



Unilateral coercive measures, IHL and impartial humanitarian action: An interview with Alena Douhan*

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By way of introduction, could you explain your role and responsibilities as the UN Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights? What is the purpose of your mandate, and how have you approached its implementation? Could you explain what distinguishes a unilateral coercive measure [UCM] from other sanctions regimes, including those instituted by the UN Security Council?

The mandate of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights is one of the Special Procedures

* This interview was conducted by Bruno Demeyere, Editor-in-Chief of the Review.

established by the Human Rights Council.¹ As a relatively new mandate, it was first established in 2015 as soon as the number of sanctions applied by States and regional organizations without or beyond authorizations of the UN Security Council, as well as the types, means, forms and targets of sanctions, began to expand a lot. One can mention here in particular the expansion of targeted sanctions, affecting thousands of individuals and companies already in that period; the introduction and tightening of economic and trade embargoes; and the introduction of so-called sectoral sanctions against sectors of the economy. These developments have been accompanied by an expansion of grounds for the introduction of sanctions – protection of human rights, suppression of terrorism and terrorist financing, cyber threats, corruption and many others – and by the implementation of provisions on civil and criminal penalties in the legislation of sanctioning States for violations of “sanctions” regulations.

UN Security Council authorization versus UCMs

When we speak about the mandate itself, its focus is not on all types of sanctions, but rather on the sanctions that are applied by States or regional organizations unilaterally without the authorization of the UN Security Council. That is the main difference between the focus of this mandate and the other major sanctions regimes. The UN Charter provides for the possibility of the UN Security Council to adopt necessary measures for the maintenance of peace in situations where there is a threat to peace, a breach of the peace or an act of aggression.² As such, States and regional organizations cannot take enforcement action without authorization by the UN Security Council. However, recent practice shows that a number of such measures are taken by States and regional organizations both in situations of armed conflict and outside of armed conflict. By 2015, it became clear that the number of unilateral sanctions applied against States, individuals and companies was rapidly expanding. Their legality is not entirely clear and, at the same time, the impact of these sanctions on the population is enormous. These unilateral sanctions do not have a military component. They include other forms of pressure – trade, economic and arms embargoes, freezing of bank accounts, entry bans etc. – which may be imposed by a State, or group of States, or regional organizations against another State or against specific individuals.

Main purposes of the mandate

The main purpose of the mandate is first to collect information about any application of unilateral sanctions by States or regional organizations and to

1 Office of the UN High Commissioner for Human Rights (UN Human Rights), “Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights”, available at: www.ohchr.org/en/issues/ucm/pages/srcoercivemeasures.aspx (all internet references were accessed in July 2021); UN Human Rights, “Special Procedures of the Human Rights Council”, available at: <https://tinyurl.com/vxa9ydsz>; Human Rights Council, *Manual of Operations of the Special Procedures of the Human Rights Council*, August 2008, available at: www.ohchr.org/EN/HRBodies/SP/CoordinationCommittee/Pages/Manualofspecialprocedures.aspx

2 Charter of the United Nations, 1 UNTS XVI, 24 October 1945, Chap. VII.

analyze what processes are in place in regulating these measures, for what purpose they are applied, what means are used, and what are their consequences. Another purpose of the mandate is to qualify these measures from the point of view of international law, because it is necessary to admit that today there are diverse views on the legality of these measures. Moreover, there is a discrepancy about the definition of UCMs itself. It is important to note that there is no recognized definition, and therefore there are disputes about which measures are legal and which measures are illegal. In numerous resolutions, the Human Rights Council³ as well as the UN General Assembly⁴ have announced that all UCMs are illegal. That is why States and regional organizations insist that they are not imposing UCMs but are rather imposing measures which they perceive as legitimate sanctions/restrictive measures, and as such, they should not be prohibited and do not fall under this mandate. Therefore, an assessment of the legality of measures to qualify them as UCMs or not is also important for the purpose of the mandate.

Thematic reports

Another aspect of the mandate is to identify spheres of interest and to prepare thematic reports to be delivered to the Human Rights Council and to the UN General Assembly. In the absence of definitions and in view of the discrepancy between States and regional organizations on the assessment of unilateral measures, my reports to the Human Rights Council and General Assembly in 2021 are focusing on the problem of the notion, elements, types and characteristics of unilateral sanctions as well as the identification of targets of unilateral sanctions.⁵ The call for contributions has been sent to all States, expert academics, non-governmental organizations [NGOs] etc.

Country visits

The next sphere of the mandate is to carry out country visits. Unfortunately, today many countries are under severe sanctions regimes, and it is therefore necessary to visit these countries in order to analyze the situation in the field and to assess, as a result, what the impact of unilateral sanctions imposed on these countries is. For instance, last year, I had visits to Qatar and Venezuela.

3 HRC Res. 15/24, 6 October 2010, paras 1–3, available at: <https://undocs.org/en/A/HRC/RES/15/24>; HRC Res. 19/32, 18 April 2012, paras 1–3, available at: <https://undocs.org/en/A/HRC/RES/19/32>; HRC Res. 24/14, 8 October 2013, paras 1–3, available at: <https://undocs.org/en/A/HRC/RES/24/14>; HRC Res. 30/2, 12 October 2015, paras 1–2, 4, available at: <https://undocs.org/en/A/HRC/RES/30/2>; HRC Res. 34/13, 24 March 2017, paras 1–2, 4, available at: <https://undocs.org/en/A/HRC/RES/34/13>; HRC Res. 45/5, 6 October 2020, Preamble, available at: <https://undocs.org/en/A/HRC/RES/45/5>.

4 UNGA Res. 69/180, 18 December 2014, paras 5–6, available at: www.ohchr.org/Documents/Issues/UCM/Res/A-RES-69-180.pdf; UNGA Res. 70/151, 17 December 2015, paras 5–6, available at: www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/151; UNGA Res. 71/193, 19 December 2016, paras 5–6, available at: www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/193.

5 The report to the Human Rights Council is to be presented in September 2021, and the report to the General Assembly in October 2021.

Impact on human rights

When we speak about the impact of unilateral sanctions on the enjoyment of human rights within the scope of the mandate, the aim is to qualify unilateral measures under international law and to identify affected individuals, or groups of individuals, as well as the humanitarian impact of measures taken. The last important aspect of the mandate is to identify whether the mechanisms of humanitarian exceptions and delivery of humanitarian aid are neither effective nor efficient due to the impediments which take place because of sanctions, or due to the non-cooperation of governments or any other reasons.

Methodology

When it comes to the methodology of work of the mandate, it is necessary that I try to use all possible mechanisms available. I described this in my first report to the Human Rights Council in September 2020, which elucidated the roadmap for the development of the mandate.⁶ Besides the thematic reports and country visits, I pay lots of attention to cooperation with NGOs because of their field presence, and also because they are facing both negative consequences (in particular, their assets or assets of their staff are frozen) as well as impediments (problems with getting humanitarian licenses, rejections of requests to do bank transfers, etc.) when performing their work. I also place a huge emphasis on cooperation with the academic community because I believe that this sphere and their contributions are underestimated.

