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Resolution of dilemmas of human rights sanctions against corporations through the application of the business and human rights concept

A resolução dos dilemas das sanções de direitos humanos aplicadas a empresas por meio do conceito de empresas e direitos humanos

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Resolution of dilemmas of human rights sanctions against corporations through the application of the business and human rights concept*

A resolução dos dilemas das sanções de direitos humanos aplicadas a empresas por meio do conceito de empresas e direitos humanos

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Abstract

In the last decade, sanctions targeting companies have become a frequent reality, though their legality remains contested due to potential conflicts with state human rights obligations, rule of law, and international norms. Despite advancements in the business and human rights framework, sanctions receive limited focus and are often only considered as amplifying corporate risk or justifying withdrawal from certain business relations. However, these sanctions raise vital questions, including whether corporate responsibility to respect human rights extends to using leverage to mitigate risks even when the company is not directly implicated. This article examines these dilemmas through Ukraine's case, assessing how human rights sanctions against corporations intersect with the business and human rights principles, highlighting the need for sanctions to meet both substantive and procedural rule of law requirements.

Keywords: sanctions; business and human rights; corporate responsibility to respect human rights; rule of law; solidarity.

Resumo

Na última década, as sanções direcionadas a empresas tornaram-se uma realidade frequente, embora sua legalidade ainda seja contestada devido a possíveis conflitos com as obrigações estatais de direitos humanos, o Estado de Direito e as normas internacionais. Apesar dos avanços no marco de empresas e direitos humanos, as sanções recebem pouca atenção e, frequentemente, são tratadas apenas como fatores que ampliam riscos corporativos ou justificam a retirada de determinadas relações comerciais. No entanto, essas sanções levantam questões cruciais, incluindo se a responsabilidade corporativa de respeitar os direitos humanos se estende ao uso de influência para mitigar riscos, mesmo quando a empresa não está diretamente envolvida. Este artigo examina esses dilemas a partir do caso da Ucrânia, avaliando como as sanções de direitos humanos contra empresas se cruzam com os princípios de empresas e direitos humanos, destacando a necessidade de que

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tais sanções atendam tanto aos requisitos substantivos quanto processuais do Estado de Direito.

Palavras-chave: sanções; empresas e direitos humanos; responsabilidade corporativa de respeitar os direitos humanos; Estado de Direito; solidariedade

1 Introduction

In the past decade, sanctions against companies, intended as a means of influencing behavior rather than as a measure of legal liability and punishment, have become almost a daily reality. Nevertheless, their legality remains contested in academic and geopolitical discussions, primarily due to concerns about their compliance with the state's human rights obligations, the requirements of the rule of law, and the principles of international law. Recent events – including Russia's war against Ukraine, mass violations of Uyghurs' rights in China, the brutal suppression of political protests, and the repression of political opposition in Belarus, along with the military coup in Myanmar, have prompted new waves of sanctions from numerous countries, including the US, EU, Canada, Australia, Great Britain, Japan, and other countries. In Ukraine, the Law "On Sanctions" was adopted in 2014, following the annexation of Crimea by Russia and the occupation of the Eastern part of Ukraine. It has been actively applied since February 24, 2022, in response to Russia's full-scale invasion of Ukraine. Currently, Ukraine leads in the number of sanctions applied to companies, with 4,882 companies listed¹).

The business and human rights literature (hereafter referred to as BHR) gives very limited attention to sanctions, merely pointing out that the application of sanctions is one of the factors that should be taken into consideration when assessing the overall environment of a company (or its supply chains) and significantly increases the risks of the company's involvement in negative impacts on human rights. Relevant BHR policy papers and guides emphasize that "the imposition of

sanctions may be a useful indicator, but not a substitute, for a business to exercise heightened human rights due diligence"². At the same time, the "due diligence framework of responsible business conduct standards can help enhance sanctions compliance when it is a legal obligation by improving visibility over complex business relationships that increase the risk of sanctions evasion."³

Sanctions literature rarely includes a BHR perspective. In practice, states that apply sanctions often refer to the fact that sanctions are a tool to influence the behavior of companies in situations where the company itself is beyond the jurisdiction of the state. Without knowing it, the states are in search of a solution to one of the main challenges of the BHR framework: what appropriate means could be used by states to protect its population against human rights abuses by business enterprises out of state's jurisdiction?

This article explores the dilemmas associated with applying human rights sanctions against companies through a BHR lens, underscoring the need for sanctions that align with substantive and procedural rule of law standards. In particular, it argues that sanctions must be proportionate to a company's involvement in an adverse impact on human rights – the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship, and should be proportional to the kind of such involvement.

The second section of this article offers a brief history of the application of economic sanctions against states and outlines key concerns related to their implementation. We review the relevant academic literature, policy papers, reports from human rights organizations, and documents prepared by UN agencies and institutions. Section three is devoted to human rights sanctions against companies and overviews existing practices of their application with indication the rule of law

¹ REGISTER of sanctions of legal entities: complete list, War and sanctions. *Sanctions.nazk.gov.ua*, [2023]. Available at: https://sanctions.nazk.gov.ua/en/sanction-company/?country=ua&date_from=10-15-2008&date_to=09-23-2023#filters. In comparison, the EU applied sanctions to just over 500 companies, UK – around 230 companies, USA – 1700, Canada – 480, Switzerland – 650, Australia – 170, Japan – 400.

² UNITED NATIONS DEVELOPMENT PROGRAMME. Heightened Human Rights Due Diligence for business in conflict-affected contexts: a guide. *UNDP*, 16 June 2022. Available at: <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide>.

³ OECD Responsible business conduct implications of Russia's invasion of Ukraine. *OECD*, 2023. Available at: <https://www.oecd-ilibrary.org/docserver/t222a4d1-en.pdf?expires=1692376231&id=id&accname=guest&checksum=23FF17867BC70CE088890FF70EBDA70F>.

concerns. Section four discovers the business and human rights concept which is important to be applied for rethinking human rights sanctions regimes against companies. The state duty to protect, as described in the UN Guiding Principles on Business and Human Rights, is taken for building argumentation of lawfulness of human rights sanctions against companies. The fifth section discovers five main dilemmas of applying human rights sanctions against companies by Ukraine: 1) The criteria of effectiveness of sanctions against Russian companies; 2) Payment of taxes to the budget of the Russian Federation as a reason of sanctions application; 3) The issue of essentiality of services and goods that are supplied by companies operating in Russia to justify the impossibility of applying sanctions against them; 4) (Not)use of leverage by companies beyond of involvement in human rights violations; 5) Western manufacturers' supplies of components for weapons to Russia. This section is based on the analysis of legislation and its interpretation by the National Security and Defense Council of Ukraine (the body that makes decisions on the application of sanctions, which are put into effect by the Decree of the President of Ukraine) that was discovered by the sub-structured interview with its representatives. In the conclusions, we apply business and human rights framework for rethinking the human rights sanctions against corporations for ensuring sanctions compliance with the rule of law.

2 Autonomous economic sanctions: brief history and current concerns

2.1 History of economic sanctions application

The history of economic sanctions' application by states and quasi-state entities dates back at least to ancient Greece. These early attempts at deploying economic coercion typically occurred in conjunction with the use of military force. Researchers provide various examples, such as in 492 BC when the Greek city-state of Aegina took non-military coercive action against Athens by seizing an Athenian ship and holding its passengers hostage. Throughout history, states have

employed different grounds to impose economic sanctions.⁴

The term "sanctions" is not, strictly speaking, a term of art in public international law.⁵ There is roughly general consensus that sanctions are measures that one party (the sender) takes to influence the actions of another (the target).⁶

Despite some differences in approaches, supporters of sanctions primarily emphasize that these measures are not punitive; rather, they are imposed to bring about a change in policy or activity by the target party (or parties) responsible for the behavior in question. This behavior may include not respecting international law or human rights, or pursuing policies or actions that do not conform to the rule of law or democratic principles.⁷

In the 20th century, economic sanctions became a popular tool in international relations. During World War I, the Allied and Associated Powers, led by Britain and France, initiated an unprecedented economic war against the German, Austro-Hungarian, and Ottoman empires.⁸ The Trading with the Enemy Act of 1917 was the first law to use political causes (armed conflict) to restrict economic relations with foreign countries.

President Wilson truly believed that economic pressure was a viable alternative to the use of force. As a prophet of economic coercion, Wilson assumed that:

⁴ The practice of justifying economic restrictions on the grounds of human rights violations dates back to the protection of religious minorities in medieval times. Indeed, Kern Alexander provides an example of trade restrictions imposed by Protestant Swiss cantons, led by Zurich, on Catholic cantons for violating their treaty obligation to tolerate their Protestant minorities. See ALEXANDER, Kern. *Economic Sanctions: law and public policy*. [S. l.: s. n.], 2007.

⁵ CRAWFORD, J. The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A retrospect. *The American Journal of International Law*, v. 96, n. 4, p. 874-890, Oct. 2002. p. 875.; UNITED NATIONS. *Report of the International Law Commission on the Work of its Fifty-third Session*. 2001. 2 Yearbook of the UN International Law Commission, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (part 2) (Commentary to the Articles on State Responsibility). p. 128.;

ZOLLER, E. *Peacetime Unilateral Remedies: An Analysis of Countermeasures*. [S. l.: s. n.], 1984. Available at: <https://brill.com/peacetime-unilateral-remedies-analysis-countermeasures>. p. xv-xvii.

