or other non-governmental entity, in order to induce a change in policy or behavior, to obtain from a State the subordination of the exercise of its sovereign rights, to secure advantages of any kind, or to signal, coerce or punish. Examples include trade sanctions in the form of embargoes and the interruption of financial and investment flows between sender and target countries, and targeted sanctions such as asset freezes and travel bans against individuals or companies.*

We consider that more clarity could be provided on the proposed definition.

First, there is no explanation as to why unilateral coercive “measures” should include “measures or activity”.

Secondly, the document might wish to clarify why the “unilateral” content of the concept is defined by measures applied “without or beyond authorization of the Security Council”. The meaning of “beyond authorization of the Security Council” could be clarified.

Thirdly, the Human Rights Council resolution 34/13, based on the Charter of Economic Rights and Duties of States, defines the “coercive” content as “measures to coerce another State”, the proposed definition in the glossary defines the “coercive” content as “measures […] to induce a change in policy or behavior […] or to signal, coerce or punish.”. According to our view, the proposed definition is more vague and broader than the one mentioned in the HRC resolution 34/13 and dilutes the “coercive” content of the concept of unilateral coercive measures. In addition, the examples provided, without any clarifications in terms of their unilaterality, are not helping to illustrate the proposed definition as they could also illustrate measures taken by the UN Security Council under Chapter VII, as indicated in the UNSC [website](https://www.un.org/securitycouncil/sanctions/information), thus creating more confusion.

A more straightforward way of defining the concept of “unilateral coercive measures” could be formulated as follows:

*Economic, political or any other type of measure applied by States or groups of States to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind without the authorization of the UN Security Council.*

The glossary then introduces a definition of unilateral sanctions, as a different concept from unilateral coercive measures, and as follows:

*Unilateral sanctions – measures taken by a state, group of States, regional organization unilaterally without authorization of the UN Security Council without prejudice to their legality or illegality. Unilateral sanctions may comply with international law if they are implemented as retorsions responding to unfriendly acts but not violating international obligations or as counter-measures against a State responsible for an internationally wrongful act in full conformity with the law of international responsibility. The vast majority of unilateral sanctions do not comply with criteria of retorsions or countermeasures and therefore qualify as unilateral coercive measures. Therefore, all Unilateral Coercive Measures are Unilateral Sanctions, but not all Unilateral Sanctions are Unilateral Coercive Measures.*

The opportunity to introduce this definition raises several questions.

First, the definition here does not add “activity” to measures, and the “unilateral” content is defined by measures “without authorization of the UN Security Council” without adding “beyond”. This raises the question of why unilaterality is defined differently for unilateral coercive measures and unilateral sanctions.

Secondly, the proposed definition indicates that unilateral sanctions may comply with international law if they are implemented as retorsions or as countermeasures. But it does not explain why this could not be also the case for unilateral coercive measures. Moreover, by defining unilateral coercive measures as unilateral sanctions that do not comply with criteria of retorsions or countermeasures, it introduces another different definition of unilateral coercive measures, creating more confusion.

Thirdly, the proposed definition is too broad and “measures taken by a state, group of States, regional organization unilaterally without authorization of the UN Security Council without prejudice to their legality or illegality” does not specify if these measures are “for or against” another State or to which entity it is applied. For example, a regional organization taking measures to provide aid or economic assistance to another State will do so without the authorization of the UN Security Council and could fall into the definition of unilateral sanctions as proposed.

Finally, by acknowledging that “not all unilateral sanctions are unilateral coercive measures”, it implies that, ceteris paribus, not all sanctions are coercive measures which creates confusion.

The [Draft Articles](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), in its Part Two, Chapter II on Countermeasures note that:

*(3) […] The term “sanction” is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the Charter of the United Nations refers only to “measures”, even though these can encompass a very wide range of acts, including the use of armed force (Articles 39, 41 and 42).*

Thus, whether in the Charter of the United Nations or in the Human Rights Council, the term used is "measures" or “coercive measures” respectively, and the term "sanction", based on practice, could be used as an equivalent. The Office believes that by using unilateral coercive measures and unilateral sanctions as equivalent, depending on the purpose and context, it is possible to resolve the intricate complications raised by the introduction of a different definition for unilateral sanctions.

*Terminology*

The concepts defined in the glossary are not systematically and precisely applied throughout the Guiding Principles. Some concepts used in the document are not defined in the glossary, such as “restrictive measures” or “precautionary measures”. In other cases, the lack of clarity and precision in the terminology used may potentially lead to some complications. To illustrate this point, we mention the principle in paragraph 20.1 under Rule of Law:

*20.1 Any unilateral measures can only be taken by States and international organizations in the course of implementation of resolutions of the UN Security Council adopted under Chapter VII of the UN Charter or if they do not violate their international obligations (retorsions) or their wrongfulness is excluded under international law in the course of counter-measures in full conformity with rules of the law of international responsibility. All other unilateral means of pressure constitute unilateral coercive measures and are illegal under international law.*

The concept of “unilateral measures” has not been defined in the glossary and it is not clear if it consists of unilateral coercive measures or unilateral sanctions. If these measures consist of or include unilateral coercive measures or unilateral sanctions, they cannot be taken in the course of implementation of resolutions of the UN Security Council as per the definitions in the glossary. In addition, paragraph 20.1 is normative in nature and sets standards on unilateral measures rather than a guideline.

More generally, the use of the terminology “sanctions” alone throughout the document could be confusing as it includes both unilateral sanctions and UNSC sanctions. As an example, in the definition of over-compliance, it is not clear if the “complexity of sanctions” refers only to unilateral sanctions or to UNSC sanctions also.

Adverse impact of unilateral coercive measures on human rights

The document does not seem to distinguish between different types of sanctions e.g. targeted, comprehensive, economic or sectoral, on individuals, and the different human rights they might negatively affect.

The draft does not explain the negative impact of sanctions on human rights. Where the document does refer to human rights impact, the document refers to human rights in general terms, without explaining the actual impact. For example, in paragraph 4:

*4. De-risking policies and over-compliance become widespread, and challenge international law and human rights, including the right to development. Secondary sanctions and over-compliance affect all areas of human rights of every individual and constitute serious impediments to the delivery of humanitarian aid even in the most critical situations and even under explicit humanitarian provisions of the UN Security Council resolutions. People in vulnerable situations, including women, children, persons with disabilities, the poorest, migrants and the elderly, among others, are affected the most.*

The document could provide a more nuanced explanation of how each type of sanction affects different human rights. When the paragraph states that “secondary sanctions and over-compliance affect all areas of human rights of every individual”, it does without specifying it this is the case of every individual in the sanctioned country, in third countries or elsewhere. Moreover, “all areas of human rights of every individual” needs to be better explained as it can be seen as a maximalist statement without providing more evidence on which rights, what impact and how it affects them negatively. More explanation is also needed for the list of vulnerable groups. Generally, as the mandate is covering the “adverse impact of unilateral coercive measures on human rights”, the document needs to provide more explanation on this impact.