There are a lot of factors to be taken into account. For example, there are specifics when unilateral sanctions are applied in the course of an armed conflict, outside of an armed conflict, or when it is disputed whether the situation can be classified as an armed conflict or not. I cooperate with States and with international organizations because this mandate comes very close to a number of different aspects: maintenance of international peace and security, international responsibility, international criminal law, the struggle against international terrorism, and many others. For example, in November 2020 I was invited as a speaker at an Arria-Formula meeting of the UN Security Council, where the aspect of cooperation regarding the interaction/impact of unilateral sanctions on the maintenance of international peace and security was discussed.⁷ I also try to work actively with other international organizations such as the Office of the UN High Commissioner for Refugees and the International Organization for Migration because the application of unilateral sanctions—together with the

6 Alena Douhan, *Negative Impact of Unilateral Coercive Measures: Priorities and Road Map*, UN Doc. A/HRC/45/7, 1 July 2020, available at: <https://undocs.org/en/A/HRC/45/7>.

7 Alena Douhan, “Statement of the Special Rapporteur on the NEGATIVE impact of the Unilateral Coercive Measures on the Enjoyment of Human Rights”, 25 November 2020, available at: www.ohchr.org/Documents/Issues/UCM/UCM-Arria-Formula-meeting.pdf; Virtual Arria-Formula Meeting on “End Unilateral Coercive Measures Now”, available at: <https://media.un.org/en/asset/k11/k115rfox1> (part 1), <https://media.un.org/en/asset/k1f/k1fnor8vmq> (part 2).

existence of armed conflict – quite often initiates or influences flows of refugees and migrants to neighbouring countries, as has happened or is still happening with Syrian and Venezuelan migrants/refugees and undocumented Afghan refugees in Iran.

You have mentioned several times, including in your guidance note on COVID-19⁸ and your first report to the Human Rights Council,⁹ the relevance of international humanitarian law [IHL] to UCMs. Would you be able to expand on this? What do you see as the interplay between UCMs and IHL? Would you go as far as to say that UCMs must comply with IHL?

UCMs and armed conflict

In my opinion, this question deals with several perspectives concerning the application of unilateral sanctions/UCMs. All of those perspectives are very important in my opinion. First of all, quite often, UCMs/unilateral sanctions are applied in situations where there is an armed conflict in the country, or there is some sort of civil disorder which – depending on the circumstances – can or cannot be qualified as a conflict of non-international character. The government or the opposition or opposition groups do not recognize the fact of the existence of the armed conflict, but sanctions are imposed. In other situations, unilateral sanctions are imposed outside of any armed conflict, but the consequences of their application have sometimes been claimed to constitute a crime of aggression or a crime against humanity, as has been done, for example, by Venezuela in its referral to the International Criminal Court [ICC].¹⁰

UCMs and UN Security Council sanctions

It is important to take into account that when we speak about the application of unilateral sanctions, we may or may not have the authorization of the UN Security Council. Even in a situation where there are relevant Security Council resolutions and the Security Council tries to handle the conflict, quite often unilateral sanctions go much further, listing more people or companies than was authorized by the Security Council, imposing new types of sanctions, or implementing penalty mechanisms (US and EU restrictive measures imposed in the course of the struggle against international terrorism; EU sanctions against Afghanistan, Eritrea, Haiti, Iraq, North Korea, Somalia and Sudan). From an international law standpoint the above excessive unilateral measures are not authorized, have no other legal grounds, and thus exacerbate the calamities of

8 Alena Douhan, “COVID-19 Human Rights Guidance Note: Negative Impact of Unilateral Sanctions during the State of Emergency”, 1 May 2020, available at: www.ohchr.org/Documents/Issues/UCM/UCMCOVID19GuidanceNote.pdf.

9 A. Douhan, above note 6, paras 103, 110.

10 ICC, “Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the Referral by Venezuela regarding the Situation in Its Own Territory”, 17 February 2020, available at: www.icc-cpi.int/Pages/item.aspx?name=200217-otp-statement-venezuela.

armed conflicts or other situations of violence, without any guarantee of human rights protection.

International humanitarian law, human rights law and refugee law

In the case of unilateral sanctions, during the course of my interactions with States I refer to their obligations to observe human rights law, IHL and international refugee law. However, my main approach and message that I try to put forward to States is that human rights should be protected in all situations and that this should be their primary concern regardless of their political approaches to specific situations, conflicts, and parties to the same. In my opinion, in certain situations it may be complicated to differentiate exactly what legal framework should be applied, but they should all be taken into account by States in order to guarantee protection of the people who are affected by the conflict or who are affected by the application of these unilateral sanctions.

Delivery of humanitarian aid

An important element of interaction with IHL standards is the problem of delivery of humanitarian aid. If we look at, for example, the Additional Protocols to the Geneva Conventions,¹¹ both of them provide, in my opinion, for the right of a population to get access to humanitarian aid and not be deprived of the essential means of their subsistence. However, when we look at the situation in the absence of international or non-international armed conflict we do not have this explicit prescription and we do not speak about these rights. That is why from a legalistic point of view, IHL enables the right to get humanitarian aid and also sets forth the principle of non-discrimination and impartiality as it concerns the availability and distribution of humanitarian aid.

There are some provisions in the Human Rights Council resolutions which regulate the functioning of my mandate in this regard.¹² I believe that it is very important, keeping in mind the need to protect human rights and to guarantee the basic humanitarian needs of people, to apply the prohibition on discrimination when distributing humanitarian aid, even in situations where no armed conflict exists or the qualification is doubtful. Unfortunately, several humanitarian NGOs have reported to me that they quite openly face some sort of pressure preventing them from delivering humanitarian aid to certain territories or to the territory under the control of certain opposition or governmental

11 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Arts 54, 69, 70; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 14. See also Anna Segall, "Economic Sanctions: Legal and Policy Constraints", *International Review of the Red Cross*, Vol. 81, No. 836, 1999, available at: www.icrc.org/en/doc/resources/documents/article/other/57jq73.htm.

12 HRC Res. 15/24, above note 3, para. 8; HRC Res. 19/32, above note 3, para. 11; HRC Res. 34/13, above note 3, Preamble, para. 11.

groups by countries which impose sanctions. That clearly violates, in my opinion, the right to access to humanitarian aid as well as the principle of non-discrimination, and that is why the application by analogy of these rules of IHL in the face of human suffering is very important.

Unilateral sanctions or UCMs a crime against humanity?

Recently there has been a new trend in the interaction between IHL and the application of unilateral sanctions or UCMs. Quite openly, countries targeted by severe sanctions are referring to the application of UCMs as a crime against humanity or a crime of aggression. In the responses I received from the call for contributions when I was preparing a report on the negative impact of UCMs during the pandemic, a number of sanctioned States referred to such unilateral measures as a crime against humanity.¹³ A very recent development includes the Venezuelan referral submitted to the ICC to consider the case of application of sanctions against Venezuela as an international crime.¹⁴ The referral was submitted a year ago. We do not have any decision yet, but that is one of the contemporary developments which we can identify.

Looking ahead, how can States best ensure, across the breadth of different legal traditions in the world, that their approach to UCMs is consistent and fully compliant with all applicable rules of international law? Are there examples of good drafting practice which States could lean on?

