

Mandates of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights; the Special Rapporteur on the right to food; the Special Rapporteur on the human rights of internally displaced persons; and the Independent Expert on human rights and international solidarity

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights; Special Rapporteur on the right to food; Special Rapporteur on the human rights of internally displaced persons; and Independent Expert on human rights and international solidarity, pursuant to Human Rights Council resolutions 45/5, 32/8, 41/15 and 44/11.

We would like to bring to the attention of your Excellency's Government the information we received about the **negative impact on human rights of sanctions imposed as the result of declarations of what appears to be permanent states of national emergency by the President of the United States under authority granted by the National Emergencies Act, 50 U.S. Code sections 1601-1651 (NEA), and the International Emergency Economic Powers Act, 50 U.S. Code sections 1701-1706 (IEEPA)**. These raise grave rule of law and human rights concerns.

Numerous executive orders (EOs) currently in effect contain declarations of national emergencies by the U.S. President and specify the use of sanctions, usually entailing the blocking of assets and other property and the prohibition of entry into the United States, as the means to address them. These declarations cite the NEA and the IEEPA and occasionally other U.S. legislation as the domestic legal foundations for such actions, as well as 3 U.S.C. 301 as the domestic legal authority by which the President may assign and empower other officials in the executive branch to designate the persons to be subject to the sanctions.

In the past, the President of the United States initially used the Trading with the Enemy Act (TWEA), 50 App. U.S. Code sections 1-44, enacted in 1917, to impose sanctions and embargoes on foreign nations. In 1977, the United States Congress amended the TWEA and enacted the IEEPA. The IEEPA requires the President to declare a national emergency to "deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States." The IEEPA falls under the provisions of the NEA, which means that an emergency declared under the IEEPA must be renewed annually to remain in effect. In October 2001, the Patriot Act amended the IEEPA, adding the phrase "block pending investigation" after the word "investigate" in IEEPA section 1702(a)(1)(B). The amendment permits the Treasury Secretary to impose all the blocking effects of a designation, including freezing an entity's or individual's assets indefinitely and criminalizing all its/his/her transactions, based on the mere assertion by the Treasury that it is investigating whether the entity or the individual should be designated.

Subchapter II of the NEA (50 U.S. Code sections 1621 and 1622) prescribe rules for the declaration and termination of national emergencies. Section 1621(a) grants the President of the United States authority to declare a national emergency authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, including use of unilateral sanctions against a country, individuals or entities.

Section 1621(b) of the NEA states that any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect only when the President, specifically declares a national emergency, in accordance with the NEA. Section 1622 provides that the President or Congress may terminate any national emergency declared by the President in accordance with the NEA, and that such an emergency shall in any event terminate on the anniversary of the declaration of that emergency, unless the President issues timely notice stating that such emergency is to continue in effect. The NEA requires that such notice be transmitted to Congress and published in the Federal Register. The NEA does not provide the judiciary with the power of oversight or to terminate the national emergency. Since the adoption of the NEA in December 1976, around 70 national emergencies have been declared by various Presidents of the United States. More than 30 of them are currently in force and extended on annual basis. For instance, the longest existing national emergency, with regard to Islamic Republic of Iran, has lasted for more than 40 years. Another example is the national emergency with regard to Syria, that has been extended for over 16 years. The existence of such protracted national emergencies make the United States virtually under a permanent state of emergency, which is contrary to the international law.

Once a national emergency declared by the President terminates, any powers or authorities exercised by reason of the said emergency shall cease to be exercised. The NEA's sections 1631 and 1641 respectively set forth requirements that the President and other officers must follow once the President has declared a national emergency. Section 1631 provides that "[w]hen the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act." Accordingly, it appears that the powers of the Office of Foreign Assets Control (OFAC) allows to encroach on fundamental rights and freedoms of individuals and entities, in imposing all the blocking effects of a designation, including freezing an entity's or individual's assets indefinitely and criminalizing all its/his/her transactions would cease to exist as soon as the national state of emergency terminates.

The lack of compliance with international human rights law of these highly discretionary powers of the US President and other high level executive officials under the International Emergency Economic Powers Act were analyzed and discussed in my letters to your Excellency dated 26 August 2020 (AL USA 22/2020) and 21 December 2020 (AL USA 30/2020), the responses to which are still being awaited from your Excellency's Government.

