

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

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights pursuant to Human Rights Council resolutions 36/10.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **negative impact on human rights of targeted sanctions authorized by the Sergei Magnitsky Rule of Law Accountability Act of 2012 (Sergei Magnitsky Act), the Global Magnitsky Human Rights Accountability Act of 2016 (Global Magnitsky Act) and Executive Order 13818 (E.O. 13818) of 20 December 2017**, which raise grave rule of law and human rights concerns as they are used as highly discretionary powers by the President of the United States without any judicial oversight. As evidenced most recently, the list of targeted individuals has expanded and included nationals from different countries: Russian Federation, China, Cambodia, Sudan, Latvia, Myanmar, Pakistan, Slovakia and others.

According to the Global Magnitsky Act, “[t]he President may impose the sanctions [...] with respect to any foreign person the President determines, based on credible evidence (1) is responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals in any foreign country who seek (A) to expose illegal activity carried out by government officials; or (B) to obtain, exercise, defend, or promote internationally recognized human rights and freedoms, such as the freedoms of religion, expression, association, and assembly, and the rights to fair trial and democratic elections; (2) acted as an agent of or on behalf of a foreign person in a matter relating to an activity described [under (1) above]; (3) is a government official, or a senior associate of such an official, that is responsible for, or complicit in, ordering, controlling, or otherwise directing, acts of significant corruption, including the expropriation of private or public assets for personal gain, corruption related to government contracts or the extraction of natural resources, bribery, or the facilitation or transfer of the proceeds of corruption to foreign jurisdictions; or (4) has materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, an activity described [under (3) above].”

The sanctions include inadmissibility to the United States and the blocking of property in accordance with the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.). The blocking of property can entail all transactions in all property and interests in property of a foreign person, whether an individual or an entity, if such

property and interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person.

E.O. 13818 builds upon the Global Magnitsky Act by, inter alia, introducing more expansive discretion and standards for determining whether sanctions are justified with respect to both serious human rights abuses and corruption; widening the range of potential victims of the serious human rights abuses and acts of corruption that are determined to have occurred; and authorizing sanctions that target persons beyond foreign entities and current and former government officials or their associates or those who facilitate their acts, including, potentially, United States persons.

In accordance with E.O. 13818, the President of the United States used his highly discretionary power to determine, allegedly without any clear and obvious evidence, that the human rights abuses and corruption have their source, in whole or in substantial part, outside the United States, and that their current global level has reached such scope and gravity that it became a threat to the stability of international political and economic systems.

The law also stipulates that a person that violates, attempts to violate, conspires to violate, or causes a violation of a sanction described above that is imposed by the President, or any regulation, license, or order issued to carry out such a sanction, shall be subject to the penalties set forth in subsections (b) and (c) of section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705), including a civil penalty that may be imposed on any person who commits an unlawful act in an amount not to exceed the greater of \$250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

The criminal prosecution and penalty may proceed if a person willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of, a violation of a sanction described above. Such person shall, upon conviction, be fined up to \$1,000,000, or, if a natural person, may be imprisoned for up to 20 years, or both.

It is true that human rights abuses and corruption undermine the values that form an essential foundation of stable, secure, and functioning societies, have devastating impacts on individuals, weaken democratic institutions, degrade the rule of law, perpetuate violent conflicts, facilitate the activities of dangerous persons, and undermine economic markets. And it might be indeed a legitimate concern for the United States to seek to impose tangible and significant consequences on those who commit serious human rights abuse or engage in corruption, as well as to protect the financial system of the United States from abuse by these same persons. Nonetheless, such measures can only be undertaken in compliance with the United States' international obligations, including those in the sphere of human rights and international law.

The discretionary powers of the President of the United States result, however, in sanctions being introduced based on information that fails to meet basic evidential

standards of proof that a person committed the acts described above. The highly discretionary use of such powers exacerbates concerns about their compliance with rule of law principles and international human rights standards related to due process and fair trial, in particular in the context of their enforcement through administering civil and criminal liability.