⁶ EATON, J.; ENGERS, M. P. *Sanctions*. NBER Working Paper, n. w3399, 1990.

⁷ COUNCIL OF THE EUROPEAN UNION. General Secretariat of the Council. Sanctions Guidelines. *Council of the European Union*, Brussels, 4 May 2018. Available at: <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>.

⁸ MULDER, N. *The economic weapon*. London: Yale University Press, 2022. p. 78.

“the boycott is what is substituted for war.”⁹ Later, the drafted Covenant of the League of Nations stipulated that if any state violates the peace, other states should either provide military and naval force or, as an alternative, impose financial and economic restrictions.¹⁰

The effectiveness of economic warfare during World War I encouraged statesmen to put significant faith in such measures as potential mechanisms for enforcing the rules of a new world order. In his book *After the Great War: Economic Warfare and the Promise of Peace in Paris 1919*, Phillip Dehne argues that the most significant success of the Paris Peace Conference concerned economic warfare,¹¹ “with the hope that the threat of facing universal economic sanctions would lead countries to reconsider before launching the war.”¹² What made interwar sanctions a truly new institution was this coercive exclusion could take place *in peacetime*.¹³ But with the outbreak of World War II, states started to employ various economic measures to undermine the economic strength of the belligerents as well.¹⁴

One of the key results of the World War II was establishing of the United Nations in an attempt to maintain international peace and security and to achieve cooperation among nations on economic, social, and humanitarian problems. Under Article 41 of the UN Charter, sanctions measures encompass a broad range of enforcement options that do not involve the use of armed force:

the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means

⁹ comp HAMILTON, F. *Woodrow Wilson's Case for the League of Nations*. 2. ed. New Jersey: Princeton University Press, 1923. p. 72.

¹⁰ MILLER, D. H.; BUTLER, N. M. *The Drafting of the Covenant*. New York: G. P. Putnam's Sons, 1928. p. 6.

¹¹ DEHNE, P. A. *After the Great War: Economic Warfare and the Promise of Peace in Paris 1919*. [S. l.]: Bloomsbury Academic, 2019. p. 5.

¹² DEHNE, P. A. *After the Great War: Economic Warfare and the Promise of Peace in Paris 1919*. [S. l.]: Bloomsbury Academic, 2019. p. 6.

¹³ MULDER, N. *The economic weapon*. [S. l.]: Yale University Press, 2022. p. 49.

¹⁴ BOGDANOVA, I. *Unilateral sanctions in international law and the enforcement of human rights: The Impact of the Principle of Common Concern of Humankind*. [S. l.]: Brill/Nijhoff, 2022. p. 32.

of communication, and the severance of diplomatic relations.¹⁵

Since 1966, the Security Council has established 31 sanctions regimes.¹⁶ Security Council sanctions have taken a number of different forms (from comprehensive economic and trade sanctions to more targeted measures such as arms embargoes, travel bans, and financial or commodity restrictions), in pursuit of a variety of goals (support peaceful transitions, deter non-constitutional changes, constrain terrorism, protect human rights and promote non-proliferation).¹⁷

The post-WWII word shows that sanctions may be imposed by states either in implementation of measures to implement United Nations Security Council resolutions or on an autonomous basis, i.e. on the own initiative of a state or a group of states.

2.2 Debate on the lawfulness of autonomous economic sanctions

The emergence of such a tool as the UN Security Council sanctions has intensified the debate over whether states can impose autonomous (unilateral) economic sanctions. These are restrictive economic measures imposed by an individual state against another state and/or its government officials, bodies, legal entities, and foreign nationals. They are implemented in pursuit of political objectives without any prior authorization from an international or regional organization.¹⁸

Starting from the 1970s, the United States framed sanctions as a part of a broader effort to promote human rights abroad.¹⁹ At the same period of time, the EU has imposed unilateral sanctions (restrictive measures) against a number of third States due to the serious human rights violations.²⁰

¹⁵ UNITED NATIONS. Security Council. *Sanctions*. UN. Available at: <https://www.un.org/securitycouncil/sanctions/information>.

¹⁶ UNITED NATIONS. Security Council. *Sanctions*. UN. Available at: <https://www.un.org/securitycouncil/sanctions/information>.

¹⁷ UNITED NATIONS. Security Council. *Sanctions*. UN. Available at: <https://www.un.org/securitycouncil/sanctions/information>.

¹⁸ BOGDANOVA, I. *Unilateral sanctions in international law and the enforcement of human rights: The Impact of the Principle of Common Concern of Humankind*. [S. l.]: Brill/Nijhoff, 2022. p. 5.

¹⁹ MARTIN, L. L. *Coercive cooperation: Explaining Multilateral Economic Sanctions*. [S. l.]: Princeton University Press, 1994. p. 101-102.

²⁰ SUMMARIES of EU Legislation: Restrictive measures against serious human rights violations and abuses. *EUR-LEX*. Available at: <https://eur-lex.europa.eu/EN/legal-content/summary/restrictive-measures-against-serious-human-rights-violations-and-abuses.html>.

As opponents of unilateral economic sanctions argue, at first glance, such sanctions might appear to challenge the principles of state sovereignty and the rule of law. Consequently, unilateral sanctions could be seen as a challenge to the existing international legal order anchored in the UN Charter. According to the Charter, sanctions should be imposed by the UN Security Council (UNSC) following a determination that there is a threat to or a breach of international peace and security. In contrast to the multilateral process of UNSC action, unilateral sanctions involve only one state making the determination that there has been a violation of international law or a breach of an international obligation.²¹ These sanctions are imposed by a State through application of its national legislation, which are *prima facie* extraterritorial in nature and against the established principles of jurisdiction under international law. The doctrine concerning extraterritorial application of national legislation, though not well settled, endorses the basic principle of international law that all national legislations are territorial in character.²²

The European Union, the United States, Canada, Australia and a number of other states have traditionally been among the staunchest supporters of unilateral human rights sanctions, while some countries lodge formal protests to such coercive measures on behalf of the international community.²³ The issue of human rights sanctions application should be considered through the lenses that

the relationship between human rights and state sovereignty should and can be complementary. State sovereignty and independence should serve not as a hurdle to, but as a guarantee for the realization of the fundamental human rights of the state's nationals. If gross human rights violations are not solved by a state itself, it is no longer solely the problem of the state concerned. Fundamental human rights have acquired a status of universality and the international community should accept this.²⁴

This universality of fundamental human rights implies several key principles that should guide the international community:

First, references to the principle of respect for state sovereignty cannot be used by states to justify their immunity from interference by other states when such interference is aimed at preventing or stopping gross fundamental human rights violations or concomitant threats to the national security of another state. *Second*, the introduction of the UN Security Council sanctions is designed to significantly increase the impact on the state that poses a threat to peace and security, and coordinated actions of the world community can ensure greater effectiveness of such a measure. However, this does not exclude the possibility (and necessity) of applying this measure autonomously. Especially obvious is the need to apply autonomous sanctions in a situation where a threat to peace and security comes from a state that is a permanent member of the UN Security Council and has the right to veto. *Third*, the question of the lawfulness of autonomous economic sanctions should not be raised when sanctions are imposed by the state in self-defense (as in the case of Ukraine) in response to an internationally wrongful act directed against its state sovereignty, national security and threatening human rights in its territory. The state is obliged to take all possible measures to protect human rights. Furthermore, referring to the previous paragraph, human rights “are matters of international concern that justify intervention by the international community”,²⁵ and case of Ukraine is a vivid example of what “if gross human rights violations are not solved by a state itself, it is no longer solely the problem of the state concerned”.²⁶

In this sense, the international community should show solidarity and take measures in its power to help protect human rights on the territory of Ukraine from the threat posed by the Russian full-scaled invasion (“responsibility to protect” (R2P): in his 2012 report on the R2P, the UN Secretary-General recognised the importance of sanctions as part of a “timely and decisive response” to atrocity crimes).²⁷ In 2022, Justices

²¹ MAROSS, A. Z.; BASSETT, M. R. *Economic Sanctions under International Law*. [S. l.]: T.M.C. Asser Press eBooks, 2015. p. XV.

²² MOHAMAD, R. *Unilateral Sanctions in International Law: A quest for Legality*. [S. l.]: T.M.C. Asser Press eBooks, 2015. p. 41.

²³ BOGDANOVA, I. *Unilateral sanctions in international law and the enforcement of human rights: The Impact of the Principle of Common Concern of Humankind*. [S. l.]: Brill/Nijhoff, 2022. p. 61.

²⁴ WALLING, C. B. Human Rights Norms, State Sovereignty, and Humanitarian Intervention. *Human Rights Quarterly*, v. 37, n. 2, 2015. p. 384.

²⁵ CLEVELAND, S. Human Rights Sanctions and International Trade: A Theory of Compatibility. *Journal of International Economic Law*, v. 5, iss. 1, p. 133–189, 2002. p. 133.

²⁶ WALLING, C. B. Human Rights Norms, State Sovereignty, and Humanitarian Intervention. *Human Rights Quarterly*, v. 37, n. 2, 2015. p. 385.