We are gravely concerned that the NEA and the IEEPA may have become essentially an unlimited grant of authority to the President of the United States to exercise, at his discretion, broad emergency powers in both the domestic and international economic arena, without judicial review or oversight. These powers may

be exercised so long as there is an unterminated declaration of national emergency extended annually through notification in the Federal Registry, whether or not the situation with respect to which the emergency was declared bears any relationship to the situation with respect to which the President is using the authorities. Contrary to the United States' international obligations under the ICCPR, the NEA and the IEEPA allow declaring national emergencies nearly for any reason that the President of the United States may pursue, including, for instance, building a wall at the border with Mexico.

We are also gravely concerned that the NEA and the IEEPA may expand unfettered emergency powers of the President of the United States with respect to virtually any perceived or real 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 would be contrary 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.

The United States continues to maintain the position that the ICCPR does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2 (1) of the ICCPR, supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice. We regret that the repository of the ICCPR is not required to be notified under Subchapter II of the NEA.

The United States of America, having ratified the ICCPR on 8 June 1992, is obliged as a matter of international law to implement the Covenant in its entirety, taking into account the U.S. reservations and understandings, and to ensure the protection of all rights enshrined therein for every individual. Therefore, we are deeply concerned that sanctions imposed as a result of U.S. emergency declarations could negatively affect the enjoyment and exercise of many of these rights by individuals directly targeted or otherwise affected by the sanctions.

Among the reasons cited for the emergency declarations resulting in these sanctions are: the dismantling and undermining of local democratic processes or institutions (E.O. 13662 [Russian Federation], E.O. 13851 [Nicaragua] and E.O. 13288 [Zimbabwe]); the use of indiscriminate violence and repressive tactics against domestic civilians (E.O. 13851 [Nicaragua]); serious human rights abuses against domestic populations through computer and network disruption, monitoring, and tracking by their governments and abetted by domestic entities (E.O. 13606 [Iran and Syria]); serious human rights abuse or corruption (E.O. 13818 [China, Cuba, Haiti, Russian Federation and others]); establishing an illegitimate Constituent Assembly (E.O. 13808 [Venezuela]); obstructing a peaceful domestic transition of power and the domestic political process (E.O. 13611 [Yemen]); the commission of violence by foreign terrorists that disrupts the Middle East peace process (E.O.s 13947 and 13099); designation as a state supporter of terrorism (laws linked to the designation of terrorist threats as an emergency in E.O. 13224 [Cuba, North Korea, Iran, Syria]); supporting terrorism, continuing the occupation of Lebanon, pursuing weapons of mass destruction and missile programs, and undermining U.S. and international efforts with respect to the stabilization and reconstruction of Iraq (E.O. 13338 [Syria]).

While EOs, the NEA and the IEEPA 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 life, freedom of movement, liberty and security, 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. We are deeply concerned that the EOs, NEA and IEEPA may be used to deny sanctioned individuals these rights.

We are gravely concerned that the emergency declarations authorized by the NEA and the IEEPA in conjunction with 3 U.S.C. 301 confer highly discretionary emergency powers on the executive branch of your Excellency's Government that may be exercised outside of the scope and jurisdiction of the U.S. judicial system, without the protection the judicial system affords to the rights of persons accused and judged of wrongdoing, including adherence to standards on the admissibility and review of evidence used in making determinations. These powers also allow the U.S. President or designated officials of the executive branch to deny rights to persons in the absence of any legal procedures against them.

We are also gravely concerned at the impact that such unilateral sanctions may have on the enjoyment of human rights by the populations of affected countries. In many contexts, sanctions restrict the flow of foodstuffs and other essential commodities and their economic impact contributes to poverty, undermining the enjoyment of economic, social and cultural rights - effects compounded by the socio-economic impact of the covid-19 crisis. In 2020, sanctions have also negatively impacted covid-19 responses by obstructing the delivery of medicines and medical equipment. Moreover, these measures may pose obstacles to the provision of humanitarian assistance to those in need, including persons internally displaced by conflict, violence or disasters. Sanctions may also hinder reconstruction efforts in countries affected by conflict which are essential for their populations to have access to housing and basic services and for internally displaced persons to achieve durable solutions.

Article 4 of the ICCPR authorizes states to derogate from their obligations under the convention "(i)n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed," although it must continue to protect certain key rights, such as the right to life and the right to not be subject to torture or cruel, inhuman or degrading treatment or punishment. Derogations from the ICCPR must be as narrow as possible in view of the situation, and must comply with other obligations under international law.