The extraterritorial character of Magnitsky sanctions raise serious concerns of legality under international law. Despite the universally recognized customary principle of universal jurisdiction, codified in multiple treaties to which the United States is party, no treaty expands such jurisdiction to corruption or single human rights violations or crimes including starting an illegal logging network, money laundering, bribery, and arms deals with designated entities; and even being a family member of someone else cannot be qualified as an international crime.

Any measures taken in response to the violation of collective *erga omnes* obligations – serious breaches of obligations under peremptory norms of general international law (art. 48(b) of the Draft articles on Responsibility of States for Internationally Wrongful Acts (A/56/10)) shall be in conformity with international law and shall not violate fundamental human rights (art. 50(1b) DARS). In a case when the alleged activity provides a solid ground for the exercise of universal jurisdiction, customary international law prescribes the obligation of adjudication with full observance of fair trial standards.

E.O. 13818 refers to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.) (NEA), the Global Magnitsky Human Rights Accountability Act (Public Law 114-328) (the “Act”), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)) (INA), and section 301 of title 3, United States Code, which stipulate that serious human rights abuses and corruption constitute an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States and, therefore, authorize the President of the United States to declare a national emergency with respect to that threat in order to exercise the power to restrict fundamental rights and freedoms, which normally can be restricted only by a court order. Such stipulation and power do not conform to article 4 of the International Covenant on Civil and Political Rights (ICCPR), which allows a party to derogate on the basis of declaring a public emergency only if there is a threat to the life of the nation.

In E.O. 13818, the President declared a national emergency on the basis of his own determination that current global level of human rights abuse and corruption had reached such scope and gravity that it became a threat to the stability of international political and economic systems and that “serious human rights abuse and corruption around the world constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.”

While E.O. 13818 and the Global Magnitsky Act are designed to provide the President of the United States with emergency powers to restrict the right to property without judicial oversight, it is highly likely that the same emergency powers can be used to unduly restrict a large array of other fundamental rights and freedoms of sanctioned individuals, including the rights to freedom of movement, liberty and security, life, privacy and family life, freedom of expression, fair trial and due process, presumption of innocence, to be informed promptly about the nature and cause of the accusation, the right to defend oneself, the right to effective remedy, the right to protection by law and the right to defend one's reputation. All of these are enshrined in the ICCPR, which the United States ratified on 8 June 1992.

While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights (HRC General Comment No. 32, para. 6). Human Rights Committee finds no justification for derogation from these guarantees during emergency situations as well as in the time of war (HRC General Comment No. 29, para. 16). This is also reflected in the international humanitarian law (see Geneva Convention IV, art. 72–73, 146(4); Geneva Convention III, art. 105–108, 129(4); Additional Protocol I to Geneva Conventions, art. 75(3, 4, 7); Additional Protocol II, art. 6).

Without prejudging the accuracy of the information above, I would like to express my concerns regarding the policies and initiatives adopted by the Government of the United States of America through E.O. 13818, which is based on the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.) (NEA), the Global Magnitsky Human Rights Accountability Act (Public Law 114-328) (the “Act”), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)) (INA), and section 301 of title 3, United States Code. I am gravely concerned that this set of legislation provides for highly discretionary powers of the President of the United States which are allegedly outside the scope and jurisdiction of the judiciary.

In this context, I urge your Excellency's Government to review and eliminate the negative impact of the Magnitsky sanctions, in full compliance with its obligations arising from the UN Charter, international human rights law and other international obligations.

In this regard, I would like to remind your Excellency's Government that no human rights violations can be cured by a violation of human rights. Moreover, the legality of unilateral sanctions taken without or beyond authorization of the UN Security Council is rather dubious from the perspective of international law.

In connection with these rights, please refer to the **Annex on Reference to international human rights law** attached to this letter, which cites the articles of the ICCPR that are relevant to these allegations.