²⁷ HUMAN RIGHTS COUNCIL. Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Spe-

Richard Humphreys and Lauma Paeglkalna published a paper outlining an escalating series of “non-warfighting measures” that could be pursued by States in relation to Ukraine.²⁸ That paper proposed a five-part typology of options that speaks to the question of what States might do both to honour their R2P in Ukraine, and to fulfil their obligation to cooperate to end serious breaches of peremptory norms, in particular economic sanctions.²⁹

2.3 Humanitarian consequences and human rights impact of economic sanctions

The key concern raised regarding economic sanctions, including UN Security Council sanctions, is that they often have adverse humanitarian consequences. Instead of impacting the target regime, economic sanctions often affect the population at large, particularly the most vulnerable in the targeted society. Considerable attention has been devoted to assessing the humanitarian and human rights effects of sanctions and exploring ways to make them more humane and better targeted.³⁰

According to the OHCHR, unilateral coercive measures can impact the full enjoyment of human rights set forth in the Universal Declaration of Human Rights, in particular the rights of everyone to a standard of living adequate for their health and well-being, including food and medical care, housing and necessary social services.³¹ Since 1996, the UN General Assembly has regularly adopted resolutions entitled “Human rights and unilateral coercive measures” that condemn the use of

unilateral sanctions and underline their incompatibility with the states’ human rights obligations.

In September 2021, during the 48th regular session of the Human Rights Council, a biennial panel discussion on unilateral coercive measures and human rights was conducted with the participation of the President of the Human Rights Council and the United Nations High Commissioner for Human Rights. Prior to this, decisions by several United Nations organs and human rights treaty bodies, along with studies by United Nations agencies, had outlined legal limitations on the imposition of unilateral coercive measures concerning rights essential for dignity and survival. Additionally, numerous declarations and resolutions have emphasized the need for special measures to alleviate the negative impact of such measures on the human rights of women, children, and other vulnerable groups.³²

However, characterizing the statements of the United Nations High Commissioner for Human Rights or UN agencies as being against the imposition of unilateral sanctions and denying their lawfulness may be considered manipulative. These institutions call for the consideration of the human rights impact of sanctions and the avoidance of adverse human rights consequences to prevent people from being deprived of their basic means of survival.³³ The Committee on Economic, Social and Cultural Rights has concluded that human rights should be fully taken into account when designing sanctions regimes.³⁴ Effective monitoring should be undertaken throughout the period that sanctions are in force, and the external entity imposing sanctions has an obligation to take steps, both individually and through international assistance, to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.³⁵ The Special Rapporteur on the

cial Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Human Rights.org*, 7 Apr. 2008. Available at: <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>. p. 9.

²⁸ HUMPHREYS, R.; PAEGLKALNA, L. Combat Without Warfighting: Non-Belligerent actors and the Russian invasion of Ukraine. *Social Science Research Network*, 28 Mar. 2022.

²⁹ BARBER, R. What does the “Responsibility to Protect” require of states in Ukraine? *Journal of International Peacekeeping*, v. 25, n. 2, 2022. p. 158.

³⁰ SIMONEN, K. Economic sanctions leading to human rights violations: Constructing legal argument. In: MAROSS, Ali; BASSETT, Marisa (ed.). *Economic Sanctions and International Law*. Unilateralism, Multilateralism, Legitimacy and Consequences. T.M.C. [J. I]: Asser Press eBooks, 2015. p. 180;

OHCHR. *Sub-Comm’n Res. 2000/1: Human Rights and Humanitarian Consequences of Sanctions, Including Embargoes*. UN Doc. E/CN.4/Sub.2/RES/2000/1.

³¹ OHCHR. *OHCHR and unilateral coercive measures*. Available at: <https://www.ohchr.org/en/unilateral-coercive-measures>.

³² OHCHR. *High Commissioner calls for critical re-evaluation of the human rights impact of unilateral sanctions*. Available at: <https://www.ohchr.org/en/2021/09/high-commissioner-calls-critical-re-evaluation-human-rights-impact-unilateral-sanctions>.

³³ OHCHR. *High Commissioner calls for critical re-evaluation of the human rights impact of unilateral sanctions*. Available at: <https://www.ohchr.org/en/2021/09/high-commissioner-calls-critical-re-evaluation-human-rights-impact-unilateral-sanctions>.

³⁴ CESCR. *General Comment 8: The Relationship between Economic Sanction and Respect for Economic, Social, and Cultural Rights*, para 7, U.N. Doc. E/C.12/1997/8 (12 December 1997).

³⁵ OHCHR. A/HRC/19/33: Thematic study of the Office of the United Nations High Commissioner for Human Rights on the impact of unilateral coercive measures on the enjoyment of human rights, including recommendations on actions aimed at ending such

negative impact of unilateral coercive measures on the enjoyment of human rights has repeatedly highlighted the importance of a systematic monitoring and assessment of the human rights impact of unilateral sanctions and the clear identification of the targets of such measures.³⁶ On the initiative of the Special Rapporteur, a tool to better identify the effects that unilateral sanctions have on human rights was developed.³⁷ It consists of a non-exhaustive set of questions and indicators that can be readily used, by governments, international and regional organisations, civil society, academia and others who observe or have information about situations in which sanctions are harming human rights. This tool proposes the list of human rights and assess if sanctions impact their availability: right to health (physical & mental), right to food, water & sanitation, education, cultural rights, employment and social protection, services and infrastructure, humanitarian assistance. And if there is an impact, the items concerned and the populations most affected should be indicated.³⁸

To conclude, human rights law does prohibit comprehensive economic sanctions regimes that rise to the level of causing starvation among the population. Star-

vation in this context is not defined narrowly as directly causing widespread death from lack of food and water, but rather is the process of creating conditions of severe malnutrition, limited access to water and to basic sanitation, and denial of basic medicines.³⁹ This is consistent with the fact that even in famine most fatalities are not caused by caloric deprivation itself, but rather by the spread of disease made possible by the conditions of malnutrition, lack of sanitation, and shortage of clean water. International law “does impose a limit . . . in the extreme circumstances where unilateral sanctions rise to the level of depriving a people of its own means of subsistence or threatens the starvation of the state.”⁴⁰ However, if the sanctions do not reach such a degree of negative impact on human rights, they can be considered lawful from the point of view of international human rights law.

3 Human rights sanctions against companies

Researchers on the sanctions application history identify various stages in the development of this instrument. A distinctive feature of the current stage, many call the intensification of the application of sanctions against non-state actors.⁴¹ Until 2012, sanctions were not systematically imposed on human rights violators and were applied to countries rather than individuals.⁴²

Sanctions against non-state actors, in particular companies, are called “smart” or “targeted” sanctions – sanctions directed against individuals, groups or entities,⁴³ and unlike comprehensive sanctions imposed

measures. *OHCHR*, 2012. Available at: <https://www.ohchr.org/en/documents/thematic-reports/ahrc1933-thematic-study-office-united-nations-high-commissioner-human>.

³⁶ OHCHR. Call for input: Draft Monitoring & Impact Assessment Tool. *OHCHR*, 2023. Available at: <https://www.ohchr.org/en/calls-for-input/2023/call-input-draft-monitoring-impact-assessment-tool>.

³⁷ OHCHR. Call for input: Draft Monitoring & Impact Assessment Tool. *OHCHR*, 2023. Available at: <https://www.ohchr.org/en/calls-for-input/2023/call-input-draft-monitoring-impact-assessment-tool>.

³⁸ In this context, a six-pronged test to evaluate sanctions was proposed: (i) Are the sanctions imposed for valid reasons (legitimate aim)? (ii) Do the sanctions target the relevant parties? (iii) Do the sanctions target the relevant goods or objects? Sanctions should not interfere with the free flow of humanitarian goods and they should not target goods required to ensure the basic subsistence of the civilian population, nor essential medical provisions or educational materials of any kind. (iv) Are the sanctions reasonably time-limited? (v) Are the sanctions effective? (vi) Are the sanctions free from protests arising from violations of the “principles of humanity and the dictates of the public conscience”? BOSSUYT, M. J. The adverse consequences of economic sanctions on the enjoyment of human rights: Working paper. *United Nations Digital Library System*, 2000. Available at: <https://digitallibrary.un.org/record/419880>.

Some of the components of the proposed test are questionable (in particular, effectiveness of sanctions and their freedom from protests). At the same time, this test overlooks procedural dimension of the lawfulness of sanctions, pays limited attention to the impacts of sanctions on human rights and does not consider different forms of involvement of the relevant parties to the wrongdoing actions.

³⁹ CONLEY, B.; DE WAAL, A. The purposes of starvation. *Journal of International Criminal Justice*, v. 17, n. 4, p. 700-701, 2019.; DANNENBAUM, T. Encirclement, Deprivation, and Humanity: Revising the San Remo Manual Provisions on blockade. *SSRN*, 2021. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784220.

⁴⁰ JIB/JAB: The Laws of War Podcast. Episode 25: Aslı Bâli on Economic Sanctions and the Laws of War. *JIB/JAB*, 15 July 2021. Podcast. Available at: <https://jibjabpodcast.com/episode-25-aslibali-on-economic-sanctions-and-the-laws-of-war/>.

