

Mandates of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights; the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea; the Special Rapporteur on the right to development; the Special Rapporteur on the right to food and the Independent Expert on human rights and international solidarity

Ref.: AL USA 21/2022
(Please use this reference in your reply)

26 October 2022

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 situation of human rights in the Democratic People's Republic of Korea; Special Rapporteur on the right to development; Special Rapporteur on the right to food and Independent Expert on human rights and international solidarity, pursuant to Human Rights Council resolutions 49/6, 49/22, 42/23, 49/13 and 44/11.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the serious challenges and obstacles in the implementation of humanitarian carve-outs (exemptions and exceptions) in the current US unilateral sanctions regimes, with serious adverse effects in the delivery of humanitarian aid and the lives of all those benefiting from such aid in the countries targeted by sanctions.**

According to the information received:

In the framing and elaboration of their unilateral sanctions regimes, the United States of America have sought to carve out spaces in which humanitarian action and the delivery of humanitarian aid could take place, on the initiative of different stakeholders, including States, UN agencies and programmes as well as international and local civil society organisations. These include exemptions and exceptions from the imposed sanction restrictions, in particular for transfers of food and medical goods and services. On the one hand exceptions provide a general approval of transfers of certain goods and services, while on the other hand exemptions involve a specific approval or licencing procedure for a specific category of activities and transfers which are to be excluded from the imposed restrictions.

It is widely claimed that existing frameworks of humanitarian exemptions and exceptions cannot counter-balance and effectively compensate for the deep social and economic disruptions caused by the extensive and multifaceted restrictions and obstacles emanating from the imposed sanctions regimes. They are not effective in either mitigating the negative humanitarian effects of the imposed sanctions or even delivering life-saving goods. It is further argued that the nature of humanitarian exemptions may only allow for *ad hoc* micro-level interventions which do not suffice in the context of broad macro-level structural changes caused by the imposed sanctions regimes and the high economic and social costs experienced by sanctioned countries, which are translated into severe suffering among these countries' general populations.

Despite the proliferation of specific interventions and guidance to determine the scope of authorised activities for the delivery of humanitarian aid, as well as efforts to design and implement relatively broad exemption frameworks, including in the case of Syria and more recently in the case of Afghanistan, humanitarian actors still continue to face significant challenges in their operations, some of which undermine their core statutory principles, including that of impartiality and non-discrimination, as well as the purposes of their mission.

Several reports and surveys focusing on the work of humanitarian civil society actors have shed light onto the complexity of the sanction regimes, the often narrow scope of humanitarian exemptions, and the lack of clarity with regard to the term “humanitarian aid”. Many humanitarian actors do not have the expertise, human and financial resources to navigate the complex sanction regimes frameworks to ensure that their operations align with the imposed restrictions. On top of the reported serious delays in the processing license requests, which may take up to a whole year from the submission of the initial request, humanitarian actors have reported cumbersome legal fees for regulatory interpretation and legal support, which may sometimes outweigh the cost of the provided humanitarian aid itself.

The US Treasury Department Office of Foreign Assets Control (OFAC) has general exemption licenses, which are designed to apply automatically without special authorisation for humanitarian activities, such as trade of food, medicines, and other goods used for humanitarian purposes, as well as in some cases for projects supporting education, non-commercial development projects, and projects to support the preservation and protection of cultural heritage, such as the case of the amended not-for-profit General Licence on Syria (§ 542.516 of the Syrian Sanctions Regulations). For other activities, not falling within the scope of general licenses, individuals and entities have to apply for specific licenses, with the risk of administrative complications, high legal costs, and delays.

At the same time, humanitarian exemption provisions often include clauses that prohibit any dealings, direct or indirect, with what is broadly termed as “Government”, as well as with designated persons (individuals or entities), thus raising significantly the levels of complexity and difficulty of humanitarian actors’ due diligence processes and of financial institutions’ compliance assessment, often resulting in over-compliance and complete disengagement with the targeted country or with any person associated in any shape or form with the activities in such a country.