Legal rather than political perspective

It is necessary to acknowledge that in accordance with resolutions of the Human Rights Council and the UN General Assembly, UCMs are illegal¹⁵ – and it is very complicated to speak about good practice in the application of illegal measures. The main idea, as well as the main recommendation that I have, is to stop looking at the application of unilateral sanctions in political terms only. Unfortunately, today there is a fierce discussion about sanctions in absolutely black-and-white terminology. They are viewed as either something good applied against someone bad, or vice versa: any unilateral measures are viewed as something totally illegal regardless of the form or type. That is why I believe we need to stop looking at them from a political perspective and start acting in accordance with international law to guarantee human rights protection. In accordance with international law, States are free to try to influence the policy

13 Alena Douhan, *Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights in the Coronavirus Disease Pandemic*, UN Doc. A/75/209, 21 July 2020, available at: www.undocs.org/en/A/75/209.

14 ICC, above note 10.

15 HRC Res. 15/24, above note 3, paras 1–3; HRC Res. 19/32, above note 3, paras 1–3; HRC Res. 24/14, above note 3, paras 1–3; HRC Res. 30/2, above note 3, paras 1–2, 4; HRC Res. 34/13, above note 3, paras 1–2, 4; HRC Res. 45/5, above note 3, Preamble; UNGA Res. 69/180, above note 4, paras 5–6; UNGA Res. 70/151, above note 4, paras 5–6; UNGA Res. 71/193, above note 4, paras 5–6.

and behaviour of other States, but by legal means only. In particular, in a situation which can be qualified as a threat to peace, a breach of the peace or an act of aggression, the mechanisms of the UN Security Council may be used – that is, Chapter VII of the UN Charter.

Trade, investment agreements and diplomatic relations

Where the severity of the threat does not amount to a breach of the peace or an act of aggression, States are free to impose measures in accordance with international law – for example, denouncing economic or trade agreements in accordance with the rules of the agreement, stopping diplomatic relations, or deciding not to engage in cooperation.

“Countermeasures”

A mechanism that is very important, in my opinion, is the law of international responsibility. Some States in their practice insist that measures taken by them do not constitute UCMs but are rather countermeasures. The mechanism of countermeasures is well known under international law. At the same time, any measures taken as countermeasures should correspond to the law of international responsibility. In particular, under the Draft Articles on Responsibility of States for Internationally Wrongful Acts, they can only be taken by the directly affected States in response to violations of international obligations in order to restore fulfilment of those obligations; they shall be proportionate to the violation and temporary; and they shall not violate human rights, peremptory norms of international law or humanitarian law.¹⁶ Naturally, countermeasures can also be taken by States other than directly affected States in response to violations of *erga omnes* obligations like aggression, genocide, apartheid or mass gross violations of fundamental human rights shocking the conscience of mankind.¹⁷ Countermeasures could thus help to restore violated international obligations but in a legal way and without a negative humanitarian effect.

The International Criminal Court

Another instrument is the possibility of submitting a referral to the ICC within its jurisdiction when international crimes are committed. I remind all States about the existence of universal jurisdiction in situations when international crimes are committed. Unfortunately, these mechanisms are quite often forgotten. If we look at the practice of the ICC, one can cite, for example, cases submitted by a group of countries against Venezuela and by Venezuela against the United States. The use of the judicial mechanism guarantees that those who commit international

16 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art. 50.

17 *Ibid.*, Art. 48(1)(b).

crimes do not enjoy impunity, but at the same time it provides due process guarantees and prevents any violation of human rights. Unfortunately, today States often prefer to impose sanctions instead of starting a criminal case in an international or national court as it is easier and faster, and the standards of proof are nearly non-existent.

Counterterrorism measures as an example

Here, the struggle against international terrorism both in the course of armed conflict and outside of conflict may serve as an illustrative example. Resolutions of the UN Security Council in the period of 1999 to 2001¹⁸ referred to the obligation of all States to suppress international terrorism by all means, but it started to become clear that this “all means” might affect human rights and international humanitarian law. So, within a couple of months, by October 2001 (Resolution 1370), we see that the terminology of Security Council resolutions had begun to refer to the obligation of States to suppress international terrorism by all means and with due account to the UN Charter and later to international law, human rights law, humanitarian law and refugee law.¹⁹ The global counterterrorism strategy of the UN refers to the obligation to protect human rights and to protect humanitarian law as one of the important preventive mechanisms in the suppression of international terrorism.²⁰ One should not violate human rights in order to protect human rights.

Good practice: Detailed guidance

When we come to good practice, I am carefully optimistic in mentioning the attempts of States to develop more detailed guidelines in the sphere of humanitarian exemptions and delivery of humanitarian aid.²¹ They are far from ideal, but I believe that these are the essential first steps which need to be taken. The same role is to be played by the recently established EU-level contact point for humanitarian aid in environments subject to EU sanctions.²² There are numerous problems with this mechanism, but it is still a good step forward to understand and acknowledge that these problems exist.

18 UNSC Res. 1267, 15 October 1999, para. 3; UNSC Res. 1333, 19 December 2000, para. 3; UNSC Res. 1373, 28 September 2001, para. 2.

19 UNSC Res. 2199, 12 February 2015; UNSC Res. 2249, 20 November 2015; UNSC Res. 2354, 24 May 2017, and many others.

20 UNGA Res. 60/288, 20 September 2006, available at: <https://undocs.org/A/RES/60/288>.

21 European Commission, “Commission Guidance Note on the Provision of Humanitarian Aid to Fight the Covid-19 Pandemic in Certain Environments Subject To EU Restrictive Measures”, 16 November 2020, available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/201116-humanitarian-aid-guidance-note_en.pdf.

22 European Commission, “EU-Level Contact Point for Humanitarian Aid in Environments Subject to EU Sanctions”, available at: <https://tinyurl.com/59acr5fs>.

European Court of Justice sanctions cases

The second good tendency that should be taken into account is the developments that exist in the practice of the European Court of Justice [ECJ] in its so-called sanctions cases. Article 275 of the Treaty on the Functioning of the European Union provides for the possibility of bringing a case to the attention of the ECJ, if sanctions are imposed against individuals.²³ For a long period of time there were just a few cases, but the activity of the ECJ in sanctions cases has enormously increased over the last five years and we see now that more than 360 decisions have already been taken. This mechanism provides the possibility of accessing justice.²⁴

Recommendations

To conclude, I believe the first recommendation is to observe international law standards; second, to carry out a humanitarian assessment of any unilateral measures taken; and third, to apply some sort of precautionary humanitarian principles to any unilateral activity that is taken by States.

The title of your mandate refers to the negative impact of UCMs. Is it all negative, or do you see any potential usefulness of UCMs?

The lawyer in me says that if we believe that UCMs are illegal, we cannot speak about the potential positives or potential usefulness of these measures, and that is why I will speak again on unilateral sanctions more generally. When we speak about the impact of the measures, the main point is that States should act in accordance with the rule of law. This means that they cannot perform illegal activities and therefore they cannot apply UCMs. However, as I mentioned in response to the previous questions, they can take unilateral activity which is in conformity with international law. The unilateral activity being in conformity with international law is an important means of international intercourse. It is a means which may help States to settle their disputes and their differences in a peaceful way, and will positively impact, in my opinion, the situation in their societies.

Negative impacts

Regarding the negative impact of UCMs that falls within the mandate, I believe that first of all it is necessary to understand what is meant by a “negative impact”. That is one of the purposes of the mandate. I have observed total unawareness about this negative impact. There is a constant discussion about the evidence-based

23 Treaty on the Functioning of the European Union, 26 October 2012, Art. 275, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

24 “Sanctions Judgments”, *Sanctions: Law, Practice and Guidance*, available at: www.europeansanctions.com/judgment/.

approach to this: is there any negative impact or none at all? How can the specific negative impact of specific unilateral measures be identified? I have been asked these questions repeatedly. We need to take into account that unilateral sanctions are never the only reason for problems in a country because quite often such sanctions are applied in situations where, for example, there is an ongoing armed conflict in the country and the infrastructure of the country itself is already affected by the conflict, or there are internal disturbances or some other problems in the country.