⁴¹ MARTIN, C. Economic Sanctions under International Law: A guide for Canadian policy. *Social Science Research Network*, 2021.

⁴² ROBERTSON, G. Bad people: and how to be rid of them. *Random House Australia*, 2021. p. 22.

⁴³ GALTUNG, J. On the Effects of International Economic Sanctions, With Examples from the Case of Rhodesia. *World Politics*, v. 19, n. 3, 1967. p. 378.

against states, such sanctions are considered to pose a significantly lower risk of negative impact on human rights for local people⁴⁴ (although such risks are also present and should be assessed). However such sanctions are restrictions on human rights imposed on a specific person, and therefore must comply with the “classic test” of the lawfulness of human rights restrictions: the legitimate aim of the restriction, the imposition of a restriction in the order prescribed by law, the proportionality of the restriction.

In 2012, the United States enacted the Sergei Magnitsky Rule of Law Accountability Act of 2012. In 2016, Congress enacted the Global Magnitsky Human Rights Accountability Act. This act entitles the US president to impose sanctions against any foreign national if there is credible evidence that this person committed or is complicit in gross violations of internationally recognised human rights and against any foreign government official responsible for acts of significant corruption. As of December 10, 2022, the United States has designated a total of 450 foreign persons (individuals and entities) pursuant to this sanctions program, which targets those connected to serious human rights abuse, corrupt actors, and their enablers.⁴⁵

A number of other states followed this example and imposed similar human rights sanctions. In December 2020, the European Union established a framework to impose sanctions (restrictive measures) against individuals, legal persons, entities or bodies responsible for, involved in or associated with serious human rights violations and abuses worldwide, no matter where they occurred (the EU Global Human Rights Sanctions Regime). It applies to acts such as genocide, crimes against humanity and other serious human rights violations or abuses. Other human rights violations or abuses can also fall under the scope of this sanctions regime, if they are widespread, systematic or otherwise of serious concern as regards the objectives of the EU common foreign and security policy.⁴⁶ As the official website em-

phasizes, the EU restrictive measures are not punitive although they are called “sanctions”. They are intended to bring a change in bad or harmful policies or activities by targeting the non-EU countries, including organisations and individuals.⁴⁷

The coalition of countries supporting Ukraine (G7, EU countries and some of Ukraine’s neighbours) is working to support Ukraine across a number of areas, including sanctions and economic measures. Russia’s full-scale invasion of Ukraine has led to several waves of sanctions packages and the creation of a “sanctions coalition” of countries that are trying to harmonize sanctions among themselves. But before moving on to consider what dilemmas Ukraine faces in applying sanctions against companies (other countries of the coalition face similar dilemmas), let’s consider a more general question – the application of any type of sanctions must comply with a number of substantive and procedural requirements, as sanctions applied in such a way that they undermine the rule of law weaken the credibility and legitimacy of the sanctions instrument.

The substantive rule of law requirements for the imposition of sanctions are following:

3.1 A legitimate aim of imposing sanctions and justification in the decision

States have a fairly wide margin of appreciation and the decision to apply sanctions is considered a political decision. But in any case, it is necessary to single out a general legitimate goal (that is, for what purpose sanctions are applied in general) and a specific one (for what purpose sanctions are applied to a specific individual or legal entity). In particular, a general goal will not be considered legitimate if the application of sanctions is aimed at obtaining an economic advantage of one state over another, or if sanctions serve the purpose of punishment (since there is an institution of legal liability). The EU calls such objectives to adopt sanctions: safeguarding EU’s values, fundamental interests, and security; preserving peace; consolidating and supporting democracy, the rule of law, human rights and the principles of international law; and preventing conflicts

⁴⁴ DREZNER, D. W. Sanctions sometimes smart: targeted sanctions in theory and practice. *International Studies Review*, v. 13, n. 1, 2011. p. 105.

⁴⁵ 2022 Global MagnitSky Human Rights Accountability Act Annual Report. *Federal Register*, 31 Mar. 2023. Available at: <https://www.federalregister.gov/documents/2023/03/31/2023-06749/2022-global-magnitsky-human-rights-accountability-act-annual-report>.

⁴⁶ EU SANCTIONS MAP. *Lists of persons, entities and items*. Available at: <https://www.sanctionsmap.eu/#/main/details/50/lists?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D>.

⁴⁷ COUNCIL OF THE EUROPEAN UNION. General Secretariat of the Council. Sanctions Guidelines. *Council of the European Union*, Brussels, 4 May 2018. Available at: <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INTE/en/pdf>.

and strengthening international security. The specific purpose of sanctions is to change the behavior of the person or entity to whom such sanctions are applied.

In addition, the justification for the legitimacy of the purpose of applying sanctions should include an explanation of the impossibility of applying other measures (in particular, bringing to legal liability persons who create or are in some way involved in creating a threat to national security, democracy, the rule of law, human rights).

The most common situation is when the application of sanctions is justified by the presence of sanctioned persons beyond the jurisdiction of the state (in particular, officials in Ukraine explain the spread of sanctions on certain individuals and companies by the impossibility of applying the usual legal mechanisms because these individuals and companies are beyond the sphere of effective control of Ukraine, in particular in the temporarily occupied territory).⁴⁸

In addition, the principle of solidarity also says that if a state cannot independently ensure the protection of human rights on its territory because of the actions of another state other states should also use all possible measures to change the behavior of actors who are involved in the negative impact on human rights. International solidarity is not limited to international assistance and cooperation, aid, charity or humanitarian assistance. International solidarity should be understood as a broader concept that includes sustainability in international relations, the peaceful coexistence of all members of the international community, equal partnerships and the equitable sharing of benefits and burdens, refraining from doing harm or posing obstacles to the greater wellbeing of others.⁴⁹

⁴⁸ According to the interview with the National defense and security council of Ukraine.

⁴⁹ OHCHR. Independent Expert on human rights and international solidarity. *OHCHR*. Available at: <https://www.ohchr.org/en/special-procedures/ie-international-solidarity#:~:text=International%20solidarity%20is%20the%20expression,rights%20to%20achieve%20common%20goals>.

3.2 Human rights impact assessment and elimination of risks of leveling access to basic human rights (the basic subsistence) for the local population or groups

This requirement is a direct manifestation of the humanitarian consequences of economic sanctions, which were disclosed above. There is increasingly widespread recognition that economic sanctions must, at a minimum, be subject to *ex ante* human rights impact assessments, as well as human rights and humanitarian waivers and exceptions built into the legal framework of the regime. For instance, it is now widely accepted that comprehensive trade sanctions regimes ought to have humanitarian exceptions, permitting the export/import of basic food, medicine, and other goods deemed essential for the health and welfare of the population in the target state. Such exceptions were developed in response to a growing body of analysis that documented the serious and extensive humanitarian consequences of comprehensive sanctions regimes, such as those imposed on Iraq. The existing legal regulation of the application of sanctions, including the sanctions regime in Ukraine, does not include human rights assessment of the sanctions.

3.3 Balancing a legitimate aim (public interest) with the individual rights of a concrete person to whom sanctions are applied

This requirement is reflected in the practice of the ECtHR. The ECtHR considered only three cases on the application of sanctions, all of which were adopted in compliance with the resolutions of the UN Security Council: *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*,⁵⁰ *Nada v. Switzerland*, and *Al-Dulimi and Montana Management Inc. v. Switzerland*.⁵¹ In all three cases, the ECtHR concluded that the interference with human rights was provided for by law and pursued a legitimate

⁵⁰ EUROPEAN COURT OF HUMAN RIGHTS. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], Judgment 30/06/2005. Information Note on the Court's case-law No. 76. *ECHR*, June 2005. Available at: <https://hudoc.echr.coe.int/fre?i=002-3835>.

⁵¹ EUROPEAN COURT OF HUMAN RIGHTS. *Al-Dulimi and Montana Management Inc. v. Switzerland* - 5809/08, Judgment 26/11/2013. Information Note on the Court's case-law 168. *ECHR*, Nov. 2013. Available at: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-9241&filename=002-9241.pdf&TID=thkbhnlzk>.

aim, which are two prerequisites for compliance with the provisions of the Convention. Although the three cases concerned different rights under the Convention, the ECtHR followed the same approach in determining whether there was a violation of the interference with those rights; whether reasonable links of proportionality were ensured between the measures applied and the objective sought to be achieved.

Therefore, in each case it is important to consider whether a fair balance was observed between the requirements to ensure the general interests and the interests of the plaintiff. In clarifying this, the ECtHR also recognized that the States concerned enjoyed a discretion as to the means to be used and as to whether the consequences were justified by the general interest in order to achieve the desired goal.

3.4 Proportionality and efficiency

Traditionally, when it comes to any restrictions on human rights, there is a requirement to observe proportionality between the legitimate aim and the ways in which it is achieved. An important feature of the application of sanctions is their focus on changing the behavior of the person to whom they are applied. In this regard, proportionality should take into account the form of involvement of a non-state actor in illegal actions in connection with which the state applies sanctions. There is a gap in application of human rights sanctions against companies as the form of their involvement in illegal actions is not taken into consideration.