As an illustrative example of the aforementioned complexity reference is made to the General Licence contained in section § 542.516 of the Syrian Sanctions Regulations, which defines the term of “Government of Syria” as follows:

- a) the state and the Government of the Syrian Arab Republic, as well as any political subdivision, agency, or instrumentality thereof, including the Central Bank of Syria;
- b) any entity owned or controlled, directly or indirectly, by the foregoing, including any corporation, partnership, association, or other entity in

which the Government of Syria owns a 50 percent or greater interest or a controlling interest, and any entity which is otherwise controlled by that government;

- c) “any person that is, or has been, acting or purporting to act, directly or indirectly, for or on behalf of any of the foregoing;
- d) “any person determined by OFAC” to be included within paragraphs (a) to (c).

Furthermore, other general humanitarian exemption licenses may contain specific clauses, which restrict the humanitarian operations and undermine the humanitarian actors’ engagement with the sanctioned country altogether, as it is for example the case of the OFAC General License E for Iran, which imposes a limit of the annual transfer of funds by a single NGO of US\$ 500,000.

As far as other specific challenges are concerned, it is often reported that the humanitarian assistance is significantly undermined by the determination of certain goods and services as “dual use”,¹ and the prohibition of exporting or re-exporting by US and non-US persons of items and technology containing at least 10 per cent of US parts,² which further complicates due diligence processes and ultimately prevents any sustainable positive impact of humanitarian interventions. Several paradoxical situations have been reported by humanitarian actors, including cases of approvals for the delivery of vaccines but not of cold chain equipment because of the latter being considered as “dual-use”, while other information received refers to challenges in the procurement and delivery of essential infrastructure equipment and spare parts, including for water purification and supply, such as chemical agents, pipes and water pumps, as well as power and gas supply, transportation, aviation, agriculture and construction of schools and hospitals, for the same exact reason or because the purpose of delivery is development rather than purely narrowly-understood humanitarian.

It has also been reported that the process of application for humanitarian exceptions is lengthy, expensive and complicated, in the absence of uniform scheme of appeal and need to use external legal assistance.

Furthermore, even if on paper humanitarian exemptions seek to clarify the scope of a principled humanitarian action, the “chilling effects” of sanctions regimes *per se* together with secondary sanctions, civil and criminal penalties, maximum pressure campaigns are significantly disproportionate compared to the scope of the actual imposed restrictions by the said sanctions. They create a generalised fear among different stakeholders who constitute key players in the performance of otherwise authorised activities in connection with a sanctioned country, including producers of vital goods, banks, delivery and insurance companies, donors and humanitarian organizations and result in

¹ Dual-use items are products or technology that are primarily used for civil or commercial purposes but can also have military or weapons applications.

In addition to the OFAC sanctions, the US Department of Commerce’s Bureau of Industry and Security (BIS) enforces the Export Administration Regulations (EAR) under 15 CFR Part 730 et seq., enforcing limitations in the export and re-export of goods of US origin, technology and software to destinations outside the US and to non-US persons

instances of over-compliance and de-risking with catastrophic consequences on the general populations. In particular, banks, being by nature risk-averse institutions, are often reluctant to engage in significant resource and financial allocations to navigate the complex sanctions regimes and to undertake enhanced due diligence procedures for fund transfers involving nationals from sanctioned countries or businesses and organisations working on projects in sanctioned countries.

Concerns about possible substantial penalty fees, criminal prosecution and reputational damage are key factors in the financial institutions reported over-compliance and de-risking, which seriously affects the implementation of humanitarian projects and the delivery of humanitarian aid. In this context, exemption or derogation approvals may not have the expected positive effects on humanitarian actors' operations. It has been reported that some banks have interpreted the fact that humanitarian organisations have obtained an exemption licence as an indication that its activities are "on the edge" of legality, and therefore constituting "red flags" in the banks' risk assessment procedure. In other cases, the absence of clear documentation attesting for the exemption approval may also be the reason for the banks' refusal to process the payment, obliging humanitarian actors to seek for alternative and less formal methods of value transfer systems, with higher costs as well as higher risks and less transparency. And even if fund transfers are approved by banks, challenges and obstacles may appear at the procurement or the delivery stage of the operations, due to over-compliance by other actors, including insurance companies, sea transport or airline companies.

