

Mandates of the Special Rapporteur on extreme poverty and human rights; the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Independent Expert on the situation of human rights in Somalia; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on extreme poverty and human rights; Chairperson of the Working Group on the issue of human rights and transnational corporations and other business enterprises; Independent Expert on the situation of human rights in Somalia; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism pursuant to Human Rights Council resolutions 26/3, 26/22, 24/30, and 22/8.

We wish to bring to the attention of your Excellency's Government information we have received concerning the **termination of accounts of Somali money transfer operators (MTOs) by commercial banks in the United States as a consequence of government anti-money laundering and counter-terrorism measures**. Similar letters about this issue have also been sent to the Governments of Somalia, the United Kingdom and Australia.

According to information we have received:

The United States is home to around 76,000 people who were born in Somalia, and over 100,000 people with Somali ancestry. This Somali 'diaspora' is concentrated in Minnesota, Ohio, and Washington state, but people of Somali origin are present throughout the United States. A 2013 study estimated that Somalis in the United States annually send approximately USD 214 million in remittances to Somalia.¹ That figure exceeds the USD 175.5 million your Excellency's Government provided in humanitarian assistance to Somalia in FY 2014.² The total annual amount of remittances sent to Somalia by the worldwide

¹ Inter-American Dialogue, Adeso & Oxfam America, 'Keeping the Lifeline Open: Remittances and Markets in Somalia' (2013), p. 9.

² USAID, 'Somalia: Complex Emergency', Fact Sheet # 4 Fiscal Year 2014, September 30, 2014.

Somali diaspora is estimated at USD 1.2 billion,³ which represents at least 20% of the country's GDP.⁴

Somalia has experienced more than two decades of chaos after the overthrow of President Barre in 1991. The country has only recently gained more stability after a new Government was installed in 2012. UNDP calculates the multidimensional poverty rate in the country at around 82% and Somalis have a life expectancy at birth of 55 years, making Somalia one of the least developed countries in the world. Given the fragile state of Somalia, remittances are vital for its development at this stage. Remittances represent “a primary source of private capital, foreign exchange and driver of economic development, while providing a vital safety net for households”.⁵ A recent report states that the bulk of money sent to Somalia is used by families to cover basic household expenses – rent, food, clothing, education and medical care.⁶ Another report states that one out of every three Somalis would not be able to pay for these necessities without remittance flows.⁷ Remittances therefore provide an “essential lifeline” to Somali households, many of which are highly dependent on a single remittance sender.⁸ Remittances are further used to invest in new businesses and development projects.⁹

Remittances are channeled from the Somali diaspora to recipients in Somalia via MTOs. These Somali MTOs have serviced the diaspora since the 1990s and offer a practical and relatively inexpensive way for Somalis living abroad to send money to their country of origin. MTOs use commercial banks in the United States and other diaspora countries to wire money to banks in the region, from where the remittances are delivered to MTO locations in Somalia. This system developed in the absence of a formal banking system in Somalia, which is non-existent due to the long period of instability in the country. Among other things, this means that recipients in Somalia do not possess bank accounts and that payments to recipients in Somalia are not regulated by the Central Bank of Somalia.

In February 2015, Merchants Bank of California, which was said to have handled 60 to 80 per cent of remittances from the United States to Somalia, terminated all bank accounts of Somali MTOs. In May 2015, Illinois-based First American Bank

³Food Security and Nutrition Analysis Unit – Somalia, ‘Assessment of External Remittances in Selected Urban Areas and Among Displaced Populations Across Somalia’ (September 2015), p. 1.

⁴ Undersecretary of State for Political Affairs, Wendy Sherman, has even publicly stated that remittances represent one-third of the Somali economy, http://www.americanbanker.com/issues/179_169/us-officials-caught-flat-footed-on-somali-money-transfers-1069713-1.html

⁵ UK Government/Beechwood International, ‘Safer Corridors, Rapid Assessment. Case Study: Somalia and UK Banking’, September 2013, p. 16.