The effectiveness of sanctions must also be considered in terms of their purpose to change the behaviour of addressee of sanctions. This provides reasonable argumentation for some derogations from guarantees that are traditionally applied in a situation of application of human rights restrictions. One such derogation may be a failure to notify the person / entity that sanctions are being considered to be applied and not give the opportunity to be heard at that stage. Such a derogation is explained by the fact that otherwise the effectiveness of the sanction will be completely leveled, and the legitimate aim of changing the behavior of a person or entity will not be achieved. However, in order to maintain proportionality, this derogation must be compensated by procedural safeguards,⁵² in particular, by ensuring

the possibility of delisting a company without going to court (by providing the necessary explanations and evidence of non-involvement in the wrongdoing action or evidence of a change in behavior to the authority that adopted the decision to impose sanctions), as well as establishing judicial control over the application of sanctions.

3.5 The procedural rule of law requirements to the sanction regimes" application

The substantive rule of law requirements should be supplemented with procedural requirements:

- 1) the procedure for the application of sanctions provided for by law;
- 2) the due process, taking into account the criteria of effectiveness, in particular the existence of effective judicial control over the application of sanctions as an important component of ensuring a fair balance of interests; the right to be heard;
- 3) the possibility of de-listing without application of the judicial procedure.⁵³

the European Convention on human rights. *USAID Activity Office. Office of Democracy and Governance, 2023.*

⁵³ Bardo Fassbender revealed the following problems: Designated individuals were not informed before being listed and, consequently, were deprived of the right to challenge their listing; Listed individuals were deprived of the right to request de-listing directly from the sanctions committee; Listed individuals were not granted a hearing after a de-listing request was filed; The absence of legal rules that would oblige the sanctions committee to approve a de-listing request if specific conditions were met. FASSBENDER, B. Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to Ensure That Fair and Clear Procedures Are Made Available to Individuals and Entities. *Study Commissioned by the United Nations Office of Legal Affairs, 2006.*

For example, the EU constantly monitors situations in connection with which restrictive measures have been introduced. Decisions of the EU Council on the introduction of restrictive measures are valid for 12 months. Depending on the development of the situation, the EU Council may decide to prolong these measures, expand them, adjust, suspend or cancel them. In the case that a decision is made to cancel the sanctions, or there is no prolongation, all restrictive measures cease to be in force. In turn, the regulations adopted by the Council have no time limit. Thus, the restrictive measures of the EU are a fairly flexible mechanism for responding to undesirable actions of third countries, as well as individuals and legal entities whose actions threaten the interests of the Union and its member states. EUROPEAN UNION COMMITTEE. *The legality of EU sanctions. 11th Report of Session 2016-17, HL Paper 102. 2017.*

⁵² MCBRIDE, J. Seizure of Assets under the law on sanctions and

4 Business and human rights concept to enhance compliance of sanctions against companies with the rule of law requirements

In recent years, the development of BHR instruments and academic literature, following the mandate of John Ruggie as UN Secretary-General Special Representative on business and human rights, provides a new lens through which to examine the business impact on human rights.

In 2011, the UN Guiding Principles on business and human rights (UNGPs) establish the state duty to protect human rights (Pillar I), the business responsibility to respect human rights (Pillar II) and that victims should have access to remedy when harm is done (Pillar III). The UNGPs are recognized as the authoritative business and human rights (BHR) common framework providing clear principles for states and businesses to prevent and address business-related human rights abuse.

According to this concept, “the corporate responsibility to respect is the basic expectation society has of business,” “the baseline expectation for all companies in all situations.”⁵⁴ The corporate responsibility to respect means, in particular, that businesses should avoid and address “human rights risks” – potential or actual adverse impacts on human rights that a business may cause or contribute to through its own activities, or to which it may be directly linked through its operations, products, or services via its business relationships.⁵⁵ Human rights risks are most commonly identified via an iterative, ongoing *process* known as human rights due diligence (HRDD), which includes assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.⁵⁶

⁵⁴ HUMAN RIGHTS COUNCIL. Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Human Rights.org*, 7 Apr. 2008. Available at: <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>.

⁵⁵ GUIDING principles on business and human rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. *OHCHR*, 01 Jan. 2012. Available at: <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>.

⁵⁶ MCCORQUODALE, Robert; NOLAN, Justine. The Ef-

As it was mentioned in the previous section, the application of human rights sanctions against companies should be proportional. For this, it is necessary to apply the UNGPs “involvement framework”⁵⁷, the typology used in Guiding Principle 13 – “causation”, “contribution” and “direct linkage”.

Guiding Principle 13 states that the corporate responsibility to respect human rights requires all business enterprises to: 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. This involvement framework helps business enterprises to understand the various ways in which they may become involved in adverse human rights impacts (within the meaning of the UNGPs) and the actions they are expected to take in response.⁵⁸ Contribution must be *substantial*, meaning that this does not include minor or trivial contributions.⁵⁹

The justification for the imposition of sanctions against corporate actors must include an explanation of the entity’s involvement in the acts for which the sanctions are applied. The absence or insufficiency of such justification may subsequently lead to that the application of sanctions is recognized by the court as unlawful. Hence, in the CJEU case law on sanctions against Russians and Ukrainians,⁶⁰ it was indicated the

effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses. *Netherlands International Law Review*, Dordrecht, v. 68, iss. 3, p. 455-478, Dec. 2021. DOI: 10.1007/s40802-021-00201-x.

⁵⁷ OHCHR. The Corporate Responsibility to Respect Human Rights: An Interpretive Guide. *OHCHR*, 2012. Available at: <https://www.ohchr.org/en/publications/special-issue-publications/corporate-responsibility-respect-human-rights-interpretive>;

OHCHR. Financial sector: OHCHR and business and human rights. *OHCHR*. Available at: <https://www.ohchr.org/en/business-and-human-rights/financial-sector>.

⁵⁸ OHCHR. Business and Human Rights in Challenging Contexts Considerations for Remaining and Exiting. *OHCHR*, 2023. Available at: <https://www.ohchr.org/sites/default/files/documents/issues/business/bhr-in-challenging-contexts.pdf>.

⁵⁹ OECD-FAO Business Handbook on Deforestation and Due diligence in Agricultural Supply Chains. *OECD iLibrary*, 2023. Available at: https://www.oecd-ilibrary.org/finance-and-investment/oecd-fao-business-handbook-on-deforestation-and-due-diligence-in-agricultural-supply-chains_c0d4bca7-en;jsessionid=ih9RBcalKD6MottMaimYH48L7HgMi-61s5yKNZ.ip-10-240-5-106.

⁶⁰ CHALLET, C. Reflections on Judicial Review of EU Sanctions Following the Crisis in Ukraine by the Court of Justice of the Euro-

lack of compliance with the obligation to state reasons was sanctioned regarding the measures imposed on Russian persons or entities which, by their conduct, were responsible for actions or policies undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.⁶¹ Thus, the non-use of the UNGPs “involvement framework” by the state authorized to justify sanctions against a particular company significantly weakens their legitimacy and validity.

In the situation of the conflict, the UNGPs’ “involvement framework” is complemented by the concept of hHRDD. In 2022, “with powerful influence in mind UNDP and the UN Working Group on Business and Human Rights developed the practical roadmap for action: Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide”.⁶² It notes that “Heightened human rights due diligence means identifying potential and actual impacts on people (human rights) as well as on the context (conflict),”⁶³ therefore hHRDD is about identifying and assessing not only companies’ actual or potential adverse impacts on human rights, but also their actual or potential adverse impacts on conflict⁶⁴. As summary of the Guide notes, “The Guide recognizes that businesses invariably impact the dynamics of a conflict and that they therefore need to adopt conflict-sensitive practices to account for, and mitigate, these impacts.”

The concept of hHRDD is built around the thesis of “contributing to or exacerbating conflict and nega-

tively impacting human rights in conflict-affected areas by business”.⁶⁵ This aspect should also be taken into consideration for assessment involvement of company in the negative impact on human rights as a reason of applying sanctions against this company.

The UNGPs framework gives also an additional justification for the legitimate aim of the imposing sanctions by the state can serve as a reference to Principle 1 UN Guiding Principles on Business and Human Rights on State’s Duty to protect:

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.⁶⁶

This implies that the state uses all possible measures to ensure the protection of human rights. One of the most difficult challenges to the concept of business and human rights is the question of how a state can ensure the protection of human rights for people in the territory of the state from violations by businesses that are not under the effective control of this state. The situation of war exacerbates this problem, as business becomes involved in human rights violations committed by one state on the territory of another state.

5 Sanctions dilemmas in legal regulation of their application in Ukraine

5.1 Dilemma 1: Ineffectiveness of sanctions

There is a big difference between impact of the sanctions on behavior of local and trans- or multinational businesses. This difference is caused by the more general difference between local and multinational companies.⁶⁷ As Tara Van Ho noted, the former are dependent

pean Union. *European Legal Studies*, 2020. Available at: http://aei.pitt.edu/103422/1/researchpaper_4_2020_celia_challet.pdf. p. 7.

⁶¹ CHALLET, C. Reflections on Judicial Review of EU Sanctions Following the Crisis in Ukraine by the Court of Justice of the European Union. *European Legal Studies*, 2020. Available at: http://aei.pitt.edu/103422/1/researchpaper_4_2020_celia_challet.pdf. p. 8.

