Mandates of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights and the Independent expert on the promotion of a democratic and equitable international order

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(Please use this reference in your reply)

24 February 2025

Excellency,

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 and Independent expert on the promotion of a democratic and equitable international order, pursuant to Human Rights Council resolutions 52/13 and 57/7.

In this connection, we would like to bring to the attention of your Excellency information we have received concerning **the reported use of the rebuttable presumption of wrongdoing or presumption of guilt, the de facto reversal of the burden of proof, and the low evidentiary threshold as a recurrent practice in sanctions designation cases, as well as in sanctions review and de-listing procedures.** These issues has been briefly addressed by the Special Rapporteur on the negative impact of unilateral coercive measures in her thematic report to the 79th session of the UN General Assembly on "Access to justice in the face of unilateral sanctions and over-compliance" (A/79/183).

According to the information received:

The concept of "rebuttable presumption of wrongdoing" and the reversal of the burden of proof can be found in sanctions laws and regulations in different jurisdictions.

The EU Council Regulation 2022/1998 of 7 December 2022 concerning restrictive measures against serious human rights violations and abuses provides that the Council of the European Union is to communicate to the targeted person its decision to impose restrictive measures as well as the reason/grounds for such designation. This means that the targeted person is informed only after the decision was made, and therefore sanctions-related restrictions are applied based on a presumption of a wrongdoing. In addition, in certain cases the reported grounds for the designation are broad without detailed explanation or assessment of the evidence, and while in others, such explanation or assessment may not even be included in the Annexes of the relevant regulations. The model notice attached to the Sanctions Guidelines issued by the General Secretariat of the Council appears to be a brief letter informing the concerned person about the designation decision without including a dedicated section where the grounds for such designation could be detailed and disclosed. It is also reported that some of the grounds of designations may have been based or substantiated through public domain searches from questionable sources, without meeting the standards and quality of proof (i.e. reliable evidence, beyond reasonable doubt).

Permanent Delegation of the European Union

The EU Council reviews its restrictive measures lists at least once every 12 months and amends them by either adding or removing individuals or entities, on the basis of new submitted information. The submitted new information may include subsequent changes of facts or additional evidence. In this context, article 14(2) of the EU Council Regulation 2022/1998 states that the designated person is provided "with an opportunity to present observations", which are to trigger the review of the designation, ex post facto. The person concerned is also provided with the opportunity to take additional steps by legally challenging the sanctions designation before the national courts of EU member states, as well as the General Court of First Instance of the European Union. In certain cases, the General Court decided to annul the Council's designations as they were found to be implemented based on an erroneous assessment, including evidence not meeting the European case law standards of proof.

Under the EU framework of restrictive measures, there is also a "rebuttable presumption" with regards to the control and ownership of non-listed legal persons or entities by a designated person or entity. This is based on the presumption that the making available of funds or economic resources to non-listed persons or entities which are "owned" or "controlled" by a listed person or entity will in principle be considered as making them indirectly available to the listed person or entity. The criteria for ownership and control are enunciated in the EU Council Regulation 2580/2001 and also included in the updated Sanctions Guidelines by the General Secretariat of the EU Council. The EU allows the presumption of ownership and control to be rebutted on a case-by-case basis if the person or entity subject to ownership or control can demonstrate that its assets are outside the control of the listed person or entity, and that any resources made available to it would not reach or benefit the listed person or entity.

Similar issues are observed in the EU's latest Directive on Asset Recovery and Confiscation 2024/1260, which was adopted in April 2024, along with the Directive on the Definition of Criminal Offences and Penalties for the Violation of Union Restrictive Measures 2024/1224. In the context of the EU's restrictive measures framework, the Directive on Asset Recovery and Confiscation empowers asset recovery offices in EU member states to trace and identify property of persons and entities subject to EU's restrictive measures and requires these offices to exercise due diligence, including with regards to the respect of fundamental rights, when they assess compliance with the principles of necessity and proportionality. The Directive provides for the freezing of assets of individuals or entities presumed to violate EU restrictive measures, which could be used as evidence in eventual criminal proceedings towards confiscation as the final deprivation of property. The administrative measure of asset freeze is undertaken on the presumption of the person's wrongdoing/commission of a criminal act, which could only be challenged during the criminal judicial procedure taking place after the asset freeze. However, in paragraph 46 and its preamble, the Directive recognizes that the freezing and confiscation orders "substantially affect the rights of the suspected and accused persons, and in certain cases the rights of third parties or other