⁶ Food Security and Nutrition Analysis Unit – Somalia, ‘Assessment of External Remittances in Selected Urban Areas and Among Displaced Populations Across Somalia’ (September 2015), pp. 1, 6.

⁷ Adeso, Global Center on Cooperative Security & Oxfam, ‘Hanging by a Thread: The Ongoing Threat to Somalia’s Remittance Lifeline’, February 2015, p. 4.

⁸ Food Security and Nutrition Analysis Unit – Somalia, ‘Assessment of External Remittances in Selected Urban Areas and Among Displaced Populations Across Somalia’ (September 2015), p. 1.

⁹ Samuel Munzele Maimbo (ed.), ‘Remittances and Economic Development in Somalia: An Overview’, World Bank Working Paper No. 38 (November 2006), p. 7.

also closed the accounts of several Somali MTOs. Earlier, in 2011, Sunrise Community Bank, based in Minneapolis, another commercial bank that handled many of the money transfers to Somalia by MTOs, decided to close the bank accounts of Somali MTOs. Even before that, other major commercial banks in the United States were already refusing to offer accounts services to these MTOs altogether.

The closure of bank accounts of Somali MTOs by commercial banks is a structural phenomenon occurring in the United States as well as abroad. The root causes lie with the implementation and, especially, enforcement of domestic and international anti-money laundering and counter-terrorism (AML/CFT) legislation and regulations that were introduced by the United States and other countries after the terrorist attacks on the United States on September 11, 2001. Although domestic legislation in the United States, such as the 1970 Bank Secrecy Act and the 1986 Money Laundering Control Act, already placed commercial banks under several obligations to prevent illicit financial flows, the 2001 Patriot Act significantly increased the duties and concomitant risks for banks. Apart from increasing the requirements on banks, it significantly increased the civil and criminal penalties for banks that were involved in facilitating money laundering or terrorist financing. United States AML/CFT laws and regulations have been aggressively enforced by regulators, who have imposed significant fines.

In addition, foreign banks have also felt the reach of the United States Government. Since the United States holds that its AML/CFT laws and regulations have extraterritorial effect when foreign banks conduct business in US dollars, foreign banks have also been fined by US regulators. Furthermore, recommendations by the Financial Action Task Force (FATF), an inter-governmental body of which the United States is an influential Member, have had a significant impact on AML/CFT laws and regulations worldwide, including as a result of their endorsement by the UN Security Council, the World Bank and the IMF. The actions of the United States Government in this area therefore have an effect beyond its own borders.

Commercial banks in the United States and abroad have responded to these regulatory risks by closing the accounts of customers that are considered high-risk. A 2013 report attached examples of letters by US banks to Somali MTOs, which indicated that trends in the regulatory environment influenced the decisions of banks to refuse to do business with them any longer.¹⁰ In a letter sent by the above-mentioned Merchants Bank of California to a Somali MTO in January 2015, Merchants Bank refers explicitly to a cease and desist order of the Office of the Comptroller of the Currency, an independent bureau of the Department of the Treasury, mandating the bank to undertake stricter due diligence as a reason to discontinue the accounts of Somali MTOs. When Merchants Bank first announced the closure of bank accounts of Somali MTOs in 2014, it had reportedly informed

¹⁰ Inter-American Dialogue, Adeso & Oxfam America, 'Keeping the Lifeline Open: Remittances and Markets in Somalia' (2013), p. 28-29.

the MTOs that the closing of these accounts was due "to the ever-changing regulatory requirements and expenses imposed upon Merchants Bank of California."¹¹