I have been repeatedly asked how I assess the impact of sanctions. When we speak about the application of unilateral sanctions, especially the sectoral or economic ones, or the situation of freezing assets of countries in banks abroad, we speak about the comprehensive negative impact on the economies of such countries. Targeted sanctions imposed on individuals and companies have less direct effect but, in their multiplicity, and in view of the existing over-compliance, may have a similar effect. All these measures exacerbate already existing economic problems in the country. Indeed, we can never exactly identify the exact impact of unilateral sanctions applied to States because of the pre-existing economic, military, social or humanitarian problems in those States. Therefore, my aim is to identify the trends in different areas of the economy, social guarantees, education and development in order to see how all these spheres have been affected by sanctions.

I will cite here the example of my recent country visit to Venezuela. Statistics, verified from different sources, clearly show that starting from the moment when sanctions were first imposed in 2015, levels of child mortality, maternal mortality, and mortality of people with diseases like HIV and diabetes, or infections like malaria and yellow fever, have increased. That is a clear demonstration of a negative impact. The situation was not ideal beforehand, but the sudden increases of all these rates is a clear sign. The same can be said for cases of malnutrition, and the increase in poverty levels. It may have well been the case that the medical insufficiency and malnutrition persisted even before these sanctions were imposed, but it is undeniable that they have been exacerbated since the implementation of such measures, which is a clear sign of a negative humanitarian impact.

Therefore, when we speak about the application of sectoral sanctions or the freezing of assets, quite often the whole population is affected. We speak not only about the absence of luxury goods, but rather about the unavailability of food, medicine, access to medical treatment, water, electricity, gas, fuel and other basic means of subsistence. This is especially important for countries which have already been affected by armed conflicts because the infrastructure there is already depleted. The above measures affect all categories of human rights, from the rights to education, access to information and freedom of expression – because of lack of access or interruptions to electricity or internet coverage – to the right to fulfilment of basic needs such as access to drinking water, sanitation, food and medical assistance. As a result, even freedom from suffering and the right to life are affected. When people cannot guarantee their basic needs, death

rates – maternal, children, people suffering from chronic diseases, etc. – usually increase. The effects of unilateral sanctions in the course of the pandemic are very illustrative in this regard.²⁵ This is why there were repeated calls from the UN Secretary-General²⁶ and from the High Commissioner for Human Rights²⁷ to lift sanctions in the course of the pandemic because the impact of sanctions in the targeted societies was enormous. Insufficiency of medicine and vaccines, and unavailability of medical aid, was especially complicated for people in the targeted societies, who appeared to be even more vulnerable and appeared to be discriminated against in comparison to other States.

Another important negative impact is that as soon as a State starts to receive limited resources as a result of the sanctions, it naturally stops all development programmes. The resources are used to guarantee the survival and basic needs of the population. Educational, development and reconstruction projects are usually stopped, and the right to housing is also affected. All economic projects are stopped. It affects a lot of economic and social rights, including the right to work, to decent labour, to housing and to education, and it results in child labour and increasing rates of involvement in the grey economy or criminal activity, human trafficking and prostitution.

Targeted sanctions

When we speak about the negative impact of targeted sanctions, we need to take into account the variety of targets and the grounds for their listing as well as a number of other aspects. A number of individual sanctions have been imposed on individuals and companies for alleged involvement in committing international crimes. However, no attempt has ever been taken to bring such cases for consideration before the ICC or to start a case domestically on the basis of universal jurisdiction. As a result, if the international crimes really took place, their perpetrators do not face any criminal charges, but a huge group of people suffer from economic and travel limitations and are publicly announced to be international criminals without any court verdict, in violation of the presumption of innocence and with very limited opportunities to access court institutions.

A larger group of individuals and companies are directly designated for alleged wrongful activity which cannot be qualified as international crimes and

25 See A. Douhan, above note 13.

26 António Guterres, “Remarks at G-20 Virtual Summit on the COVID-19 Pandemic”, 26 March 2020, available at: www.un.org/sg/en/content/sg/speeches/2020-03-26/remarks-g-20-virtual-summit-covid-19-pandemic; António Guterres, “We Are All in This Together: Human Rights and COVID-19 Response and Recovery”, 23 April 2020, available at: www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and; “COVID-19 Shows ‘Urgent Need’ for Solidarity, UN Chief Tells Nobel Forum”, *UN News*, 11 December 2020, available at: <https://news.un.org/en/story/2020/12/1079802>. See also UNGA Res. 74/270, “Global Solidarity to Fight the Coronavirus Disease 2019 (COVID-19)”, 3 April 2020, available at: <https://undocs.org/en/A/RES/74/270>.

27 UN Human Rights, “Bachelet Calls for Easing of Sanctions to Enable Medical Systems to Fight COVID-19 and Limit Global Contagion”, 24 March 2020, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25744&LangID=E.

therefore no grounds for the exercise of universal jurisdiction exist. This clearly demonstrates an attempt to expand national or regional jurisdiction beyond national borders. At the same time, practice demonstrates no attempt to start criminal processes, even when grounds for national jurisdiction exist. I would cite here a case of six Nigerian individuals who have been sanctioned by the United States for committing cyber fraud schemes against US citizens.²⁸ Committing information technology fraud against the United States is a crime against that country and I would recommend for this situation a criminal prosecution.

When we speak about those who have been targeted by sanctions, some of them are designated for something that does not constitute a crime at all and therefore I see here serious problems as concerns the limitation of their rights in the absence of a legal ground. Moreover, they are designated without any court hearing and therefore without any fair trial guarantees, which is why, as I said, I welcome the access to justice in cases at the ECJ.

Another example of the negative impact of targeted sanctions against individuals can be seen in those sanctions imposed against judges and officials of the ICC.²⁹ In these cases, the situation becomes even more expanded because we speak about the problems of the privileges and immunities of those judges, and moreover the impediment of their access to justice. There is a communication which has been forwarded to the United States by the group of Special Procedures;³⁰ I was one of the signatories. In my opinion, the sanctions against the ICC judges and officials not only negatively affect these people in particular, but also undermine the Court's ability to bring to justice perpetrators of war crimes and crimes against humanity which have been committed in the territory of Afghanistan. Although no response has been received, I note with pleasure that the sanctions have been reversed.³¹

The final negative impact I need to mention when I speak about targeted sanctions is that they have indirect effects. Not only the designated people are affected, but also their business partners, the employees of the companies of designated people, the employees of their partner companies, the beneficiaries of humanitarian aid that has not been received because of the designation of donors, and a number of other groups who have been somehow negatively affected because of over-compliance with stringent sanctions.

One consistent criticism with regard to UCMs – as with other forms of restrictive measures – is that they may contribute to overly cautious behaviour by

28 US Department of the Treasury, “Treasury Sanctions Nigerian Cyber Actors for Targeting U.S. Businesses and Individuals”, press release, 16 June 2020, available at: <https://home.treasury.gov/news/press-releases/sm1034>.

