

Mandates of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights; the Special Rapporteur in the field of cultural rights; the Special Rapporteur on the right to development and the Independent Expert on human rights and international solidarity

Ref.: AL OTH 40/2022
(Please use this reference in your reply)

22 June 2022

Dear Mr. de Boer,

We have the honour to address you in our capacities as Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights; Special Rapporteur in the field of cultural rights; Special Rapporteur on the right to development and Independent Expert on human rights and international solidarity, pursuant to Human Rights Council resolutions 45/5, 46/9, 42/23 and 44/11.

We are independent human rights experts appointed and mandated by the United Nations Human Rights Council to report and advise on human rights issues from a thematic or country-specific perspective. We are part of the special procedures system of the United Nations, which has 56 thematic and country mandates on a broad range of human rights issues. We are sending this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information we have received. Special Procedures mechanisms can intervene directly with Governments and other stakeholders (including companies) on allegations of abuses of human rights that come within their mandates by means of letters, which include urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned actors identifying facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards.

In this connection, we would like to bring to your attention information we have received concerning serious challenges faced by scholars and authors in accessing scientific publication processes due to the imposed restrictions under US sanctions and regulations on publishing and other activities and their interpretation by the United States Office of Foreign Assets Control.

According to the information received:

A number of international publishing companies hosting a significant number of scientific journals have included in their websites sections referring to submissions from authors based in sanctioned countries and territories.

Several of these clauses, which are included in the ethical integrity and code of conduct sections of the publishing companies' websites, merely encourage the journals' editors to treat with special caution any submission emanating from a sanctioned country and refer them to additional legal advice for any further assessment, without providing any detailed guidance or clarification.

Others, make specific reference to the interpretative guidance issued on 28 October 2016 by the United States Office of Foreign Assets Control (OFAC) on the publishing of general licenses and certain exemptions found in the Iranian Transactions and Sanctions Regulations (ITSR), 31 C.F.R. §§ 560.210, 560.538, the Cuban Assets Control Regulations (CACR), 31 C.F.R. §§ 515.206, 515.577, the Sudanese Sanctions Regulations (SSR), 31 C.F.R. §§ 538.212, 538.529, and the Syrian Sanctions Regulations (SySR), 31 C.F.R. §§ 542.211, 542.532.

According to the OFAC interpretative guidance, if the authors are located in a sanctioned country and they are not Specially Designated Nationals, then the editing and publication of their articles or submissions may be "generally authorised" only when a) the authors act in their "personal capacity" and "not as an official representative or otherwise on behalf of a sanctioned government"; b) the authors act on behalf an "employing entity" having research and/or teaching as the "primary function", even if the entity "may be characterisable as an agency or instrumentality of a sanctioned government".

In addition, the guidance refers to activities that "may qualify as exempt" and be authorised, because "they do not involve the substantive or artistic alteration or enhancement of informational materials, or the provision of marketing and business consulting services to a sanctioned person". This may be the case of articles submitted by authors from sanctioned countries, including sanctioned government officials, representing entities whose primary function is not research and/or teaching. For these articles or submissions, the reviewers or publishers will be authorised to publish them, but without substantive editing prior to their publication.

However, in spite of the above-mentioned permissible criteria, the OFAC guidance clearly stipulates that the assessment of the author's affiliation (whether or not the author is employed by a sanctioned government) and the employing institution's primary function (whether or not the employing institution is a "research institution") is the responsibility of the "person relying on a publishing general license", thus imposing an additional burden on publishing companies and journals' editors, who may not have the adequate means to conduct a thorough due diligence procedure.

The complexity of the imposed regulations and authorised activities in the scientific publication processes, and the inability to clearly distinguish between publications in "personal capacity" and those that may be supported by sanctioned countries' public institutions including public universities or research establishments, and public funds, could lead publishing companies, editors and reviewers to summarily reject submissions from sanctioned countries for fear of repercussions including personal liability. In certain cases, the rejection (even to start editorial process) responses do not even provide any explanation to the concerned authors, but merely referring in broad terms

to the publishing company's obligation to comply with laws and regulations applied by certain countries.