The United States Government has taken a number of actions that are relevant in this regard. In August 2014, President Obama signed the Money Remittances Improvement Act into law, which improves oversight of the money transfer industry. In October 2014, the Assistant Secretary for Terrorist Financing at the Department of the Treasury indicated that it took seriously the concerns that MTOs are having difficulty "obtaining or maintaining bank accounts and that some banks are no longer providing banking services to money transmitters, regardless of risk".¹² He explained that Treasury saw the following four essential components as necessary to improve the banking access of MTOs: "improve the clarity of our expectations for banks, strengthen money transmitter AML/CFT controls and compliance, further enhance money transmitter AML/CFT oversight, and continue ongoing outreach to financial institutions and the customers they serve." He also referred to cooperation with the United Kingdom, the World Bank, the G-20 and FATF related to these issues and said this "will remain a high priority for the Treasury Department." Furthermore, the Financial Crimes Enforcement Network (FinCEN), the agency primarily responsible for administering the Bank Secrecy Act, issued a statement in November 2014 to clarify the obligations of 'money services businesses' (MSBs) to address the concern that "banks are indiscriminately terminating the accounts of all MSBs, or refusing to open accounts for any MSBs".¹³ Finally, the State Department has announced to finance a \$ 3,000,000 project to improve regulation and oversight of the Somali financial sector, in order to facilitate that remittances can continue to be sent to Somalia.

These actions, however positive, do not adequately address the most pressing issue for Somali MTOs at this time, which is access to bank accounts in order to continue transferring remittances to Somalia. It remains to be seen to what extent the interventions mentioned will stop the trend of the closure of bank accounts of Somali MTOs in the United States. The termination of MTO bank accounts by Merchants Bank of California and First American Bank indicate that the above-mentioned actions have not had the desired effect. In addition, the Government's actions to improve oversight of the financial system in Somalia, while laudable, are not likely to produce results in the short-term and are therefore not likely to address the immediate problems that MTOs are facing and the associated dire consequences for remittance flows to Somalia.

The Australian and United Kingdom's response to the issue of the closure of Somali MTO bank accounts illustrates some aspects of good practice, although it is clear from the Australian and UK context that the root causes of the problem

¹¹ Foreign Policy, 'Feds Choke Off Vital Somali Lifeline', 16 May 2014.

¹² Daniel L. Glaser, 'Treasury's Work to Support Money Transmitters', 8 October 2014.

¹³ FinCEN, 'Statement on Providing Banking Services to Money Service Businesses', 10 November 2014.

need to be tackled by the governments involved in a coordinated way and at the international as well as the domestic level. In particular, the Australian Government established a multi-stakeholder working group involving relevant Government departments, the national bankers' association, and a number of Somali MTOs. The working group engaged in discussions about risk mitigation strategies and initiated the monitoring of remittance outflows. In the United Kingdom, the Government has developed a similar initiative by the establishment in 2014 of the UK Action Group on Cross Border Remittances, consisting of representatives of the Government, banking sector, MTOs and other relevant stakeholders.

The cumulative effect of the closing of bank accounts of MTOs may be disrupting the vital flow of remittances to Somalia, despite the initiatives mentioned above. A September 2015 survey in Somalia by the Food and Agriculture Organization (FAO) indicated that around 25% of those interviewed reported a decline in remittance receipts in the period January to June 2015.¹⁴ The same survey indicates that one of the reasons for the decline is that money transfer from the diaspora country in question is no longer possible. Although no definite conclusions can be drawn from this survey, the outcomes are worrying and merit close monitoring of the situation.

The cumulative effect of the closing of these MTO bank accounts may not only have a devastating impact on the lives of the Somalis who are dependent on the remittances they receive through these MTOs and the Somali economy as a whole, but may ultimately also undermine the purpose of AML/CFT laws and regulations. Closing off this route may force Somali families to transfer their money to relatives and friends in Somalia through other, more informal, routes that may be more difficult to monitor and have a higher risk of being used for money laundering and the financing of terrorism.¹⁵ Alternative routes may also significantly increase the cost of sending money to Somalia, which may further decrease the flow of money to an already fragile economy.¹⁶ The concerns about the potential impacts of the closing of these bank accounts are apparently shared by some state and federal legislators in the United States.¹⁷ However, despite the increased attention to this issue, news reports indicate that your Excellency's Government has still not reached an effective and comprehensive solution to this important matter.¹⁸

While we do not wish to prejudge the accuracy of these allegations, we express our deep concern with the widespread and increasing closure of bank accounts of Somali MTOs in the United States and abroad. While the closures involve decisions by private

¹⁴ Food Security and Nutrition Analysis Unit – Somalia, 'Assessment of External Remittances in Selected Urban Areas and Among Displaced Populations Across Somalia' (September 2015), p. 4.