In its Fourth Periodic Report under Article 40 of the ICCPR, your Excellency's Government stated that "The United States has not declared a 'state of emergency' within the meaning of Article 4" and that it has invoked the NEA and the IEEPA "generally to block the property of persons who were contributing to conflict in nations or persons who were undermining democratic processes and institutions in nations

seeking to establish democratic systems.”¹ We appreciate the candor of your Excellency’s Government in admitting that it has been blocking the property of persons designated through the NEA/IEEPA procedure rather than through due process, while not availing itself of the Article 4 framework that could render such derogations legal. We draw your Excellency’s attention to the fact that this remains an active issue that warrants attention under the terms of our mandates in view of the expanding scope of emergencies declared and renewed as well as the resulting sanctions imposed by the United States.

The reliance of the United States on emergency declarations as the grounds under U.S. law to deviate from its ICCPR obligations inherently requires these declarations to comply with the Article 4 meaning of “public emergency.” This is the only path made available by the convention for derogations to occur lawfully. Moreover, to the extent that your Excellency’s Government may consider the NEA and the IEEPA to prevent national emergencies from complying with the meaning in Article 4 of the ICCPR, the emergency declarations and renewals made since the United States ratified the convention must be deemed contrary to the Convention because their implementation is harmful to the rights protected by the it; in this regard, we refer to an advisory opinion by the Inter-American Court of Human Rights in a parallel situation, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*.²

We understand that IEEPA does not exclude a close alignment between U.S. emergency declarations and the meaning in Article 4, as the IEEPA authorizes such declarations in the presence of an “unusual and extraordinary threat, which has its source in whole or substantial part outside of the United States, to the national security, foreign policy, or economy of the United States.”³ A threat to national security may rise to the level of the existential threat to the state envisioned by Article 4, although breaches of the ICCPR on the basis of emergencies declared to address threats to U.S. foreign policy or the U.S. economy would not necessarily qualify.⁴ In this context, we call your Excellency’s attention to the requirement that any derogations arising from sanctions founded on emergencies declared under Article 4 must be limited “to the extent strictly required by the exigencies of the situation” and cannot apply to non-derogable rights.

We respectfully draw your Excellency’s attention to the fact that these derogations must be temporary, as stated by the Human Rights Committee in General Comment No. 29. This, too, is accommodated by the NEA, which requires that national emergencies be assessed by the U.S. President and automatically terminate after one year unless formally continued.⁵ In this regard, we are deeply concerned about the persistence of some U.S. emergencies over many years, even decades, through annual

¹ ICCPR, Consideration of reports submitted by States parties under article 40 of the Covenant: Fourth periodic report United States of America, 30 December 2011, CCPR/C/USA/4, 22 May 2012, para. 144, <https://undocs.org/en/CCPR/C/USA/4>.

² Inter-American Court of Human Rights. Advisory Opinion OC-14/94, 09.12.1994.

³ IEEPA, 50 U.S.C. 1701 note (Public Law 95-223, Sec. 202 (a)).

⁴ See, e.g., Concluding Observations of the Human Rights Committee: Uruguay, CCPR/C/79/Add.90 (1998), para. 8, in which “the Committee notes that the grounds for declaring an emergency are too broad.”

⁵ NEA, Title II.

renewals under the NEA. We are further concerned that the renewal of the emergency declarations without supplemental or alternative measures would indicate a willingness to tolerate the stated threats indefinitely, and that the renewals are simply a method to perpetuate the imposition of sanctions.

Moreover, we understand that sometimes the public announcements of sanctions that your Excellency's Government imposes as the result of emergency declarations, make no reference whatsoever to any emergency in or affecting the United States, nor do they suggest the existence of any situation that might be perceived by the U.S. public as an emergency that the sanctions are meant to counter.⁶ In view of the above observations, numerous, if not most, emergencies declared by the United States would not be genuine emergencies,⁷ and that the denial of rights through the resulting sanctions would be contrary to international law

Our concerns in this regard are reinforced by the addition of "corruption around the world" as a threat justifying the declaration of a national emergency in E.O. 13818 of 21 December 2017, which created the authority to impose the so-called "Magnitsky sanctions" against foreign persons in any country. The lack of compliance by these sanctions with international human rights law was analyzed and discussed in our letter to your Excellency dated 26 August 2020 (AL USA 22/2020). We further note that alleged domestic corruption in states other than the United States does not constitute an international crime, implemented without due process and access to justice guarantees and does not endanger the very existence of the United States.