29 Executive Order 13928, “Blocking Property of Certain Persons Associated with the International Criminal Court”, 11 June 2020, available at: www.federalregister.gov/documents/2020/06/15/2020-12953/blocking-property-of-certain-persons-associated-with-the-international-criminal-court.

30 AL USA 15/2020, 23 June 2020, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25379>.

31 US Department of State, “Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court”, press release, 2 April 2021, available at: www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/.

commercial actors, including financial institutions, in terms of which clients they accept, to whom they agree to transfer funds, etc. This practice is known as “de-risking”. In your experience, what are the risks associated with, and the consequences of, “de-risking” by the private sector, overall as well as particularly when it comes to their impact on the work of impartial humanitarian organizations? Are those risks any different, or any greater, for UCMs as opposed to UN Security Council sanctions?

Over-compliance and humanitarian organizations

The question of de-risking is often discussed in terms of over-compliance with sanctions, and indeed over-compliance is cited today as one of the major problems of the application of unilateral sanctions. I have been told that the fear of imposing sanctions is affecting human rights more than the actual unilateral sanctions themselves, and that is something I have heard equally from NGOs, private companies and individuals. As mentioned earlier, I pay a lot of attention to cooperation with NGOs because they work on the ground and are aware of the impediments in the field. I have held several meetings with them to discuss problems they have faced while working within sanctions regimes. They all unanimously referred to problems with over-compliance, and I will now mention some aspects about which they complained.

Problems of over-compliance: De-risking

The first issue is that the concept of de-risking is used by everyone today. On the one hand, it is used by the banking system, especially taking into account that the banking system is all interrelated and the majority of banks in whatever country they are placed have corresponding banks in the countries that impose one or more types of sanctions. Therefore, these banks prefer either to refrain from any bank transfers or to make it a long, cumbersome process. It has been reported to me, for example, concerning bank transfers to severely targeted societies like Syria or Venezuela, that the duration of bank transfers has moved from two days to up to 45–60 days. The costs for bank transfers have increased from 0.25–0.5% to 5–10% for one bank transfer. The same rules are applied to humanitarian organizations when they try to make these bank transfers; some of them refer to losing a tenth of the aid money they try to use for humanitarian activity within the banking sector purely because of a bank raising its transfer fees or refusing to make a transfer. Delivery companies feel that they are at risk of facing civil or criminal charges from the side of sanctioning States, and that is why they charge more. Sometimes humanitarian organizations have to work through several agents, and it is necessary to pay these agents. As a result, some humanitarian actors report that the amount of money which was initially allocated for humanitarian purposes can sometimes be twice what it could have been without all these extra charges and delays. The timely delivery of humanitarian aid, especially in societies which face serious crises or which are in conflict or

immediate post-conflict situations, is very important as it pertains to the lives of affected populations.³²

Problems of over-compliance: Donors

Another problem which has been repeatedly complained about by humanitarian organizations is the fear that donors have. Humanitarian organizations have said that donors from various countries are quite openly reluctant to provide humanitarian aid or to provide money to deliver humanitarian aid to countries which have been targeted by sanctions of the State of nationality of the donor, because these donors are very scared to be listed for providing such aid. The unwillingness of donors to be involved in the provision of humanitarian aid means that humanitarian organizations have less money for humanitarian operations. Secondly, humanitarian organizations have to do extensive reporting about the purposes and the final targets/beneficiaries of the humanitarian aid that has been delivered. Moreover, a number of humanitarian organizations have complained that the bank accounts of the organizations and of their employees have been frozen because of making these financial transfers or trying to be involved in some operations to deliver humanitarian aid. Due to over-compliance, they even refer to problems in transferring the salaries of people working in the field in the targeted societies, although these people are employees of those humanitarian organizations.

Private businesses

I should say that the same problems are faced by private businesses as well. Private businesses are usually not directly listed, but because of de-risking or over-compliance, they face problems very similar to those dealt with by humanitarian organizations. Producers often refrain from cooperating with them directly because they are from targeted societies. They have to act via several agents, including several delivery or transportation companies. They have to find ways to do several bank transfers via several banks, and they say that this is very lengthy and costly, and results in a two-, three- or four-fold price rise from the point of view of the end consumer. It is necessary to note that the people in the targeted societies are also already suffering and are usually at some level of poverty, and they need humanitarian aid and other goods to be brought over for their survival.

Practice of the UN Security Council

When I compare this situation with the practice of the UN Security Council, there is quite a bit of difference. First of all, I have not heard about cases of over-compliance with resolutions of the UN Security Council. The number of UN Security Council resolutions is not that huge, the resolutions are rather clear, and the

³² A. Douhan, above note 13.

decision-making process is not fast. It is also possible to find all of them online easily, so any actor around the world is clearly aware of the number and scope of UN Security Council sanctions. Secondly, there is no huge risk that the UN Security Council will impose secondary sanctions over those who are violating its resolutions today or tomorrow, so the process is transparent and the process is usually not that fast. When we speak about unilateral sanctions, however, the secondary sanctions – or sanctions for trading with designated companies – may be imposed within one or two days, or within the week. This is why companies feel this risk of being under sanctions constantly. The third point is that the practice of the UN Security Council since the late 1990s and early 2000s reveals that there have been repeated efforts to assess the humanitarian impact of its sanctions.³³ There are reports which have been done by UN institutions, including under the supervision of the UN Economic and Social Council, in that regard.³⁴ Unfortunately, so far there have been no reports and no assessment of the humanitarian impact of unilateral sanctions. That is why I would say that the aspect of de-risking and over-compliance exists to a certain extent when we speak about sanctions of the UN Security Council, but there is a continuous policy to minimize this negative impact and to assess the humanitarian impact of those sanctions. This is absolutely not the case for the application of unilateral sanctions today, and that is why the over-compliance problem is grave and continues to grow.

Recently, there has been a strong focus on the indirect effect that sanctions and other restrictive measures may have on civilians in conflict zones. What risks do you see arising from the use of UCMs without due regard for their wider social implications?

- 33 W. Michael Reisman and Douglas L. Stevick, “The Applicability of International Law Standards to United Nations Economic Sanctions Programmes”, *European Journal of International Law*, Vol. 9, No. 1, 1998, pp. 100–103–104, 110–111, 114–116, 120–121. A similar position is expressed in Ioana M. Petrescu, “The Humanitarian Impact of Economic Sanctions”, *Europolity*, Vol. 10, No. 2, 2016, pp. 207–210; Marc Bossuyt, “The Adverse Consequences of Economic Sanctions”, 2000. On the assessment of the humanitarian effect of UN Security Council sanctions, see also Katie King, Naz K. Modirzadeh and Dustin A. Lewis, “Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action”, Working Group Meeting Memorandum, Harvard Law School Program on International Law and Armed Conflict, Counterterrorism and Humanitarian Engagement Project, 2016, available at: <https://tinyurl.com/spb9hkbe>; Alice Debarre, “Safeguarding Humanitarian Action in Sanctions Regimes”, International Peace Institute, June 2019, available at: www.ipinst.org/wp-content/uploads/2019/06/1906_Sanctions-and-Humanitarian-Action.pdf; High-Level Review of UN Sanctions Working Group 3, *UN Sanctions: Humanitarian Aspects and Emerging Challenges*, Chairperson’s Report, 19 January 2015; Claude Bruderlein, “Coping with the Humanitarian Impact of Sanctions: An OCHA Perspective”, 2 December 1998; Marco Alberto Velásquez Ruiz, “International Law and Economic Sanctions Imposed by the United Nations’ Security Council: Legal Implications in the Ground of Economic, Social and Cultural Rights”, *Revista Colombiana de Derecho Internacional*, No. 21, 2012.
- 34 Marc Bossuyt, “The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights”, 5 April 2012, available at: www.ohchr.org/Documents/Events/WCM/MarcBossuyt_WorkshopUnilateralCoerciveSeminar.pdf; M. Bossuyt, above note 33.