¹⁵ World Bank, 'Anti-Money Laundering Regulations: Can Somalia survive without remittances?', 2 November 2014.

¹⁶ Foreign Affairs, 'Money Keeps Moving Toward Somalia, Sometimes In Suitcases', 15 May 2015.

¹⁷ Letter of 6 February 2015 to the Secretary of State et al. by 12 Members of Congress; Letter to the Secretary of State by 12 Members of the Washington State Legislature.

¹⁸ US News, 'Despite Kerry's Visit, Little Movement on Lifeline for Somalis', 6 May 2015.

corporations, there are strong indications that these decisions are influenced to a large degree by the regulatory environment in the United States for which your Excellency's Government is ultimately responsible. This regulatory environment is further shaped by actions taken by the United States and other States in the context of international organizations and other international fora. The closing of bank accounts of Somali MTOs and the accompanying reduction in the level of remittances to Somalia is likely to have a direct and significant impact on the enjoyment of human rights of Somali-Americans as well as people living in Somalia who are dependent on remittances from the United States.

Thus the starting point for the analysis that follows is that the actions taken by banks in the United States in response to the domestic and international regulatory environment have directly affected the human rights of people living in Somalia, as well as the rights of their relatives living in the United States. In particular, the cumulative effect of account closures in the United States appears to have severely affected the realization of the economic, social and cultural rights as well as the civil and political rights of Somalis, including their rights to food, health, education and life. The Somali State, a party to international human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), bears the primary responsibility to respect, protect and fulfill the human rights of people living in its territory. In light of its extremely fragile state and its heavy dependence on remittances, Somalia is unlikely to be able to compensate for the impact of the drying up of remittances from the United States. Before we address the intricacies of the obligations of the United States under international human rights law, it is important to keep this context in mind.

The United States is a State Party to the ICCPR. Article 2 (1) and 26 of the ICCPR require the United States to respect and to ensure the rights recognized in the ICCPR without distinction of any kind and to guarantee that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The closure of the accounts of Somali MTOs by commercial banks in the United States appear to affect in particular the Somali minority living in the United States. Since the decisions by banks are influenced to a large degree by the regulatory environment in the United States, the AML/CFT laws and regulations appear to contribute to the disproportionate impact of the closure on the Somali minority. In this regard, it is relevant that the High Commissioner for Human Rights has warned that counter-terrorism laws and regulations could lead to further marginalization and discrimination of ethnic minorities and migrants.¹⁹ The almost complete closure of bank accounts of Somali MTOs in the United States can be seen as both representing and leading to discrimination and stigmatization of Somali-Americans.²⁰ The current situation therefore appears to

¹⁹ Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, 2 September 2009, A/HRC/12/22, para. 22 & 29.

²⁰ In publications on the closure of these accounts, Somali-Americans have highlighted that they "carry the dual weight of being both black and Muslim" Al Jazeera, 'US Bank Regulators may Destroy Somalia's Economy', 27 February 2015. It is furthermore telling that a Twitter campaign by the Somali diaspora in response to the bank account closures is using the hashtag #IFundFoodNotTerror.

necessitate positive measures by the United States aimed at protecting the Somali minority in the United States against discrimination and stigmatization.