persons who are not being prosecuted" and calls for "specific safeguards and judicial remedies" to guarantee the protection of fundamental rights of such persons in line with right to a fair trial, the right to an effective remedy and the presumption of innocence.

A presumption of guilt is any presumption that a person is guilty of a criminal offense until proven to be innocent. Similarly, in sanctions-related cases, the application of the presumption of wrongdoing imposes an obligation to the concerned individual or entity to prove that an act or conduct was not wrong and should not be subject of sanctions, which are often similar to criminal penalties in terms of severity. It is a reversal of the principle of the presumption of innocence, which is the cornerstone of due process and minimum guarantees of fairness, whereby a person charged with a criminal offense is presumed innocent unless found to be guilty according to law, and which provides that no guilt can be presumed until the charge is proved beyond reasonable doubt.

However, it is often the case that decisions on designations and listings of primary targets of unilateral sanctions (individuals or entities), or of those who have any nexus with these primary targets, are taken and enforced extraterritorially, without prior judicial review or ruling, on a presumption of guilt with regards to a perceived or reported violation of either domestic or international law.

In addition, when a designated person or entity wishes to appeal against the designation and the consequent sanctions-related restrictions and penalties, the review of the case and the possible decision for delisting require the submission by the designated person or entity of evidence against the presumed wrongdoing or violation. However, during this process the concerned designated/listed person or entity may not have access to evidence or facts motivating and substantiating the decision of the designation/listing in the first place. This constitutes a reversal of the burden of proof in the review or appeal process of the designation/listing, which itself may have been taken and enforced based on a lower evidentiary threshold than that of "beyond a reasonable doubt", given that it is implemented outside any formal judicial procedure.

Such practice demonstrates certain commonalities with the practice of "non-conviction-based proceedings" (NCBs) under several jurisdictions, including in cases of forfeiture, seizure and confiscation. NCBs can be undertaken independently of and prior to any eventual criminal proceeding against the alleged offender; the guilt of the alleged offender does not have to be examined; they are reportedly applied also in circumstances where a conviction is not feasible; they apply a reversed burden of proof; and, the presumption of innocence cannot be invoked. NCBs in cases of forfeiture, seizure and confiscation bear similarities with the administrative process of asset freezes and commodity seizures enforced as a result of the sanctions designations of individuals or entities, and both reportedly feature a lower standard of proof, such as balance of probabilities as opposed to the criminal standard of beyond reasonable doubt.

While we do not wish to prejudge the accuracy of the received information, we wish to express our concern at the reported use of the concept of rebuttable presumption of wrongdoing and the de facto reversal of the burden of proof in sanctions-related cases, as described above. We are concerned that these reported practices may undermine fundamental principles of the presumption of innocence, due process and fairness enshrined in international law and relevant international human rights instruments. It is also of concern that although sanctions-related restrictions and prohibitions are imposed through administrative procedures, outside formal judicial processes, they appear to be commensurate with criminal or civil penalties. In this context, decisions on and enforcement of such measures appear not to abide by the same due process standards, including the respect of the presumption of innocence, and instead allow for extensive deference to the authorities undertaking such actions, if challenged.

Of particular concern is also the reported low evidentiary threshold to trigger and substantiate the sanctions designations of targeted persons and entities, which is significantly lower than criminal standard of "beyond reasonable doubt", even though the enforcement of restrictions and penalties in sanctions-related matters are commensurate with criminal or civil penalties.

In addition, the principle of fairness appears to be undermined by the reported practice of notifying the targeted persons and entities of their designations only after the designation has been confirmed.