Non-selectivity

Again, I will begin by citing the experiences of a humanitarian organization. This organization has stated that when military force is applied, it is usually applied against certain regions, and people there are affected. However, when unilateral sanctions are applied, they are not selective – they are applied against the entire population of the country, and that is one of the risks. I have heard some statements from NGOs that the application of economic and sectoral unilateral sanctions affects a population not less but sometimes even more than the armed conflict as such. Therefore, I believe that the first risk is the non-selectivity of unilateral sanctions, when the whole population of the country is affected by the application of these measures.

Discrimination in the delivery of humanitarian aid

The second risk is the impediment to the delivery of impartial humanitarian aid because of sanctions. This refers to situations where sanctioning countries try to apply pressure on humanitarian organizations to deliver humanitarian aid in one region and not to others. Naturally, in this situation, humanitarian organizations start to get scared of being sanctioned and listed as well.

Rebuilding societies

When we speak about the risks for civilian populations, especially in the post-COVID world or a post-conflict society, we need to speak about the problem of very narrow interpretations of humanitarian exceptions and very narrow approaches to the delivery of humanitarian aid. As we all know, when we speak about post-conflict society and post-conflict peacebuilding, the reconstruction of civilian institutions and the normal functioning of the government are very important parts of getting past any conflict.

Unfortunately, the existing situation demonstrates that unilateral sanctions impede the reconstruction progress. The situation in Syria is an ideal example when we speak about the difficulty of delivering any aid or starting any activity in the country. The imposition of sanctions, including Caesar Act sanctions,³⁵ affects reconstruction efforts there, as the sanctions are aimed against companies which are involved in these efforts. These measures impede the right to housing for people already affected by a military conflict.³⁶ Therefore, when I talk to humanitarian organizations, they say that sometimes it is possible to get licenses for delivery of life-saving equipment or life-saving goods – for example, food,

35 Caesar Syria Civilian Protection Act, Public Law 116-92, Title LXXIV, 20 December 2019; Executive Order 13894, “Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Syria”, 14 October 2019, available at: www.federalregister.gov/documents/2019/10/17/2019-22849/blocking-property-and-suspending-entry-of-certain-persons-contributing-to-the-situation-in-syria.

36 See AL USA 30/2020, 21 December 2020, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25785>.

vaccines or medicine – but it is impossible to get humanitarian exceptions for any license for any restoration or reconstruction project, and that means that the affected society cannot restore itself. The same is true for equipment and spare parts, especially those that are necessary for the rebuilding of the infrastructure of a State. Post-conflict societies are already suffering because of the destruction of water, electricity, gas and gasoline supplies and other infrastructural damage, and they need resources to rebuild and restore the society. However, you will find no humanitarian license today which provides for the possibility of buying and delivering equipment, spare parts or fuel, which can all be used to rebuild societies. Unfortunately today, all these aspects are limiting any possible aid to only foods and medicine, and in the best case, medical equipment and vaccines. Such aid does not include the restoration of electricity or water supplies, the provision of machinery, the rebuilding of the economy and so forth.

In the same vein, there has been an increasing focus on the gendered effects of sanctions. In your experience, have you seen a relationship between UCMs and gender issues, such as disparities in treatment, legal protections, access to employment, and education? If you have seen such a relationship, how do you believe that the gendered effects of UCMs can best be mitigated or prevented?

The best way to mitigate this is to start acting in accordance with international law and to apply unilateral measures only in ways that are allowed by international law. Indeed, the negative impact on women when we speak about the application of unilateral sanctions is enormous today, both in situations of pre-existing armed conflict and in the absence of armed conflict. As for my experience, women are one of the vulnerable groups of the population that face the impact of the application of UCMs.

Impacts of UCMs on women and girls: Employment, health, sexual and domestic violence

UCMs always affect the economy a lot, and as soon as the economy is affected, women will be the first ones to lose their jobs and be made to work part-time or to get lower salaries. When they lose their jobs, it results in a rise in migration. Women will also be the ones taking care of children because their spouses have to earn a living. Quite often their spouses leave the country, and women are left alone to take care of children even when their spouses have no job. Because of these two reasons, quite often women become involved in criminal activity, including prostitution and human trafficking. When we speak about these two aspects, we come to the health concerns as well. If the society is targeted by unilateral sanctions, there are serious problems with medicine and with various sorts of contraceptives. As a result, increasing cases of opportunistic infections like HIV may spread amongst these women. Moreover, in a situation of total economic crisis, because of the impact of unilateral sanctions, we speak about, for example, prostitution, all these sorts of infections, and human trafficking not only of adult women, but also of teenagers. Multiple cases have been reported to me

where 12- or 13-year-old girls have been involved in prostitution to earn their food, and we come to the issue of adolescent pregnancies, STDs, and various sorts of sexual violence and domestic violence because of that.

Unavailability of food and medical aid

In societies that are affected by unilateral sanctions, cases have been repeatedly reported to me of women ending up in bad health conditions when they become pregnant or when they deliver babies, due to a lack of proper medical care and food/nutrition. Indeed, cases have been reported of increasing rates of maternal mortality and child mortality because of unavailability of food and medical aid. Naturally, if for example pregnant women are not tested, their health is not controlled or they do not have sufficient food intake needed for the baby, this will result in a poor state of health when they deliver the baby.

Right to education

Not only are the right to work, the right to food and the right to health affected, we also speak about the violation of the right to education. Girls will be the first ones who will be withdrawn from school to assist at home or take up some menial jobs.

In light of all of this, I would say that yes, indeed, the gender perspective in the face of the application of UCMs is very important, and women are indeed very vulnerable because of all these aspects. When you look at the reports about women that have been prepared by UN organizations in the course of the pandemic, they demonstrate very similar trends: women are more affected because of unemployment, domestic violence, their health, and their access to education.³⁷ Unfortunately, in the targeted societies, they are made vulnerable twice and affected twice.

Various terms are used when it comes to the mechanisms through which some UCMs seek to allow for humanitarian activities to proceed: “humanitarian exemption”, “exception” and “derogation”. How do you see their respective scopes? Is the lack of a clearly agreed-upon understanding of these terms problematic? How would a good humanitarian carve out a UCM in your view?

The point of terminology is one of the big problems when we talk about the application of unilateral sanctions. We still do not know exactly how to classify unilateral sanctions and UCMs in a legal sense, and the same is true of all these humanitarian exceptions, exemptions and derogations. Generally speaking, I would say that the sanctioning countries or regional organizations are just using the terms which they believe are appropriate. There is no uniform interpretation or application of these terms and that is why I cannot comment on the differences between them. I would prefer to use the term “humanitarian

³⁷ UNGA Res. 75/157, “Women and Girls and the Response to the Coronavirus Disease (COVID-19)”, 16 December 2020, available at: <https://undocs.org/en/A/RES/75/157>.

exceptions” as a generic term for all these sorts of activities. Indeed, it is necessary to take into account and admit that all sanctions regimes theoretically provide for the possibility of humanitarian exceptions and for the possibility of acquiring humanitarian licenses. There are repeated attempts to provide some sort of guidance on how these humanitarian exception licenses can be received and what States or companies or humanitarian actors should do in this sphere. Unfortunately, in practice, all this guidance is virtually non-applicable, and that is the experience of humanitarian organizations I have talked to, as well as the experience of States subject to unilateral sanctions.