Article 27 ICCPR furthermore provides that in “those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture [...]”. Somali-Americans are such a minority that ‘exists’²¹ in the United States. The Human Rights Committee (HRC) has interpreted the term ‘culture’ broadly and explained that “culture manifests itself in many forms”.²² In later human rights treaties such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (article 31), States have explicitly addressed the importance of “respect for the cultural identity of migrant workers and members of their families” and the importance of not keeping them “from maintaining their cultural links with their State of origin.” The large-scale closure of bank accounts of Somali MTOs may have a severe impact on the right of Somali-Americans to enjoy their own culture. Somali-Americans and other Somalis that form part of the global Somali diaspora use remittances to support their family and friends in Somalia, who they have in many cases had to leave behind in the context of decades of civil strife and unrest in their home country.²³ Sending remittances can be seen as an integral part of the culture of Somali-Americans.²⁴ One report has stated that remittances “are not just a financial mechanism; they are an expression and reproduction of familial and clan ties and other social bonds, deeply rooted in tradition.”²⁵ The HRC has clarified that article 27 ICCPR puts an obligation on States “to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself [...] but also against the acts of other persons within the State party.”²⁶ Based on article 27 ICCPR, the United States is therefore under an obligation to address the problem of the closure of accounts of Somali MTOs, whether these closures are the direct result of those laws and regulations or of private decisions by banks.

While the AML/CFT laws and regulations of the United States may be said to fulfill a legitimate objective, they should not encroach on the rights of Somali-Americans if that encroachment is not strictly necessary and if there are less restrictive measures

²¹ “Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term ‘exist’ connotes.” Human Rights Committee, General Comment No. 23 (art. 27), 26 April 1994, CCPR/C/21/Rev.1/Add.5, para.5.2.

²² Human Rights Committee, General Comment No. 23 (art. 27), 26 April 1994, CCPR/C/21/Rev.1/Add.5, para. 7.

²³ The importance of sending remittances has been underlined in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which provides (in article 47) that migrant workers shall have the right to transfer their earnings and savings from the State of employment to their State of origin or any other State. Similarly, the ILO Convention concerning Migration for Employment (in article 9) obliges States to permit the transfer of such part of the earnings and savings of the migrant for employment as the migrant may desire.

²⁴ “[R]emittances are first and foremost a duty, a way to maintain a sense of community and solidarity in an age of global migration and for acting on clan and political affiliations across borders.” Center on Global Counterterrorism Cooperation, ‘Capitalizing on Trust: Harnessing Somali Remittances for Counterterrorism, Human Rights and State Building’ (2012), p. 2.

²⁵ Center on Global Counterterrorism Cooperation, ‘Capitalizing on Trust: Harnessing Somali Remittances for Counterterrorism, Human Rights and State Building’ (2012), p. 9.

²⁶ Human Rights Committee, General Comment No. 23 (art. 27), 26 April 1994, CCPR/C/21/Rev.1/Add.5, para. 6.1.

available to achieve the same objective.²⁷ While it is clear that the impact of these laws and regulations on the rights of Somali-Americans is severe, as shown above, it is unclear whether these account closures are necessary and proportionate to fulfill the objectives of these laws. We are not aware of evidence pointing to a structural problem of Somali MTOs in the United States being used to launder money or to finance terrorism.²⁸ There are furthermore many less restrictive measures that have been proposed to meet the objectives of the AML/CFT laws and regulations of the United States, including in a letter by 12 Members of Congress to Secretary of State Kerry.

The closure of the overwhelming majority of bank accounts held by Somalis in the United States in response to the current regulatory AML/CFT framework does not only impact the human rights of Somalis living in the United States, but may also have severe effects on the human rights of people living in Somalia who are dependent on remittances from abroad. The following human rights of people living in Somalia appear to be especially affected by bank account closures in the United States.