While we do not wish to prejudge the accuracy of the above-mentioned alleged facts, we express our serious concern at the extension and application of sanction regimes and restrictions in the area of scientific and academic research and publishing and subjecting them to the complex and often opaque licensing procedures, thus preventing the free flow of information and ideas. Scientific and academic research and the dissemination of its findings should not be conditioned by decisions falling in realms outside of the scientific and academic community itself and should not be contingent upon political decisions and designations of individuals or entities.

Furthermore, we note with concern that such regulations and their direct and indirect adverse effects may constitute a serious threat to international human rights norms and standards, including the rights to freedom of thought and freedom of expression enshrined in articles 18 and 19 of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), the right to education including academic freedom, the freedom indispensable for scientific research and creative activity and the right of everyone to participate in cultural life and share in scientific advancement and its benefits, provided in articles 26 and 27 of the UDHR and 13 and 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). They may also contravene the fundamental and universal principle of non-discrimination on any grounds, including national or social origin, political or other opinion, as well as any other status.

We are also concerned at the potential impact of complex, broadly-worded and vague regulations on the behaviour of publishing companies, editors and reviewers, who out of fear of enforcement, repercussions, as well as "reputational damage", may feel compelled to overcomply to otherwise authorised activities and would opt for a complete disengagement and summary rejection of submissions by authors from sanctioned countries.

Notwithstanding these pressures, we wish to recall the responsibilities of companies and businesses in acting in a manner that does not violate human rights, independently of the states' ability or willingness to fulfil their duty in this regard. This corporate responsibility is clearly stipulated in international human rights instruments such as the United Nations Guiding Principles on Business and Human Rights (Guiding Principles).¹ They call on all businesses to avoid infringing on the human rights of others and to address adverse human rights impacts in which they are involved (Guiding Principle 11). In connection with this, all companies should have in place "policies and processes appropriate to their size and circumstances," including a "human rights due diligence policy to identify, prevent, mitigate and account for how they address their impacts on human rights" (Guiding Principle 15). Business enterprises also have the responsibility to "(a)void causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur" (Guiding Principle 13a), and to "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" (Guiding Principle 13b). Moreover, companies are expected to use their leverage to "effect change in the wrongful practices of an entity that causes a harm"

¹ https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

(Commentary to Guiding Principle 19).

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide any comment you may have with regard to the OFAC interpretation of the regulations and exemptions on publishing activities, and how these regulations affect your company in its review and publishing procedures involving authors from sanctioned countries and territories.
3. Please provide information on the measures undertaken by your company to eliminate overcompliance, including by providing all necessary information to journals' editorial boards and reviewers, as well as the necessary assistance and guidance in order to prevent cases of summary rejection of otherwise authorised publications.
4. Please provide information on any steps undertaken to further clarify the existing regulatory framework with OFAC and other US competent authorities. If available, please provide information on the outcome of such initiatives.

This communication and any response received from your company will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Although we may publicly express our concerns in the future about this matter, we are committed to give priority to what we regard as an indispensable dialogue on this issue of concern - in the spirit of independence, impartiality, objectivity that inspires and guides our mandates and work. We believe that the matter raised in this communication merits serious attention and warrants discussion and clarification. Any public expression on our part would indicate that we have been in contact with your company to clarify the issue/s in question.

Please accept, Mr. de Boer, the assurances of our highest consideration.

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

Alexandra Xanthaki
Special Rapporteur in the field of cultural rights

Saad Alfarargi
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Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your attention to the relevant international norms and standards that are applicable to the issues brought forth by the situation above.

We would like to refer to the International Covenant on Civil and Political Rights (ICCPR and in particular articles 2, 18, 19, and 26, which provide for the principle of non-discrimination as well as the rights to freedom of thought and freedom of expression.

Furthermore, we wish to refer to the Universal Declaration of Human Rights, which in articles 26 and 27 as well as articles 13 and 15 of the International Covenant on Economic, Social and Cultural (ICESCR) which recognize the right of everyone to education, to freely take part in cultural life – the freedom indispensable for scientific research and creative activity – and to enjoy and share the benefits of scientific progress and its applications.