We are deeply concerned, moreover, that Your Excellency's Government continues to declare emergencies that mandate sanctions in ways that are growing increasingly distant from the meaning in Article 4 of the ICCPR. We specifically refer to E.O. 13928 of 11 June 2020, which imposed sanctions against persons involved in efforts by the International Criminal Court to investigate, arrest, detain and prosecute U.S. persons and those of certain allies who are alleged to have engaged in grave international crimes, including crimes against humanity. These concerns were analyzed and discussed in a joint letter to your Excellency dated 26 June 2020 (AL USA 15/2020), the response to which is still being awaited from your Excellency's Government.

Although such sanctions deny rights within the United States, we are concerned that your Excellency's Government does not consider obligations created by the ICCPR to apply domestically because it has deemed the convention to be non-self-executing, a position that has been disputed by numerous U.S. legal scholars.⁸ The United States continues to maintain that the ICCPR does not apply to individuals under its jurisdiction but rather outside its territory, despite the interpretation to the contrary of article 2(1)

⁶ E.g., U.S. Department of the Treasury, "Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Accountability Act," press release, 9 July 2020, <https://home.treasury.gov/news/press-releases/sm1055>.

⁷ For states generally, "an emergent trend in the literature and empirical evidence is that it is now impossible to isolate and separate a state of emergency from normalcy" (Alan Greene, "Shielding the State of Emergency: Organised Crime in Ireland and the State's Response," *Northern Ireland Legal Quarterly* 62, no. 3 (2011): 249-268, at 250).

⁸ Penny M. Venetis, "Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation," *Alabama Law Review* 63, no. 1 (2011): 97-160, at 107-110.

of the ICCPR, supported by the Human Rights Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice.

We welcome the recognition by your Excellency's Government that the ICCPR creates obligations at the level of international law.⁹ Its ratification is a legal act that binds the United States to honor its provisions wherever it has jurisdiction to do so. In this respect, however, we should note that the extraterritorial jurisdiction created by U.S. emergency declarations for the sanctions they mandate is of dubious legality under international law. Despite the universally recognized customary principle of universal jurisdiction, codified in multiple treaties to which the United States is a party to, no treaty expands such jurisdiction to the activities covered by the sanctions. It also bears mention that the legality of unilateral sanctions taken without or beyond authorization of the UN Security Council is highly questionable from the perspective of international law.

Finally, with respect to sanctions affecting persons in countries involved in armed conflict, we wish to note that a situation of conflict may be a legitimate cause for declaring a state of emergency for the parties directly affected, but it is not a blanket authorization for a party to the ICCPR to derogate from its obligation to protect the human rights enshrined in the convention. Article 4 specifically requires parties to the ICCPR to interpret emergency-based derogations narrowly to include only those necessary to confront the stated emergency and for only as long as that emergency exists. It also requires that any derogations be consistent with a state's other international obligations, such as those elaborated in international humanitarian law through the Geneva Conventions and Additional Protocols.

To summarize, we are gravely concerned that the NEA and the IEEPA could grant unlimited authority to the President of the United States to exercise broad and highly discretionary emergency powers that, through emergency declarations and sanctions, would be contrary to a number of ICCPR-guaranteed rights, including the rights to life, freedom of movement, freedom of association, due process rights (to fair trial, to presumption of innocence, to be informed promptly about the nature and cause of the accusation, to defend oneself), the rights to effective remedy, to protection by law and to defend one's reputation, as well as rights to health, to food, to housing, economic and social rights and the right to development.

We are concerned about the lack of transparency regarding the criteria for declaring a national emergency and imposing sanctions, including the legal justification for listing and delisting, the lack of accountability, the lack of precautionary measures and the lack of compliance with international rule of law principles of legality, legitimacy, proportionality and necessity. As explained above, this may lead to loss of lives resulting from sanctions.

We respectfully exhort your Excellency's Government to fully observe its obligations under the Covenant to prevent any negative impact on the human rights of persons subject to the sanctions authorized under emergency declarations; to use competent international bodies (UN Security Council, other UN counter-terrorism and suppression of trans-boundary crimes bodies, international courts and other international fora) to avail itself of the existing mechanisms of public law in the

⁹ CCPR/C/USA/4, para. 1.

international arena and to negotiate creation of other international mechanisms to address contemporary challenges, in accordance with principles of international law, the rule of law, and human rights protection in the spirit of cooperation, multilateralism and solidarity.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

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