As it is my responsibility, under the mandates provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I 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 jurisdiction of your Excellency's Government over individuals subjected to sanctions authorized and implemented through the Sergei Magnitsky Act, the Global Magnitsky Act and E.O. 13818 from the point of international law.
2. Please, provide a detailed answer on whether your Excellency's Government has already taken steps to eliminate or minimize the negative impact of these sanctions on the enjoyment of human rights, or whether you intend to do so in the future and in which form.
3. Please, indicate what measures have been taken by your Excellency's Government to ensure that the sanctions are, in each case, compliant with the United States' obligations under the UN Charter, international human rights law and other international obligations to guarantee that the rule of law is observed.
4. Please, provide any additional information whether your Excellency's Government has contacted Governments of the nationalities of targeted individuals and companies to bring individuals accused in the commission of human rights violations and corruption to justice.
5. Please, clarify, whether there is any possibility for judicial control over sanctions authorized and implemented through the Sergei Magnitsky Act, the Global Magnitsky Act and E.O. 13818, to guarantee the implementation of the right to fair trial and humanitarian standards.

I would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to prevent any negative impact on the human rights of persons subject to the sanctions authorized under the Sergei Magnitsky Act, the Global Magnitsky Act and E.O. 13818.

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

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

Annex
Reference to international human rights law

In connection with the above concerns, I would like to refer your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described.

I refer to article 12 of the ICCPR on freedom of movement, which states that "No one shall be arbitrarily deprived of the right to enter his own country" The UN Human Rights Committee, in General Comment No. 27 (1999), specified that "(t)he scope of 'his own country' is broader than the concept 'country of his nationality.' It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien."

The right to privacy and family life (ICCPR, article 17) comes into play in conjunction with article 12 in cases where an individual's ties with a foreign country include, for example, family members who are present in the foreign country as citizens or residents.

The right to freedom of expression is relevant to cases in which a sanctioned person is blocked from using social or other media that deny use on the basis that allowing it would violate the sanctions. I recall that article 19 of the ICCPR gives every person the right of "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." It admits certain restrictions as provided by law if they are necessary to respect the rights and reputations of others, or to protect national security or public order.

I refer to article 14 of the ICCPR with respect to the blockage of property and related financial transactions. This article addresses the procedures that constitute due process. Article 14(2) establishes that all persons charged with a criminal offence are to be presumed innocent until their guilt is established through legal procedures. As a criminal charge can be essential for establishing one's innocence as well as guilt, the presumption of innocence can only be strengthened if no criminal charges are levied. As for determining whether a crime has been committed, article 14(1) holds that everyone charged with a crime "shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law," during which the accused person has the right to defend himself in person or through legal assistance of his or her own choosing (article 14(3)(d)). This allows the presumption that if no charge is brought, the act in question does not rise to the level of a crime for which a fair hearing shall be held.

I wish to recall that the due process is also addressed in article 2 of the ICCPR, which states that "any person whose rights or freedoms as herein recognized are violated shall have an effective remedy" (ICCPR, article 2(3)(a)), and that "any person claiming such a remedy shall have his right thereto determined by competent judicial,

administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy” (ICCPR article 2(3)(b)).

I additionally refer to article 17 of the ICCPR, which prohibits “arbitrary or unlawful interference with [a person’s] privacy, family, home or correspondence” as well as “unlawful attacks on his honour and reputation.”

Lastly, I wish to recall that as a party to the ICCPR, the United States is authorized under article 4 to derogate from the obligations it imposes on States Parties “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.” The ICCPR allows derogations from its obligations only “to the extent strictly required by the exigencies of the situation.” Thus, a derogation may only occur in the case of a threat to “the life of the nation,” which the UN Human Rights Committee, in General Comment No. 29 (2001), deems to be an actual and direct existential threat to the state rather than a threat of disruption to daily life within the state; and it must be limited only to those obligations in the ICCPR that are absolutely necessary for addressing such a threat.

Article 4 also requires a State Party derogating from its provisions as the result of a public emergency to “immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated.” General Comment No. 29 notes that such notification is essential for allowing the Human Rights Committee to assess whether derogations are justified by the circumstances for which an emergency is declared.