

## **Executive Order [ ]—Blocking Property and Prohibiting Transactions To Prevent Mass Atrocities**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), and the National Emergencies Act (50 U.S.C. 1601 et seq.),

I, [insert President’s name], President of the United States of America, find that the existence of threat of mass atrocities constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and hereby declare a national emergency to deal with that threat.<sup>1</sup>

Sec. 1. Except to the extent provided in section 203(b) of IEEPA (50 U.S.C. 1702(b)) and in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date, I hereby order that all property and interests in property of the following persons that are or hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons (including any foreign branch) are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: foreign persons the Secretary of State determines:

(a) to have committed or bear responsibility for, or pose a significant risk of committing or bearing responsibility for, mass atrocities;<sup>2</sup> or

(b) to be a political or military leader or senior official of a state or other entity, if mass atrocities are attributable to that state or other entity;<sup>3</sup> or

(c) to materially contribute or to have materially contributed, or pose a significant risk of materially contributing to persons designated pursuant to this order;<sup>4</sup> or

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<sup>1</sup> The existence of an emergency based on the threat of an event occurring in the future was used in part to justify Executive Order 13224 (Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism), dated September 25, 2001. That being said, this justification for invoking the IEEPA and NEA is likely stretching the bounds of executive authority. In all likelihood, however, the bounds of authority under IEEPA and NEA are non-justiciable.

<sup>2</sup> Executive Order 13224 (Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism), Sec. 1(b), dated September 25, 2001 contains similar language: “. . . to have committed, or to pose a significant risk of committing, acts of terrorism[.]”

<sup>3</sup> Country sanctions Executive Orders will often target senior political and military leaders (e.g. Executive Order 13611 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen), Sec. 1(b), dated May 16, 2012, stating: “be a political or military leader of an entity that has engaged in the acts described in subsection (a) of this section[.]”) This exact language may work as an alternate formulation in lieu of the attribution language used above. The current language is broader in that it captures all senior state officials once state attribution for mass atrocities has been determined, not just those individuals determined to be engaging in the mass atrocities.

<sup>4</sup> Executive Order 13382 (Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters,), Sec. 1(a)(ii), dated June 28, 2005, contains similar language: “. . . in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery[.]”

(d) to assist or provide financial or technological support for or goods or services in support of, persons designated pursuant to this order;<sup>5</sup> or

(e) to be owned or controlled by, or to act for or on behalf of, or be purported to act for or on behalf, directly or indirectly, persons designated pursuant to this order;<sup>6</sup> or

(f) to be a spouse or dependent child of any person whose property and interests in property are blocked pursuant this order.<sup>7</sup>

Sec. 2. The prohibitions in section 1 of this order include but are not limited to:

(a) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and

(b) the receipt of any contribution or provision of funds, goods, or services from any such person.<sup>8</sup>

Sec. 3. I hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of aliens determined to meet one or more of the criteria in section 1 of this order would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants or nonimmigrants, of such persons. Such persons shall be treated as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions).<sup>9</sup>

Sec. 4. Further, I prohibit:

(a) any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order.

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<sup>5</sup> Similar language is contained in multiple Executive Orders (e.g. Executive Order 13581 (Blocking Property of Transnational Criminal Organizations), Sec. 1(a)(ii)(B), of July 24, 2011).

<sup>6</sup> Executive Order 13382 (Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters), Sec. 1(a)(iv), dated June 28, 2005, contains similar language: “. . . to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order[.]”

<sup>7</sup> Several country sanction Executive Orders contain similar targeting of family members (e.g. Executive Order 13469 (Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe), Sec. 1(a)(vi) , dated July 25, 2008).

<sup>8</sup> Section 2 is standard language used in multiple Executive Orders (e.g. Executive Order 13619 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Burma ), Sec. 4, dated July 11, 2012).

<sup>9</sup> In addition to appearing in multiple Executive Orders, the Presidential Proclamation, dated August 4, 2011, regarding the Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses, sets out similar prohibitions for the acts targeted in this draft Executive Order.