The UN Committee on Economic, Social and Cultural Rights has stated that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students, and the freedom of the members of the academic community, individually or collectively, to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation and writing. It has also found that the enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds (see CESCR General Comment No. 13, paras 38 and 39).

With regard to article 15 of the ICESCR, the Committee has endorsed UNESCO's definition of the term "science", which is the enterprise whereby humankind makes an organised attempt, by means of the objective study of the observed phenomena and its validation through sharing of findings and data through peer review... with the opportunity of using, to its own advantage, understand processes and phenomena in nature and society. And it understands the "benefits" of science not only as the material results, but also as the development and dissemination of the knowledge itself for the purpose of forming critical and responsible individuals to fully participate in society. Furthermore, the Committee includes in the term "freedom of research", the freedom of researchers to cooperate with other researchers, both nationally and internationally, and their freedom to share scientific data and analyses (see E/C.12/GC/25).

The UNESCO Convention against discrimination in education of 1960 in art 5(1a) stipulates that 'Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace'.

We additionally call your attention to the UN Guiding Principles on Business and Human Rights, which apply to all states and companies and recognizes “(t)he role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights”.

Guiding Principle 11 calls on companies to “avoid infringing on the human rights of others and (...) address adverse human rights impacts with which they are involved.” It also says companies “should not undermine States’ abilities to meet their own human rights obligations”.

We refer to Guiding Principle 13, which states that “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”.

In its commentary to Guiding Principle 13, the UN Office of the High Commissioner of Human Rights notes that a company’s activities are understood to include both actions and omissions, and its business relationships “are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services”.

We call your attention to Guiding Principle 15, which calls on each company to have in place a policy and a process to meet its responsibility to respect human rights. It should also have a human rights due diligence process to identify, prevent, mitigate and account for how it addresses the impact its activities have on human rights, and a remediation process to correct any adverse human rights impact it causes or to which it contributes. Guiding Principle 22 states that a company which has, through its due diligence process, identified a human rights problem that it has caused or contributed to, should provide for or cooperate in the problem’s remediation.

We further refer to Guiding Principle 17, which details how human rights due diligence should be carried out: “The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed,” and “should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships”.

The commentary to this principle states that “(h)uman rights due diligence should be initiated as early as possible” when a company engages in an action. It also notes that “(q)uestions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties”.

We point out that Guiding Principle 18 calls on each company to “identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should: (a) Draw on internal and/or independent external human rights expertise; (b) Involve meaningful consultation with potentially affected

groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation”.

The commentary to Guiding Principle 18 states that “(t)he purpose is to understand the specific impacts on specific people, given a specific context of operations. Typically, this includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified.” It further states that “(i)n this process, business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability (...)”.

We also refer to Guiding Principle 19, which calls on companies to take appropriate action to prevent and mitigate adverse human rights impacts. The commentary to this principle states that if a company finds it “contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm”.

The commentary to Guiding Principle 19 further states that “(i)f the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors.” It also notes that if the company lacks the leverage to prevent or mitigate adverse impacts and cannot increase its leverage, it should consider ending the relationship with the entity involved, although if the company retains the relationship as essential to its business, “it should be able to demonstrate its own ongoing efforts to mitigate the impact (of any harm to human rights) and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection”.

We also would like to refer to Article 1 of the Declaration on the Right to Development states that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. The right to development, as established in the Declaration, is an equal right among all universal, inalienable, interrelated, interdependent and indivisible human rights. The right to science, which has been defined by the Committee on Economic, Social and Cultural Rights to signify a right to participate in and to enjoy the benefits of scientific progress and its applications, has a direct impact on the ability of persons and peoples to participate in multiple aspects of all aspects of development. The Declaration on the right to development calls on States to take all necessary measures for the realization of the right to development and to ensure equality of opportunity for all in their access to basic resources, education, health, food, housing and employment (art. 8).