Finally, another element which is directly intertwined with sanctions is the existing counter-terrorism and terrorism financing frameworks, which have further shrunk the space of activity for humanitarian actors and exacerbated the de-risking conduct by financial institutions. Specific reference should be made to the FATF recommendations and the portrayal of the non-profit sector as vulnerable to terrorist financing abuse, the various national counter-terrorism laws and regulations and their broad application, including the US material support statutes, 18 U.S.C. §§2339A and 2339B and the International Emergency Economic Powers Act (IEEPA), all of which add further complications and uncertainties in the processes of vetting and compliance, raising costs, and thus increasing the likelihood of over-compliance and de-risking with significant adverse impact on the daily operations of humanitarian actors.

While we do not wish to prejudge the accuracy of the received information, we wish to express our grave concern at the negative impact of the imposed sanctions regimes on the design and delivery of humanitarian assistance and ultimately on the lives and fundamental human rights of millions of beneficiaries of such assistance who live in sanctioned countries. Of particular concern is the widely reported inability of the designed and implemented humanitarian carve-outs (exemptions, exceptions and derogations) to effectively offset the significant and multifaceted sanctions-induced economic and social distortions affecting societies as a whole, with far-reaching consequences for the most vulnerable. We are also concerned by the reported broad and vague formulations and prohibitions contained in humanitarian exemption provisions, as well as the reported complexity around items considered as "dual-use", resulting in prohibitions of exporting such items to sanctioned countries, including

items and goods essential for the development and maintenance of vital infrastructure, with far-reaching consequences for the lives of millions.

We are concerned at the dominant discourse at political and other fora, framing the existing humanitarian exemptions as the appropriate tools for responding to humanitarian needs, while at the same time overlooking the complexities and serious obstacles in the practical implementation of such measures, as reported by different relevant actors, including international and local civil society organisations, as well as international organisations, such as various UN entities with presence in sanctioned countries.

We also note with concern that the existence of humanitarian carve-outs does not effectively address the issue of over-compliance and de-risking by financial institutions and other businesses, mainly due to the broad interpretation and application of sanction and counter-terrorism clauses, which exacerbate the uncertainty and fear of unintended transgression of the imposed restrictions and prohibitions. Considering the catastrophic impact of unilateral sanctions and other unilateral coercive measures on human rights, with their international implications not limited to the targeted countries, it would be simply naïve to hold the belief that the existing framework of humanitarian exemptions and exceptions could alleviate the human pain and suffering caused by such indiscriminate measures.

We wish to recall and to echo the United National Secretary General's assessment that the humanitarian exemptions tend to be ambiguous and are interpreted arbitrarily and inconsistently, causing delays, confusion and denial of request to import essential humanitarian goods, leading to resource shortages in the targeted by sanctions countries.³ Furthermore, we also recall the General Comment No. 8 by the UN Committee on Economic, Social and Cultural Rights (CESCR), which has underscored the findings of a number of UN and other studies which have analysed the impact of sanctions on human rights and concluded that humanitarian exemptions do not have the expected positive effects, such as the unhindered flow of essential goods and services destined for humanitarian purposes (E/C.12/1997/8, paras 4 and 5). Finally, we recall United Nations Security Council's resolution 2462, in particular paragraph 6 demanding Member States to ensure that all measures taken to counter terrorism, including measures taken to counter the financing terrorism, to comply with their obligations under international law, including international humanitarian law, and paragraph 24 urging Member States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.

We also recall the States' obligations in ensuring the respect, protection and fulfilment of all human rights and fundamental freedoms, in accordance with all relevant international and regional human rights instruments. We also call on States to take all necessary steps to protect against human rights abuses by business enterprises domiciled in, or owned and controlled by them; to provide effective guidance to business enterprises on how to respect human rights throughout their operations; and, to exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for business enterprises, in line with

³ See Impact of Armed Conflict on Children: Note by the Secretary-General, U.N. GAOR, 51st Sess., 128, U.N. Doc. A/51/306 (1996)

principles 2, 3, 4 and 5 of the UN Guiding Principles on Business and Human Rights.