Multi-layered sanctions regimes

The first reason for this is that we have multi-layered sanctions regimes and therefore companies and humanitarian actors do not know what humanitarian licenses they should get. For example, when they get a humanitarian licence from the EU, they may still be sanctioned by the United States because they did not get a licence from the United States. At the same time, if we look at the guidance developed by the EU in November 2020 on delivery of humanitarian aid in relation to the COVID pandemic,³⁸ one of the questions asked in this guidance is whether EU companies should observe or act in conformity with someone else’s sanctions. In response, the guidance mentions that EU companies should only observe the EU sanctions regime. In theory this sounds easy, but in practice, banks, donors, business partners, transferors and delivery agencies will take into account all sanctions regimes, and that is why this is one of the problems: the multi-layered character of sanctions and the multi-layered character of getting licenses.

Difficulty in obtaining a license

The second point is that it is not so easy to get a license. You need to know where to go, what sanctions exist, where to apply and how to get the license. In practice, humanitarian actors have to consult compliance companies and therefore have to pay for their services. Quite often it is expensive, and that is why we get to the point of de-risking. We do not know which sanctions regimes exactly exist, and that is why the services are so expensive; as a result, many humanitarian agents or private companies simply prefer not to take the risk. Legal norms applicable to humanitarian exception licenses are pretty confusing and complicated, and it is necessary to know where and how to apply. Humanitarian organizations have reported to me that organizations with legal offices in their headquarters can afford to do this, but the small NGOs cannot as they do not have the resources or workforce, and are not aware of the mechanisms.

38 European Commission, above note 21.

Lengthy application processes

The third problem that exists in this sphere is that usually the application is very lengthy. When you speak about delivery of humanitarian aid to societies where people are malnourished and live in poverty or societies which have been destroyed by armed conflict, you need to deliver humanitarian aid fast to help people survive. Getting licenses may take several months – two, three, sometimes four – as stated by humanitarian actors. Quite often the offices which are responsible for providing the licenses do not reply, so the companies do not even know whether they have been heard or what they should do afterward. This is why, for example, some non-governmental humanitarian organizations have reported to me that they prefer to try to transfer money rather than to try to get licenses for delivery of humanitarian goods, because there are now fewer restrictions concerning transfers of money. However, this means that no new goods are coming to a targeted society. Moreover, this money may be used in the shadow economy, which increases the risk for humanitarian actors and reduces the positive humanitarian effort in this sphere.

Burden of proof: Pure humanitarian character of delivery of humanitarian goods

The fourth point is that the sanctioning States place a burden of proof of the “pure humanitarian character” of the delivery of humanitarian aid on humanitarian actors. They must guarantee that all humanitarian goods will not be used for any activity which is not supported by the sanctioning States. Naturally, humanitarian actors feel they are at risk, and that is why they try to minimize such activity. There is a very narrow interpretation of pure humanitarian delivery of goods. I will cite again the guidance developed by the EU in November 2020. The delivery of medical goods under some situations can be used in targeted societies for non-humanitarian purposes, such as the risk of humanitarian goods going into the black market. There may be corruption or other criminal activity involved with these goods, and all these risks lay on the humanitarian actor delivering them.³⁹ The licenses that can be received are narrow in their very nature and refer only to medicine and food. Quite often, a lot of medical goods are interpreted as dual-use goods, including some medical equipment. It has been reported, for example, that when it comes to the delivery of humanitarian aid to Syria, even toothpaste is considered as being a dual-use good and is limited for the delivery of humanitarian aid.⁴⁰

³⁹ *Ibid.*

⁴⁰ Sibylle Bauer, “For the Bathroom or the Missile Factory? Why Dual-Use Trade Controls Matter”, Stockholm International Peace Research Institute, 12 December 2012, available at: www.sipri.org/commentary/essay/2012/bathroom-or-missile-factory-why-dual-use-trade-controls-matter.

December 2020 guidance on delivery of humanitarian aid

Over-compliance because of all these risks is enormous today. Due to all these aspects, after consultations with humanitarian organizations, I developed a guidance on the delivery of humanitarian aid which was published in December 2020, and in which I tried to ask sanctioning States to withdraw this enormous burden of proof from humanitarian agents because they are trying to help and are trying to bring some relief to people who are suffering.⁴¹

*In your first report to the UN General Assembly,⁴² you mentioned the importance of humanitarian exemptions, not simply for specific products, but also for the supply chains of humanitarian organizations. Could you expand on this issue, and what impact it has on field operations? How can States most effectively minimize the risks posed by incomplete exemptions, or otherwise avoid rendering their humanitarian carve-out processes, to use your words, “rather fictitious”?*⁴³

The whole supply chain of humanitarian aid delivery is affected by the application of unilateral sanctions, starting from donors of humanitarian aid up to the final beneficiaries. Therefore, in my opinion, States should take into account humanitarian concerns when drafting humanitarian exception clauses. In my opinion, the most important aspects are to not apply secondary sanctions to humanitarian agents and donors when they do their humanitarian work; to withdraw the burden of proof of humanitarian purposes from humanitarian actors because it makes their work complicated; and to provide for the possibility of doing reconstruction work in post-conflict or targeted societies in order to enable the governments to do their duty to guarantee the well-being of their populations, because if there are no resources, how can a government be expected to do it alone? There is a need for equipment, spare parts, medical equipment, medicine, vaccines etc. Also, I believe that it is important to guarantee due bureaucratic process from the side of humanitarian organizations, because if you look at the guidance and explanations existing in the sanctioning States concerning the issuing of humanitarian licenses, they usually state that humanitarian actors need to find their own way—where to go, whom to ask, what documents to submit, and so on and so forth.⁴⁴ This is why we speak about the feasibility of the processes: they should be made as simple and as clear as possible so that they can be used even by the smallest humanitarian organizations, without the need for huge teams of lawyers.

41 UN Human Rights, “UN Expert Issues Sanctions Guidance Amid COVID-19 Aid Concerns”, 10 December 2020, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26589&LangID=E.

42 A. Douhan, above note 13, paras 91–92 (on exempted medical supplies and non-exempted transportation methods).

43 A. Douhan, above note 6, para. 60.

44 European Commission, above note 21.

In the same report, you also noted that while States generally feel their legal processes are appropriate, derogation processes can be so challenging as to go unused by commercial and humanitarian actors.⁴⁵ What challenges have current laws presented? In the end, is a standing exemption for impartial humanitarian activities the only viable option, and how politically achievable do you believe this to be?

Indeed, countries differ a lot when they try to describe the idea of humanitarian exceptions and the delivery of humanitarian aid. Quite often, the sanctioning countries say that they are the main providers of humanitarian aid to the targeted societies and that the mechanism of humanitarian exception licenses in their documents is sufficient and effective. From the other side, the countries under sanctions say that these mechanisms are insufficient, ineffective, lengthy, costly and unhelpful. Humanitarian organizations support this point and echo the ineptness of the current process.