⁶² UNITED NATIONS DEVELOPMENT PROGRAMME. Heightened Human Rights Due Diligence for business in conflict-affected contexts: a guide. UNDP, 16 June 2022. Available at: <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide>.

⁶³ UNITED NATIONS DEVELOPMENT PROGRAMME. *Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide*. New York: UNDP, 2022. Available at: https://www.undp.org/sites/g/files/zskgke326/files/2022-06/UNDP_Heightened_Human_Rights_Due_Diligence_for_Business_in_Conflict-Affected_Context.pdf.

⁶⁴ UNITED NATIONS DEVELOPMENT PROGRAMME. *Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide*. New York: UNDP, 2022. Available at: https://www.undp.org/sites/g/files/zskgke326/files/2022-06/UNDP_Heightened_Human_Rights_Due_Diligence_for_Business_in_Conflict-Affected_Context.pdf. p. 13.

⁶⁵ ČERNIČ, Jernej Letnar; GERRITSE, Eva. Opinion: Responsible Business Conduct in Times of War. *E-International Relations*, 22 Oct. 2022. Available at: <https://www.e-ir.info/2022/10/22/opinion-responsible-business-conduct-in-times-of-war/>.

⁶⁶ Referència

⁶⁷ VAN HO, T. Business and human rights in transitional justice: challenges for complex environments. In: DEVA, S.; BIRCHALL, D. *Research Handbook on Human Rights and Business*. [S. l.]: Edward Elgar Publishing eBooks, 2020.

on operating within a state and may have no choice but to do what the government tells them. They have low power and independence. The latter generally *can* leave the state, even if doing so is financially uncomfortable. They enjoy power and independence over their own involvement in the abuses.⁶⁸

Institutional theory proposes the explanations⁶⁹ and provides a framework for understanding the societal process that shapes how organizations are formed, operate, and react to the external environment.⁷⁰ Firms may be considered a product of their institutional environment as organizations seek legitimacy and gather the resources needed to implement their strategy. Firms also develop organizational capabilities that are reflective of the prevailing external institutions.⁷¹ In an economy such as Russia, with weak institutional structures, corruption, and lower levels of property rights protection and rule of law, Russian firms have developed organizational capabilities and resources to operate in a politicized external environment. Targeted economic sanctions work when the sanctioned targets seek international legitimacy and need access to international markets to maintain and grow their businesses.⁷² Moreover, given the nature of politically connected firms, sanctions may further drive these firms into the arms of their home governments. As a result of foreign sanctions, Russian firms faced a highly uncertain environment and needed to satisfy the often-conflicting demands of their home institutional environment and the pressures from the external (foreign) environment. The home-host institutional conflict presented a unique situation for Russian firms to deploy a range of strategies that varied from partnering with the home governments, attempting to avoid the impact of sanctions, adapting through reor-

ganizing global supply and distribution chains, and restructuring subsidiaries.⁷³

Nevertheless, it is essential to reconsider the objectives of sanctions within the framework of corporate responsibility to respect human rights, which encompasses not only a company's direct actions but also its supply chains. Imposing sanctions on Russian firms typically does not alter their conduct, but it should influence the behavior of those companies whose supply chains are intertwined with sanctioned entities. This expanded perspective broadens our interpretation of the legitimate purpose of applying sanctions: not only to induce changes in the sanctioned company itself but also to impact the conduct of its supply chains.

In this sense, the concept of social expectations, which underlies the concept of corporate responsibility to respect human rights, also requires rethinking, as it turns out to be distorted in non-democratic societies.⁷⁴ According to the classical business and human rights concept, "the corporate responsibility to respect is the basic expectation society has of business", "the baseline expectation for all companies in all situations".⁷⁵ The corporate responsibility to respect means, in particular, that businesses should avoid and address "human rights risks" – potential or actual adverse impacts on human rights that a business may cause or contribute to through its own activities, or to which it may be directly linked through its operations, products, or services via its business relationships.⁷⁶ One of the goals of sanctions is to signal to the public that certain behavior of a company is unacceptable in a situation where the company operates under the jurisdiction of a state that does not fulfill its human rights obligations.

⁶⁸ VAN HO, T. Not all parties are equal: understanding the responsibility for reparations in conflict-affected areas. *Business & Human Rights Resource Centre*, 20 Feb. 2023. Available at: <https://www.business-humanrights.org/en/blog/not-all-parties-are-equal-understanding-the-responsibility-for-reparations-in-conflict-affected-areas/>.

⁶⁹ OLIVER, C. Strategic Responses to Institutional Processes. *Academy of Management Review*, v. 16, n. 1, p. 145-179, 1991. p. 146.

⁷⁰ SCOTT, W. R. The Adolescence of Institutional Theory. *Administrative Science Quarterly*, v. 32, n. 4, p. 493-511, Dec. 1987. p. 496.

⁷¹ SAKA-HELMHOUT, A.; GEPPERT, M. Different Forms of Agency and Institutional Influences within Multinational Enterprises. *Management International Review*, v. 51, p. 567-592, 2011. p. 568.

⁷² DREZNER, D. W. Sanctions sometimes smart: targeted sanctions in theory and practice. *International Studies Review*, v. 13, n. 1, 2011. p. 99.

⁷³ GAUR, A.; SETTLES, A.; VÄÄTÄNEN, J. Do Economic Sanctions Work? Evidence from the Russia-Ukraine Conflict. *Journal of Management Studies*, v. 60, iss. 6, p. 1391-1414, Sep. 2023. p. 1398.

⁷⁴ It is also shown in the series of the podcasts. Rule of Law and Corporate Actors. 2023. Available at: <https://ruleoflawbiz.org/category/podcasts>.

⁷⁵ GUIDING principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. *OHCHR*, 01 Jan. 2012. Available at: <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>.

⁷⁶ GUIDING principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. *OHCHR*, 01 Jan. 2012. Available at: <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>.

5.2 Dilemma 2: Payment of taxes to the budget of the aggressor state

There is a pressure on the companies continue to pay taxes in Russia that they are indirectly financing the war and the severe breaches of international human rights and humanitarian law that we see in Ukraine today.⁷⁷ The report from B4Ukraine and the Kyiv School of Economics (KSE) takes a closer look at multinational revenues and taxes in Russia in 2022. The report finds: in 2022, global corporations made over \$213.9 billion in revenues through their local Russian businesses. Collectively, companies headquartered in the EU member states earned \$75.2 billion in 2022 and paid \$594 million in profit tax.⁷⁸

The National Agency on Corruption Prevention and the Ministry of Foreign Affairs of Ukraine are developing the list of the international war sponsors. This list includes companies which pay taxes in Russian Federation. As the site is emphasizing, the list designation is reputational only. Ukraine does not control the enforcement: it is the global community who acts as the judge, jury, and executioner.⁷⁹

In the context of formulating the UN Guiding Principles on Business and Human Rights (UNGPs), Professor John G. Ruggie noted that the “mere presence in a country, *paying taxes*, or silence in the face of abuses is unlikely to amount to the practical assistance required for legal liability”.⁸⁰ The paper published by the OHCHR in August 2023 also notes that, as a general rule, the payment of taxes in situations of armed conflict or authoritarian regimes does not on its own make a business “involved with” the violations of

a government regime, even an illegitimate one (apart from exceptional circumstances where a business is a very significant tax contributor to a government that is involved in gross violations of human rights).⁸¹ Guiding Principle 23 reminds businesses that they should comply with all applicable laws, including in challenging circumstances (indeed, this is often an important line of defence against arbitrary government action). Further, taxes are necessary to fund public services that fulfil human rights, such as health and education.⁸²

At the same time, situations are possible when the government does not fulfill its obligations to provide the local population with public services necessary for the realization of human rights. Myanmar can be cited as an example. Many experts called on companies operating in Myanmar to stop paying taxes to the budget of Myanmar’s military.⁸³ However, this is not the only criterion that must be taken into account, and the assessment of the company’s conduct must be individual. So when H&M announced its withdrawal from Myanmar, Vicky Bowman, director of the Myanmar Centre for Responsible Business and former British ambassador to Myanmar, regret H&M’s announcement, as it will have a negative impact on thousands of women workers in Myanmar.⁸⁴

The situation with Russia is distinct in that the withdrawal of companies making substantial contributions to the Russian budget doesn’t inherently jeopardize the population’s access to essential public services

⁷⁷ REPORT: The Business of Staying: a closer look at multinational revenues and taxes in Russia in 2022. *Business & Human Rights Resource Centre*, 4 July 2023. Available at: <https://www.business-humanrights.org/en/latest-news/report-the-business-of-staying-a-closer-look-at-multinational-revenues-and-taxes-in-russia-in-2022>.

⁷⁸ B4UKRAINE; KSE INSTITUTE. The Business of Staying: a closer look at multinational revenues and taxes in Russia in 2022. *B4Ukraine.org*, 2022. Available at: <https://b4ukraine.org/pdf/BusinessOfStaying.pdf>.

⁷⁹ FREQUENTLY asked questions. Available at: <https://sanctions.nazk.gov.ua/en/faq>.

⁸⁰ HUMAN RIGHTS COUNCIL. Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Human Rights.org*, 7 Apr. 2008. Available at: <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>.