(b) any conspiracy formed to violate any of the prohibitions set forth in this order.<sup>10</sup>

Sec. 5. I hereby determine that the making of donations of the type specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by United States persons to persons determined to be subject to this order would seriously impair my ability to deal with the national emergency declared in this order, and hereby prohibit such donations as provided by section 1 of this order.<sup>11</sup>

Sec. 6. Further, if the Secretary of State determines a mass atrocity is occurring or is imminent, and further determines a foreign government is complicit in, directing, engaging in, or preparing to engage in acts that would constitute mass atrocities, or if mass atrocities otherwise are or likely will be attributable to the state, I prohibit:<sup>12</sup>

(a) any transactions in the foreign exchange of the currency issued by that foreign government.

(i) in the event the foreign government in question is a member of a currency union with other governments not engaged in the activities described in this section, the Secretary of State, may, in his or her discretion, suspend application of this provision.<sup>13</sup>

(ii) in the event the foreign government in question utilizes United States dollars as its currency, this provision will be not be given effect.<sup>14</sup>

(b) any transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of that foreign government or a national thereof,

(c) the importing or exporting of currency or securities issued by that foreign government, by any person, or with respect to any property, subject to the jurisdiction of the United States.

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<sup>10</sup> Section 2 is standard language used in multiple Executive Orders (e.g. Executive Order 13619 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Burma ), Sec. 7, dated July 11, 2012).

<sup>11</sup> Section 5 is standard language used in multiple Executive Orders (e.g. Executive Order 13619 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Burma), Sec. 4 dated July 11, 2012).

<sup>12</sup> This section does not appear in any prior Executive Order, and likely represents the full scope of Presidential Authority under IEEPA.

<sup>13</sup> This provision has the potential to affect dozens of countries currently in currency unions. These include, for example, all former and current French protectorates and colonies still using the CFA and CFP Franc, the eight nations using the East Caribbean Dollar, the ten countries and territories using the Australian Dollar, and all the Eurozone Countries, among others. Furthermore, there are several planned currency unions that would be affected by this provision, including the East African Community, the West African Monetary Zone, and the Bolivian Alternative for the Americans, among others.

<sup>14</sup> This would include: Palau, the Federated States of Micronesia, the Marshall Islands, Zimbabwe, British Virgin Islands (British dependency), Turks and Caicos (British dependency), Bonaire, Saint Eustatius, and Saba.

(i) in the event the foreign government in question is a member of a currency union or other such union or association in which joint securities are issued with other governments not engaged in the activities described in this section, the Secretary of State, may, in his or her discretion, suspend application of this provision.<sup>15</sup>

(ii) this provision shall not be applied to such securities or currency held directly by the International Monetary Fund.<sup>16</sup>

Sec. 7. For the purposes of this order:

(a) the term “person” means an individual or entity;

(b) the term “entity” means a government, militia, partnership, association, corporation, or other organization, group or subgroup;

(c) the term “United States person” means any United States citizen or national, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States;

(d) the term “foreign person” means any citizen or national of a foreign state (including any such individual who is also a citizen or national of the United States) or any entity not organized solely under the laws of the United States or existing solely in the United States;<sup>17</sup>

(e) the term “mass atrocity” means acts that would constitute genocide, crimes against humanity, or war crimes.

(i) the definition of “genocide” contained in 18 U.S. Code § 1091 shall be utilized for the purposes of this order.

(ii) the term “crimes against humanity” means certain acts, including but not limited to: murder, extermination, enslavement; deportation or forcible transfer of a civilian population; imprisonment or other severe deprivation of physical liberty; torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, or gender grounds; enforced disappearances of persons, apartheid, or other inhumane acts of a similar character intentionally causing great suffering

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<sup>15</sup> See note 13.

<sup>16</sup> There may be other entities we would want to include in this subsection to avoid any unintended consequences.

<sup>17</sup> This definition often says “but not to include a foreign government” in other Executive Orders as well.

or serious injury to body or to mental or physical health, that are committed as part of a widespread and systematic attack, directed against a civilian population, where the attack is pursuant to or in furtherance of a state or organizational policy to commit such an attack. The act itself must be committed with knowledge of the larger attack. The attack need not amount to, or occur in the context of, an armed conflict.<sup>18</sup>

(iii) the definition of “war crimes” contained in 18 U.S. Code § 2441 shall be utilized for the purposes of this order. The war crimes targeted in this order are only those that are large-scale or undertaken as part of a plan or policy.<sup>19</sup>

(f) the term “committed mass atrocities” means directly engaging in the acts defined in part (e)(i-iii) of this section.