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

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

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please describe the measures undertaken to provide guidance and clarity to all humanitarian actors with regard to the scope and application of humanitarian exemptions, as well as mechanism of getting licenses.
3. Please indicate measures undertaken to ensure access to justice, redress and remedy by all individuals and entities, without discrimination, who are under investigation for alleged violations of the existing sanctions regimes, and provide information on relevant measures of due process and of accountability in case of violation of their rights.
4. Please provide information on the legislative and policy measures adopted and implemented to effectively address over-compliance and de-risking by US-based and Government-controlled businesses and financial institutions.
5. Please provide information on the interpretation and application of counter-terrorism and terrorism financing laws, in particular with regard to the operations of non-profit and humanitarian actors, and indicate the measures undertaken to ensure that no principled humanitarian activity is prosecuted and sanctioned.
6. Please provide information on initiatives and steps taken to include civil society and humanitarian actors in the conceptualisation, design and implementation of humanitarian carve-outs (exemptions and exceptions).
7. Please provide information on measures taken to guarantee implementation of the UN Security Council resolutions regarding the delivery of humanitarian aid to the countries under sanctions.

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

Given the concerns raised in this communication we recommend close attention to this matter, and would appreciate a prompt and detailed response.

We reserve the right to share our concerns with the wider public as we believe that it should be informed about the harmful consequences of the current modalities of humanitarian exemptions on the lives of countless people. Any expression of concern on our part, will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

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

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

Tomás Ojea Quintana
Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea

Saad Alfarargi
Special Rapporteur on the right to development

Michael Fakhri
Special Rapporteur on the right to food order

Obiora C. Okafor
Independent Expert on human rights and international solidarity

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to appeal to your Excellency's Government to take all necessary steps to ensure the fundamental rights in accordance with the principles and rights set forth in articles 1, 9, 11, and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as articles 1, 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR), which guarantee the protection of everyone's right to adequate standard of living, food, health, social security, education, development, as well as the right to life and to freedom from inhuman treatment.

The obligation to protect the right to life requires States to take special measures to protect persons in vulnerable situations whose lives are particularly endangered by specific threats (CCPR, General Comment No. 36, para. 23). We note that the right to life is linked to the positive obligation to ensure access to the basic conditions necessary to sustain life (CCPR General Comment No. 6, para 5; CCPR General Comment No. 36, para 21). Measures, including the obstruction of humanitarian assistance, which restrict access to basic and life-saving goods and services such as food, health, electricity and safe water and sanitation run counter to the right to life (CCPR/C/ISR/CO/4, para. 12; A/73/314, para. 27). We recall that any deaths attributable to such measures amount to an arbitrary deprivation of life, which engages the responsibility of the State (A/73/314, para. 13).

We would like to refer to article 1 of the Declaration on the Right to Development adopted by the United Nations General Assembly by Resolution 41/128 on 4 December 1986, by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development. We also wish to recall article 6, which raises the need for co-operation by states with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms, which are interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

With respect to injury caused to another state by means of an internationally wrongful act, the Draft Articles on Responsibility of States for Internationally Wrongful Acts notes that an injury which creates an obligation for the responsible state to make reparation "includes any damage, whether material or moral, caused by the internationally wrongful act of a State" (article 31), with a wrongful act being defined as an action or omission that "is attributable to the State under international law" and "constitutes a breach of an international obligation of the State" (article 2).

General Comment No. 8 by the UN Committee on Economic, Social and Cultural Rights stipulates that "it is commonly assumed that [humanitarian] exemptions ensure basic respect for economic, social and cultural rights within the targeted country" and are designed "to permit the flow of essential goods and services destined for humanitarian purposes". However, a number of UN and other studies which have analysed the impact of sanctions have concluded that these exemptions do not have this effect. Moreover, the exemptions are very limited in scope. They do not

address, for example, the question of access to primary education, nor do they provide for repairs to infrastructures which are essential to provide clean water, adequate health care, etc. They also remain cumbersome and aid agencies encounter difficulties in obtaining approval for exempted supplies (E/C.12/1997/8, paras 4 and 5).

We further recall that the spirit of solidarity and international cooperation is enshrined in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, which provides that States have a duty to cooperate in the various fields irrespective of differences in their political, economic and social systems. The Declaration stipulates that States are obliged to cooperate, inter alia, in the protection and promotion of human rights; in the economic, social and cultural fields as well as the field of science and technology; in the promotion of international cultural and educational progress; and in the promotion of economic growth, especially in developing countries (General Assembly resolution 2625 (XXV), annex, fourth principle).