First, the bank account closures appear to affect the right of Somalis to an adequate standard of living, including adequate food and their fundamental right to be free from hunger. Hunger and a lack of access to adequate food are significant problems in Somalia. In 2011, an estimated 250,000 people were killed in a famine and the United Nations World Food Programme estimates that 731,000 Somalis currently require urgent lifesaving humanitarian assistance to help meet immediate food needs. The Somali Prime Minister has warned that as a result of the reduction of the flow of remittances to his country, “many Somalis risk to lose their autonomy and ability to pay rent, buy food and clothes, access medical services or even afford to send their children to school.”²⁹ Second, the drying up of remittance flows from the United States may directly affect the right of Somalis to the enjoyment of the highest attainable standard of physical and mental health. Remittances are used by Somalis to pay for basic healthcare and medicines. Third, against the backdrop of the precarious humanitarian situation in Somalia, the restriction of remittances may well be the last straw for Somalis who depend on remittance money to buy food, basic health care and medicines. The possibility should not be excluded that, for those who are heavily dependent on remittances, the closure of bank accounts in the United States and the shutting off of transfer possibilities may be tantamount to a deprivation of the right to life.³⁰

As a signatory of the ICESCR, the United States is under an international obligation not to defeat the object and purpose of that treaty, as was explicitly acknowledged by the then Assistant Secretary of State for Democracy, Human Rights and Labor in 2011. It is the object and purpose of the ICESCR, which does not contain a jurisdictional clause, that State Parties undertake steps “individually and through

²⁷ Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, 2 September 2009, A/HRC/12/22, para. 13.

²⁸ Congressman Keith Ellison, ‘Don’t Block Remittances to Somalia’, 10 April 2015.

²⁹ Available at: <http://diplomat.so/2015/02/08/somalias-prime-minister-we-call-on-the-united-states-to-reconsider-on-remittances-to-somalia/>

³⁰ “[...] there is a clear correlation between the enjoyment of the right to food and the right to life.” Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, 2 September 2009, A/HRC/12/22, para. 18.

international assistance and co-operation” to achieve progressively the full realization of the rights recognized in the ICESCR. It can be argued that the United States, at the very least, has an obligation not to defeat the object and purpose of the Covenant and should therefore ensure that its actions, including in the area of anti-money laundering and counter-terrorism, do not lead to a direct and severe retrogression of economic, social and cultural rights in other States. Not only are United States AFM/CFT laws and regulations likely to hinder the full realization of the rights recognized in the ICESCR in Somalia, they may also hinder the Somali State in its efforts to guarantee those human rights, which goes directly against the objective of providing assistance and co-operation.

It is important to add that the obligations of the United States toward people living in Somalia can also be traced back to other sources of law. The United States has pledged itself in Article 56 of the United Nations Charter to take joint and separate action for the achievement of, *inter alia*, universal respect for, and observance of, human rights and fundamental freedoms for all.³¹ The Universal Declaration of Human Rights, which includes many of the economic, social and cultural rights included in the ICESCR, can be seen as giving substance to the meaning of the term ‘human rights’ in the UN Charter. It is widely accepted, as noted in General Comment No. 3 of the Committee on Economic, Social and Cultural Rights (CESCR), that “in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of *all States* (underling added).”³² The United States has often reaffirmed the importance of acting in accordance with the UN Charter and international human rights law, most notably in the context of Security Council resolutions dealing with measures to counter terrorism.³³ These Security Council Resolutions, adopted under Chapter VII of the UN Charter, are binding on all States on the basis of article 25 of the UN Charter and take precedence over other obligations as per article 103 UN Charter.³⁴ It can thus be argued that the United States is under an international legal obligation not to interfere impermissibly or unnecessarily with the ability of Somalia to comply with its human rights obligations and to take feasible measures to avoid doing harm to individuals in Somalia.³⁵

³¹ *Namibia*, Advisory Opinion, 1971, I.C.J. Rep 16, para. 131.

³² CESCR, General Comment No. 3 (1990), para. 14.

³³ Security Council Resolution 1822, 30 June 2008, S/RES/1822 (2008). See also Security Council Resolution 2174, 27 August 2014, S/RES/2174 (2014).