(g) the term “bears responsibility for mass atrocities” means having planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through superior responsibility, or incited others to engage in the acts defined in part (e)(i-iii) of this section, or attempted or conspired to do so.<sup>20</sup>

(h) the term “attributable to the state or other entity” means that the state or other entity wields or has wielded overall control of the group that committed or is committing mass atrocities; not only by equipping and financing the group, but also by coordinating or helping in the general planning of its activity. It is not necessary that the state should issue, either to the head or to members of the group, instructions for the commission of specific acts that would constitute mass atrocities for mass atrocities to be attributable to the state or other entity.<sup>21</sup>

Sec. 8. For those persons determined to be subject to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that

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<sup>18</sup> The definition for “crimes against humanity” was taken from the United States Department of State Foreign Affairs Manual, 9 FAM 40.8 N2.1 Sec. (b)(2).

<sup>19</sup> The last sentence in this definition is meant to direct this order toward only the most egregious war crimes and not towards isolated incidents that would technically amount to violation of International Humanitarian Law. The last sentence is paraphrased from Art. 8 (1) of the Rome Statute of the International Criminal Court.

<sup>20</sup> This definition comes almost entirely from that contained in Presidential Proclamation dated August 4, 2011, regarding the Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses. The “attempted or conspired” elements comes directly from the United States Department of State Foreign Affairs Manual, 9 FAM 40.8 N2 INA 212(F)(b)(2). The element of incitement is original to this draft Executive Order. This incitement element could be problematic on First Amendment grounds for those who have a constitutional presence in the United States.

<sup>21</sup> The definition is almost verbatim from the *Tadic* opinion of the International Criminal Tribunal for the Former Yugoslavia. *The Prosecutor v. Tadic (“Prijedor”)*, Case No. IT-94-1-A, ICTY AC, July 15, 1999, para. 131.

for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to this order.<sup>22</sup>

Sec. 9. The Secretary of State, in consultation with the Secretary of Treasury, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA as may be necessary to carry out this order. The Secretary of State may delegate responsibility for designation of persons pursuant to this order to the appropriate bureau or office within the Department of State.<sup>23</sup> This bureau or office will maintain and update quarterly a list of countries it determines to be in danger of mass atrocities occurring within their territory. This list will contain a list of persons within such countries determined to be the likely perpetrators of future mass atrocities to enable rapid designation under this order if necessary. The use of information and reports from Non-Governmental Organizations, Inter-Governmental Organizations, as well as that gathered by the United States Government, is permitted when maintaining and updating this list, as well as when designating persons pursuant to this order. This list shall be, to the extent allowable by national security, unclassified. To the extent national security considerations do not allow this list to be published fully in an unclassified form, the unclassified portion of the list will be published with a classified annex appended. All agencies and departments of the United States Government shall take all appropriate measures within their authority to assist the Secretary of State in the execution of this order.<sup>24</sup>

Sec. 10. The Secretary of State and other relevant departments and agencies shall make all relevant efforts to cooperate and coordinate with other countries, including through technical assistance, as well as bilateral and multilateral agreements and arrangements, to achieve the objectives of this order, including the prevention and cessation of mass atrocities, the denial of financing and financial services to those responsible for mass atrocities, and the sharing of intelligence about funding activities in support of those committing mass atrocities.<sup>25</sup>

Sec. 11. The Secretary of State is hereby authorized to submit the recurring and final reports to the Congress on the national emergency declared in this order, consistent with section 401(c) of the NEA (50 U.S.C. 1641(c)) and section 204(c) of IEEPA (50 U.S.C. 1703(c)).

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<sup>22</sup> Section 8 is standard language used in multiple Executive Orders (e.g. Executive Order 13619 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Burma ), Sec. 9, dated July 11, 2012).

<sup>23</sup> Placing this responsibility in the Department of State is justified under 22 U.S.C. 8213 (Investigations of violations of international humanitarian law), which states: “The President, with the assistance of the Secretary, the Under Secretary of State for Democracy and Global Affairs, and the Ambassador-at-Large for War Crimes Issues, shall collect information regarding incidents that may constitute crimes against humanity, genocide, slavery, or other violations of international humanitarian law.”

<sup>24</sup> Section 9 is largely original, with the exception of several standard sentences and phrasings taken from various Executive Orders.

<sup>25</sup> This section was taken from Executive Order 13224 (Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism), Sec. 6, dated September 25, 2001. This is the only instance where such language appears.

Sec. 12. Nothing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.