Delivery of humanitarian aid: Assistance from the UN

The only exception concerning the delivery of humanitarian aid that works really well, from my experience, is when it is done with the assistance of the organizations in the UN system. Usually both the targeted societies and the sanctioning countries are ready to cooperate with these organizations, which try to help deliver humanitarian aid and which monitor how this humanitarian aid is distributed in the country.

A new approach to the delivery of humanitarian aid

Unfortunately, I need to mention the following fact when it comes to the delivery of humanitarian aid: governments and opposition groups as well as sanctioning States may disagree about the control over the distribution of this aid. Humanitarian aid as well as access to food and medicine may be used as an instrument of political control, and that is why I try to express in all my reports the main idea that humanitarian perspectives should be of primary importance when we discuss the delivery of humanitarian aid. The life of every individual is the highest value. It must be treated with care. Unfortunately, firstly, the existing humanitarian exceptions mechanism and existing delivery of humanitarian aid are not sufficient. Secondly, they cover only the survival of the population. If you do not allow the population and the country to rebuild, you will have to deliver humanitarian aid all the time afterwards to guarantee survival. That is why, in my opinion, the concept of development is very important. The purpose should be to help people right now and to help the country to rebuild and to be able to guarantee its own means for the future. It is very hard to imagine that the global community and any country will be able to deliver humanitarian aid to all

⁴⁵ A. Douhan, above note 13, paras 87–89.

countries in need for undetermined periods—especially now with the ongoing pandemic, and when according to all reports, the world is facing a major economic crisis, which we are still battling with.

That is also why, in my opinion, it is important to change the very idea of the delivery of humanitarian aid, and our approach to it. First, humanitarian concerns should prevail. Second, there should be no discrimination in access to humanitarian aid. Third, delivery of humanitarian aid and humanitarian assistance should not be used as a political tool. When we speak about the survival of a population, we need to care about the lives of people first, and then about political concerns afterwards. Fourth, there should be a clear understanding of the procedure for obtaining humanitarian exceptions. Fifth, sanctioning countries should do their best to avoid, or at least minimize, over-compliance. This brings me back to a previous point: that no secondary sanctions should be applied.

One area of importance for humanitarian actors, including the ICRC, is the humanitarian–development nexus. Increasingly, we see that humanitarian organizations receive funding from development actors. In turn, the latter precondition such funding with compliance with applicable UCMs. What risks do you see resulting from this requirement for impartial humanitarian actors in terms of their ability to comply with the principles traditionally governing their activities?

Limited resources

This is a very serious question and problem not only for the ICRC but also for other humanitarian organizations. I have mentioned some of the risks already, but generally speaking, firstly, a most important issue is the problem of limited resources because of a need to comply with sanctions imposed and because of the fear of coming under secondary sanctions as well.

Discrimination

Secondly, there is a risk of discrimination. Attempts to bring political concerns and political interests into the work of humanitarian organizations are inadmissible in my opinion. Humanitarian organizations do not have any political purpose in their functioning. They try to bring humanitarian relief to assist people—people affected either by conflict or by economic or humanitarian crises, or by unilateral sanctions as such. Therefore, I believe that the principle of non-discrimination which is applied in the course of military conflict should also be applied to all humanitarian activity. Every person deserves to have their right to food and to medical treatment, and deserves to enjoy the right to life as well as the right to development. That is why, unfortunately, discrimination is a serious problem which I hope will be discussed at the level of the United Nations. It is not acceptable to discriminate against people and to violate their basic human rights

in order to achieve certain common goods, because unfortunately people are suffering because of this.

Limiting the resources of the government

The third risk is that because of all these limitations, political actors may agree to the minimal humanitarian aid but not to reconstruction processes, and that becomes especially evident when we speak about the application of unilateral sanctions. Officially, unilateral sanctions are intended to limit the resources of the targeted government. In an absence or insufficiency of resources, governments are not able to maintain traditional social and development activities. All cooperation stops, all sorts of assistance to the government stops, but who is suffering at the very end? From my experience, it is the people of the country that are affected the most due to a lack of resources for their subsistence.

From a practical perspective, for example, let us imagine a situation where humanitarian aid has already been delivered to the country. How will it be distributed? Considering the constraints in transportation, it is practically only viable to use the supply chains of the government for distribution of these humanitarian goods. That is why I reiterate that humanitarian concerns must be placed above any political motivation as it pertains to the lives of people.

We could speak about different mechanisms. For example, in my preliminary assessment report concerning the situation in Venezuela,⁴⁶ one of my recommendations was that the government should cooperate with the agencies of the UN to guarantee the fair distribution of the goods which are delivered as a sort of humanitarian aid with the assistance of the UN agencies, as well as humanitarian goods which I hope could be bought using the frozen assets in various banks. In this case, monitoring from the side of international agencies can really be useful, but I can hardly imagine any situation where the goods are delivered and fairly distributed over the whole country without any cooperation and involvement by the government.

Is there anything else you would like to share with our readers?

It is high time to stop speaking about the application of unilateral sanctions as something common and as the means to make someone bad become good – that is definitely not the case. Any discourse about unilateral sanctions should stop being assessed in black-and-white terms. This is not about policy; rather, it is about law, human rights, and human lives, and these aspects should always be taken into account before any unilateral measures are taken.

46 UN Human Rights, “Preliminary Findings of the Visit to the Bolivarian Republic of Venezuela by the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights”, 12 February 2012, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26747&LangID=E.

The UN Security Council

I would also like to reiterate the practice concerning the sanctions of the UN Security Council in the 1990s–2000s. The sanctions taken by the Security Council in that period were absolutely legal. At the same time, it appeared that despite their legality, their humanitarian impact was enormous, and as a result the Security Council changed its policy towards sanctions in order to minimize this impact.

Bringing international law back into the discussion

When we speak about the application of unilateral sanctions, the majority of measures are not in conformity with international law. Moreover, being different from the practice of the UN Security Council, a humanitarian assessment of the impact is usually not done, or the impact is politically assessed. That is why my recommendations are to bring international law back into the discussion and to use international law as a means for cooperation between States and for settlement of any differences that States may have between each other. Humanitarian assessments of unilateral measures must be carried out, and the so-called humanitarian precautions principle should be considered before these measures are taken.

The last point is that in my opinion, States should not sacrifice the existing legal mechanisms to bring those who are allegedly guilty to justice or to settle any disputes they have with other States. Here, I refer to the possibility of using various competent international institutions as a means to help address all these problems. I am very happy to see that there are an increasing number of cases in the International Court of Justice relevant to sanctions: I speak about disputes between Qatar and four other States,⁴⁷ and about disputes concerning the interpretation and application of the amity treaty between Iran and the United States.⁴⁸ I would also highlight the referrals which have been brought against⁴⁹ and by Venezuela⁵⁰ to the International Criminal Court, and the disputes that are brought to the World Trade Organization. These are the competent bodies which can help in settlement and in identifying the legality of the activity, can help to bring international law back into the discussion, and can help intermediately to protect and safeguard human rights.

47 International Court of Justice, “Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)”, available at: www.icj-cij.org/en/case/173.

48 International Court of Justice, “Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)”, available at: www.icj-cij.org/en/case/175.

49 See: www.icc-cpi.int/itemsDocuments/180925-otp-referral-venezuela_ENG.pdf.

50 See: www.icc-cpi.int/itemsDocuments/200212-venezuela-referral.pdf.