⁸¹ OHCHR. Business and Human Rights in Challenging Contexts Considerations for Remaining and Exiting. *OHCHR*, 2023. Available at: <https://www.ohchr.org/sites/default/files/documents/issues/business/bhr-in-challenging-contexts.pdf>.

⁸² HUMAN RIGHTS COUNCIL. Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Human Rights.org*, 7 Apr. 2008. Available at: <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>.

⁸³ O’SULLIVAN, Diarmid; MATHIASON, Nick. How we helped reveal Heineken and Carlsberg tax payments to Myanmar military junta. *Finance Uncovered*, 20 Apr. 2023. Available at: <https://www.financeuncovered.org/stories/how-we-helped-reveal-heineken-and-carlsberg-tax-payments-to-myanmar-military-junta>.; MYANMAR: Urgent action needed to block foreign revenue. *Human Rights Watch*, 25 Jan. 2022. Available at: <https://www.hrw.org/news/2022/01/25/myanmar-urgent-action-needed-block-foreign-revenue>.

⁸⁴ REID, Helen. Exclusive-H&M says it will ‘phase out’ sourcing from Myanmar. *Reuters*, 17 Aug. 2023. Available at: <https://jp.reuters.com/article/global-fashion-myanmar-hm-idAFL1N39Y14B>.

that safeguard basic human rights (as discussed in dilemma 3). However, the significant financial contributions of certain companies could be viewed as leverage. In our perspective, the imposition of sanctions against such companies might be justifiable. However, the payment of taxes to the budget of the Russian Federation cannot be the only and automatic criterion for the application of sanctions. From the perspective of a corporate responsibility to respect human rights, the company should answer the question of what actions it has taken to use its leverage to stop or minimize risks to human rights. When a company operates in a situation of conflict and/or a non-democratic political regime, the understanding of leverage is broadened and applied not only to the direct business relationships of the company, but also to its impact on the overall human rights situation in the country. In this regard, companies with leverage (paying significant taxes, having large sales markets and a wide client base in the country, etc.) are obliged to answer the question of what measures they have taken in connection with gross violations of international human rights law and international humanitarian law by the host country in addition to the heightened human rights due diligence.⁸⁵

5.3 Dilemma 3: The essentiality of services and goods that are supplied by companies operating in aggressor state

Access to essential services and goods – including safe drinking water, adequate food, housing, healthcare and medicine, electricity and gas supply, rail and urban transport, public utilities, banking services, sanitation, and access to internet and communication services – is a key condition to satisfy basic needs for leading a life with human dignity⁸⁶ and well-being.⁸⁷ Recognized

⁸⁵ UNITED NATIONS DEVELOPMENT PROGRAMME. Heightened Human Rights Due Diligence for business in conflict-affected contexts: a guide. *UNDP*, 16 June 2022. Available at: <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide>.

⁸⁶ THE SPHERE PROJECT. *Humanitarian Charter and Minimum Standards in Disaster Response*. Geneva: The Sphere Project, 2004.

⁸⁷ BROOK, P. J.; SMITH, S. M. *Contracting for Public Services: Output-based Aid and Its Applications*. Washington, DC: World Bank, 2001. Available at: <http://hdl.handle.net/10986/13978>;

UNITED NATIONS. *UN Habitat: International Guidelines on Access to Basic Services for All*. UN Doc HSP/GC/22/2/Add. 2009.; OLIVER, D.; PROSSER, T.; RAWLINGS, R. *The regulatory state: Constitutional Implications*. Oxford: Oxford University, 2010. p. 158.;

human rights standards call for ensuring the minimum necessary access to these essential services.

“Essentiality” is context specific. No fixed definition of essential goods/services exists in the strict sense. A frequently used term that can be interpreted more narrowly is the term “basic goods / services”, defined as goods/services in the social domain that should be available and reasonably accessible to everyone in need for them.

B4Ukraine notes that “companies exploiting the “essentiality” justification are some of the biggest revenue generators in Russia meaning that the continued provision of non-essential food and hygiene products significantly contributes to the war in Ukraine.”⁸⁸ B4Ukraine emphasizes that

the burden should be on each company to justify why the good/service is essential to the market, why no alternative products are available or no other local actor(s) can supply the good/service, and how the company will mitigate its proximity to human rights harms.⁸⁹

However, it does not sufficiently take into account the context. Companies, assessing their impact on human rights in a targeted state, should assess not just the nature of their products (food, medicine, etc.), but their role in the implementation of a specific human right and provide evidence that the enjoyment of a fundamental human right would be threatened if it were withdrawn from the market.

5.4 Dilemma 4: (Not)use of leverage beyond of involvement in human rights violations

The business and human rights concept requires companies to ensure corporate responsibility to respect human rights, but “this does not mean that companies must categorically stay away from authoritarian states”,⁹⁰ because “international companies that respect human rights in words and deeds can be a force for good”.⁹¹ The

ČERNIČ, J. L. *Corporate accountability under socio-economic rights*. Oxon: New York: Routledge, 2019. p. 111.

⁸⁸ ESSENTIAL Goods & Services. *B4Ukraine*. Available at: <https://b4ukraine.org/what-we-do/essential-goods-services>.

⁸⁹ ESSENTIAL Goods & Services. *B4Ukraine*. Available at: <https://b4ukraine.org/what-we-do/essential-goods-services>.

⁹⁰ EKELOVE-SLYDAL, G. M.; DALE, I. *Doing Business in Authoritarian States: Tackling Dilemmas While Preserving Integrity*. [S. l.]: Norwegian Helsinki Committee, 2022. p. 7.

⁹¹ EKELOVE-SLYDAL, G. M.; DALE, I. *Doing Business in Authoritarian States: Tackling Dilemmas While Preserving Integrity*. [S. l.]: Norwegian Helsinki Committee, 2022. p. 7.

Norwegian Helsinki Committee notes that international companies should step up their support for human rights within their spheres of influence and publicly state their values and principles. Companies struggling to be faithful to their values due to government pressure and persecution need to be supported by democratic states, which, i.e., should introduce targeted sanctions against corrupt and brutal political leaders and their enablers who trample on human rights. In designing sanctions, the role of international companies should be considered.⁹² This thought was supported also by Ekaterina Deikalo: a company, sticking to human rights values, using the leverage of partnership, etc., can indeed sometimes be the only “hope” and instrument for the people trying to protect themselves.⁹³

There are many examples when companies were called to use their power (leverage) to impact to the human rights environment positively. In 2019, major Dutch institutional investors appealed to Shell to bring pressure on Brunei Darussalam over a proposed law mandating the death penalty for homosexuality. Leading investment banks such as JP Morgan also boycotted hotels owned by the Sultan of Brunei;⁹⁴ the legislation was eventually abandoned. But supporting civic freedoms does not always have to mean stark choices or overt public messaging. In some cases, investors and companies can exert influence discreetly.

As Tara van Ho mentioned, the business’s power to stop (or minimize) the harm should be taken into consideration. Power can manifest in three different ways: power directly over the circumstances; power in a relationship with another actor; and power over the environmental or social conditions that lead to harm.⁹⁵

As always in business and human rights, context matters. Companies do not have the same leverage over a government that tolerates gross human rights violations and, accordingly, there cannot be a universal call to stop business or leave the country. As we have already indicated, companies with leverage (large taxpayers, companies with a large customer base, etc.) must demonstrate how they used their leverage in order to minimize the negative impact on human rights, or, if that’s not possible – exit.

5.5 Dilemma 5: Western manufacturers’ supplies of components for weapons to Russia

Following the February 2022 invasion of Ukraine, the US, the UK and the EU passed a range of sweeping sanctions on Russia. These included targeted financial and sectoral sanctions, in addition to the extension of wide-ranging export controls designed to curtail the country’s access to military technology and critical components. A variety of other countries and jurisdictions, including Japan, South Korea, Taiwan, Canada, Australia and Switzerland, committed to implementing similar export controls. While prior to the invasion many of the US manufactured components found in Russia’s weapons systems were cleared for export to Russia under the Export Administration Regulation (EAR99) (Byrne, Somerville, Byrne, Watling, Reynolds & Baker),⁹⁶ the US exporters of these products still had a due-diligence obligation to make sure they were not destined for a prohibited end user, or to be applied in a prohibited end use.

However, in the summer of 2023, RUSI identified 450 unique components primarily sourced from Western manufacturers, of which at least 318 came from US-based companies, 34 from Japan companies, 30 – Taiwan, 18 – Switzerland, 14 – Netherlands, 10 – Germany, 6 – China, 6 – Republic of Korea, 5 – United Kingdom, 2 – Austria.⁹⁷

[I]: Norwegian Helsinki Committee, 2022. p. 8.

⁹² EKELØVE-SLYDAL, G. M.; DALE, I. *Doing Business in Authoritarian States: Tackling Dilemmas While Preserving Integrity*. [S. l.]: Norwegian Helsinki Committee, 2022. p. 13.

⁹³ DEIKALO, E. BHR agenda and authoritarian regimes: The case of political and human rights crisis in Belarus since 2020. *Business and Human Rights Journal*, 2023. p. 4.