It is generally agreed in criminal, administrative and any other public law processes that the burden of proof of the wrongfulness of a behavior lies with the claimant, which in the case of sanctions is the competent state authority. Targeted individuals or entities cannot be obliged to prove that they behaved in a compliant manner or in good faith, and therefore the burden of proof should not be shifted.

In essence, the presumption of guilt and the reversal of burden of proof, which are deviations from the standards and principles of due process and fair trial, are reportedly used in sanctions-related procedures which notwithstanding their administrative nature they impose penalties whose severity and impact are similar to criminal or civil penalties. In addition, the observed adverse effects of such practices on the rights of targeted persons are further compounded by arbitrary treatment and restrictions in the name of national security and foreign policy considerations and priorities, including obstacles in accessing evidence and relevant information motivating the designations, delays in examining requests for review of the designations and removal from sanctions lists, as well as absence of impartiality in judicial procedures examining the appeal of the targeted person or entity.

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 detailed information on the use of rebuttable presumption of wrongdoing in sanctions-related procedures, with specific reference to relevant regulations and decisions, and please explain how this practice is compatible with international human rights law, including the standards of due process.

3. Please provide detailed information on the practice of the reversal of the burden of proof in sanctions-related cases, with specific references to relevant regulations and decisions and please explain again how this practice is compatible with international human rights law, including the standards of due process.

4. Please provide detailed information on how a listed persons or entity can appeal the sanctions designation, and what judicial means are available to challenge the legality of such designation and the veracity of the presented evidence.

This communication and any response received from your Excellency 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.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency to clarify the issue/s in question.

Please be informed that a letter on this subject matter has been also sent to the Government of the United States of America.

Please accept, Excellency, the assurances of our highest consideration.

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

George Katrougalos
Independent expert on the promotion of a democratic and equitable international order

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, we would like to refer to the relevant international norms and standards that are applicable to the issues brought forth by the situation described. We reiterate our observation that sanctions-related procedures and decisions are of an executive and administrative nature. They, however, impose penalties and restrictions which are commensurate with criminal or civil penalties which are enforced following formal conviction through judicial proceedings. In this context, we wish to highlight specifically the international standards on due process and fair trial guarantees enshrined in the international human rights instruments, in particular the International Covenant on Civil and Political Rights (ICCPR).

Article 14(1) of the ICCPR sets out a general guarantee of equality before courts and tribunals and the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law.

In addition, article 14 of the ICCPR provides a set of contain procedural guarantees that must be made available to persons charged with a criminal offence, including presumption of innocence; the right to be promptly and in detail informed about the nature and cause of the charge; to have adequate facilities for the preparation of the defence; to communicate with counsel of his own choosing; to be tried without undue delay; and the right of appeal. These guarantees must be respected by State parties, regardless of their legal traditions and their domestic law.

In its general comment No. 32 (2007), the Human Rights Committee states that deviating from the fundamental principles of fair trial, including presumption of innocence, is prohibited at all times, including in circumstances of emergency. Furthermore, it states that access to administration of justice must be effectively guaranteed to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status.

Similarly, the right to equality before courts and tribunals also ensure equality of arms, which provides that each party is given equal opportunity to contest all the arguments and evidence adduced by the other party (para. 13).

General comment No. 32 refers also to the notion of fair trial which includes the guarantee of fairness of proceedings, which entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and whatever motive (para. 25), as well as the avoidance of undue delays (para. 27).

Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has

been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused (para. 30).

The right to be informed of the charge "promptly" requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law**,** or the individual is publicly named as such (para. 31).

Article 14 3(b) of ICCPR provides that accused persons must have adequate time and facilities for the preparation of their defense and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms. According to Human Rights Committee, "adequate facilities" must include access to documents and other evidence. This access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory (para. 32).

Finally, considering that in the majority of cases the alleged conduct which triggers the imposition of sanctions is not considered to be a criminal offense, while at the same time the imposed sanctions are often commensurate with criminal penalties, we wish to recall article 15 of ICCPR which stipulates that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.