⁹⁴ VANDELDELDE, M.; MORRIS, S. JPMorgan bans staff from Brunei-owned hotels over gay law. *Financial Times*, 2019. Available at: <https://www.ft.com/content/b0365536-69ca-11e9-80c7-60ee-53e6681d>.

⁹⁵ VAN HO, T. Not all parties are equal: understanding the responsibility for reparations in conflict-affected areas. *Business & Human Rights Resource Centre*, 20 Feb. 2023. Available at: <https://www.business-humanrights.org/en/blog/not-all-parties-are-equal-understanding-the-responsibility-for-reparations-in-conflict-affected-areas>.

⁹⁶ BYRNE, J.; SOMERVILLE, G.; WATLING, J.; REYNOLDS, N.; BAKER, J. Silicon Lifeline: Western Electronics at the Heart of Russia’s War Machine. *RUSI*, 2022. Available at: https://static.rusi.org/RUSI-Silicon-Lifeline-final-updated-web_1.pdf.

⁹⁷ BYRNE, J.; SOMERVILLE, G.; WATLING, J.; REYNOLDS, N.; BAKER, J. Silicon Lifeline: Western Electronics at the Heart of Russia’s War Machine. *RUSI*, 2022. Available at: https://static.rusi.org/RUSI-Silicon-Lifeline-final-updated-web_1.pdf.

Components that have been identified by the Ukrainian authorities in Russian missiles are linked to many of the same companies whose components have appeared in other intercepted weapons on Ukrainian territory since April 2022: US Analog Devices, US Texas Instruments, US Microchip Technology, US Intel corporation, US AMD, German Infineon Technologies, Korean Samsung, Switzerland STMicroelectronics, US Vicor, USA XILINX, USA ZILOG, US Maxim Integrated, and USA Cypress Semiconductor. These components are not from old stocks. In December 2022, Conflict Armament Research analyzed the remnants of two Russian Kh-101 missiles in Kyiv and concluded with near certainty that these missiles had been manufactured within the previous two months (i.e., before November 2022).⁹⁸ As experts in sanctions regimes issues note,

the export control regime is not as effective as needed. Too many components from Western producers are finding their way to Russia, even if we recognize that some circumvention of export controls is unavoidable as entities in third countries may be outside the direct reach of the sanctions coalition.⁹⁹

As a response to this threat, they propose

that companies and other legal entities operating in sanctions coalition countries be obligated to disclose information on their business ties with Russia and Belarus. At a minimum, the proposed disclosure requirements should obligate EU, U.S., Canadian, Korean, Japanese, UK, and Ukrainian companies that have business ties with Russia to disclose the existence of such ties, the identity of their Russian counterparts, and the nature of the relationship. These disclosures will increase awareness of these businesses' dealings, investors, creditors, clients, and other stakeholders of such relationships.¹⁰⁰

⁹⁸ THE INTERNATIONAL WORKING GROUP ON RUSSIAN SANCTIONS. Working Group Paper #12: Strengthening Sanctions to Stop Western Technology from Helping Russia's Military Industrial Complex. *Stanford University*, 3 July 2023. Available at: https://fsi9-prod.s3.us-west-1.amazonaws.com/s3fs-public/2023-07/sanctions_working_group_-_russian_import_of_critical_components-7-9-2023_final.pdf.

⁹⁹ THE INTERNATIONAL WORKING GROUP ON RUSSIAN SANCTIONS. Working Group Paper #11: Action Plan 2.0: Strengthening Sanctions against the Russian Federation. *Stanford University*, 24 Apr. 2023. Available at: https://fsi9-prod.s3.us-west-1.amazonaws.com/s3fs-public/2023-04/russia_sanctions_working_paper_11_action_plan_2.0_v2.pdf.

¹⁰⁰ THE INTERNATIONAL WORKING GROUP ON RUSSIAN SANCTIONS. Working Group Paper #11: Action Plan 2.0: Strengthening Sanctions against the Russian Federation. *Stanford University*, 24 Apr. 2023. Available at: https://fsi9-prod.s3.us-west-1.amazonaws.com/s3fs-public/2023-04/russia_sanctions_working_paper_11_action_plan_2.0_v2.pdf. p. 10.

It shows the lack of awareness on the UNGPs framework among those who are developing sanctions” regimes and lack of capacities to implement UNGPs for ensuring responsible business conduct in supply chains of components that could be used for the Russian military aggression. Above mentioned risks could be significantly minimized by implementing a heightened HRDD approach: As the risk of gross human rights abuses is heightened in conflict-affected contexts, businesses should carry out heightened human rights due diligence: to identify and assess not only their actual or potential adverse impacts on human rights, but also their actual or potential adverse impacts on conflict.¹⁰¹ Moreover, the expectation that the company know own supply chains (suppliers in different tiers of its supply chains), makes them transparent and takes steps to ensure that suppliers in different tiers of supply chains respect human rights and are not involved in human rights violations and violations of the IHL – such expectations are already meaningful part of the UNGPs agenda. It should be also noted that disclosing information on business ties is very limited and non-holistic approach that is not able to ensure responsible business conduct as it does not cover policy commitments, due diligence, and remedy.

The using of tools heightened HRDD and tracking supply chains would identify risks at much earlier stages. Due diligence framework of the RBC standards can help enhance sanctions compliance where it is a legal obligation by improving visibility over complex business relationships that heighten the risk of sanctions evasion – including in the context of export restrictions on certain dual use technologies to Russia. For companies and policy makers, this makes a compelling case for enhanced due diligence based on the RBC standards, including in relation to down-stream impacts and business relationships. Where relevant, the RBC due diligence can help improve companies’ understanding of how their supply chains and business relationships potentially intersect with exposed entities or sectors, while ensuring that related issues and relevant RBC risks are

¹⁰¹ THE INTERNATIONAL WORKING GROUP ON RUSSIAN SANCTIONS. Working Group Paper #11: Action Plan 2.0: Strengthening Sanctions against the Russian Federation. *Stanford University*, 24 Apr. 2023. Available at: https://fsi9-prod.s3.us-west-1.amazonaws.com/s3fs-public/2023-04/russia_sanctions_working_paper_11_action_plan_2.0_v2.pdf. p. 11.

identified and addressed, whether operating in or from a sanctioning jurisdiction or not¹⁰².

6 Conclusions

The development of the business and human rights framework has given very limited attention to sanctions against companies. In fact, sanctions are seen only as a factor that significantly increases the risk for a company to be involved in negative impacts on human rights, or as an indicator of the need to withdraw from business relations. At the same time, the debate around the applied sanctions raises issues of high relevance to the business and human rights concept. One such question is whether the corporate responsibility to respect human rights encompasses the company's obligation to use its power (leverage) to minimize or eliminate human rights risks in a situation where the company itself is not involved in negative impact ("causation," "contribution" and "direct linkage"). In other words, there is a situation where the company has the ability to influence beyond of its business relationship. Leverage can be the company's role in the country's economy, influence on the investment image, influence on public opinion, etc. (public power linkage). Thus, the concept of corporate responsibility to respect human rights should be much more related to the company's power (leverage) and, accordingly, expanded beyond its understanding only within the framework of a situation where "the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship."¹⁰³ Most often, companies encounter this situation in non-democratic political regimes.

And in this sense, the answer depends on what we consider as the underlying idea of the concept of business and human rights. It seems to us that the main idea is that any actor endowed with a certain amount of public power (the power to influence the behavior

of other participants in social relations) is the bearer of human rights obligations.

The theory and practice of applying sanctions against companies completely overlooks the business and human rights concept. The BHR concept has significant potential to ensure that sanctions comply with the requirements of the rule of law, maintain their legitimacy and increase their effectiveness. We have identified key positions in which the concept of sanctions should be rethought through the lens of the concept of business and human rights. The principle of proportionality is traditionally at the basis of the rule of law, and the purpose of application of human rights sanctions against companies should be based on understanding of human rights adverse impact by business and corporate responsibility to respect human rights.

First, companies should be sanctioned on the basis of their alleged involvement in human rights violations: "causation," "contribution", "direct linkage" and, as we mentioned earlier, "public power linkage". The sanction itself should be proportionate to the perceived degree of involvement of the company in the violation.

Second, the purpose of imposing sanctions against companies may not be to change the behavior of the company itself, but to change the behavior of companies that are part of its supply chains. This, in turn, brings the issue of hHRDD and supply chain tracing to the fore in order to ensure the effectiveness of sanctions. Companies that fail to exercise hHRDD and end up in the supply chain of sanctioning companies should be held accountable.

Third, the application of sanctions should include a human rights impact assessment. One of the components of such an assessment should be depriving or significantly complicating the access of the population (or groups) to basic services and goods that ensure the realization of fundamental human rights. It also means that a sufficient reason for not withdrawing from a business relationship that adversely affects human rights cannot be based on the essentiality of the provided goods and services, unless such withdrawal will deprive the local people (or some groups, especially vulnerable) of a fundamental human right or significantly limit them.

¹⁰² OECD Responsible business conduct implications of Russia's invasion of Ukraine. *OECD*, 2023. Available at: <https://www.oecd-ilibrary.org/docserver/f222a4d1-en.pdf?expires=1692376231&id=id&accname=guest&checksum=23FF17867BC70CE088890FF70EBDA70F>.

¹⁰³ Referência.

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