³⁴ “A practice that perhaps had been regarded by some international lawyers as of rough and ready convenience—namely, that in the drafting of resolutions, Chapter VII resolutions are to be regarded as capable of binding, while Chapter VI resolutions are not—is now said to be endowed with the status of law.” Rosalyn Higgins, *Themes and Theories* (2009), p. 205.

³⁵ This minimum obligation of all States to ‘do no harm’ extraterritorially complies with the notion put forward by the Special Rapporteur on the right to food, who held that the obligation to respect the right to food “requires States to ensure that their policies and practices do not lead to violations of the right to food in other countries.” Report of the Special Rapporteur on the right to food, 24 January 2005, E/CN.4/2005/47, para. 48; Similar extraterritorial obligations of States can be found in the case law of the CESCR. See: CESCR, General Comment No. 12, 12 May 1999, paras. 36 and 37; CESR, General Comment No. 15, para. 33; CESCR, General Comment No. 8, para. 14. This extraterritorial ‘do no harm’ obligation can also be deduced from Human Rights Council Resolution 10/15 (2009), which urges States to protect all human rights, including economic, social and cultural rights, while countering terrorism “bearing in mind that certain counter-terrorism measures may have an impact on the enjoyment of these rights”; See also: Aldo Caliari

As noted earlier, this is not to suggest that appropriate counter-terrorism measures cannot be adopted, but rather to say that such measures must be designed in accordance with human rights principles.

Finally, to the extent that the AML/CFT laws and regulations of the United States leave private banks discretion whether to close the bank accounts of Somali MTOs, it should be underlined that the United States has a duty to ensure that its laws are implemented by business enterprises in such a way as to respect human rights. The UN Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council on June 16, 2011 in a resolution cosponsored by the United States Government,³⁶ are especially relevant in this regard. In particular, Guiding Principle 3 sets out “General State regulatory and policy functions” and states that, in meeting their duty to protect, States should “ensure that laws and policies concerning the creation and ongoing operation of business enterprises...do not constrain but enable business respect for human rights” and “provide effective guidance to business enterprises on how to respect human rights throughout their operations”. The commentary to Guiding Principle 3 notes that “Laws and policies that govern the creation and ongoing operation of business enterprises...directly shape business behaviour” and states that “greater clarity in some areas of law and policy...is often necessary to protect both rights-holders and business enterprises”. Taken together, this means that States should: ensure that their laws and regulations provide an environment that is conducive to facilitating business respect for human rights; ensure that their laws and regulations do not constrain but enable business respect for human rights; and clarify laws and regulations by way of guidance where necessary and appropriate.

Furthermore, Guiding Principle 2 of the UN Guiding Principles on Business and Human Rights provides that the United States should set out clearly the expectation that “all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations”. This principle has been echoed by the Human Rights Committee, which held in relation to Germany, that the “State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations.”³⁷ In conformity with Guiding Principles 2 and 3, and the commentary to Guiding Principle 3, the United States should therefore clarify the intent and scope of the AML/CFT legislation as it pertains to Somali MTOs in order to facilitate the respect by private banks in the USA of the human rights of Somali-Americans and Somalis.

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 therefore be grateful for your observations on the following matters:

and Mac Darrow, ‘International Cooperation, MDG 8, and Human Rights’, in: Malcolm Langford et. al. (eds.), *The Millennium Development Goals and Human Rights: Past, Present and Future* (2015), p. 322.

³⁶ United States Department of State Bureau of Democracy, Human Rights, and Labor, ‘U.S. Government Approach on Business and Human Rights’ (2013), p. 3. The United States Government “encourages stakeholders to treat the Guiding Principles as a “floor” rather than a “ceiling” for addressing issues of business and human rights”. *Ibid*, p. 4.

³⁷ HRC, 2012 Concluding Observations: Germany, UN Doc. CCPR/C/DEU/CO/6 (12 November 2012), para. 16.

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

2. Please indicate whether the United States has sought to identify ways in which legitimate measures to counter terrorism and money laundering could be reconciled in this context with measures to avoid violation of the economic, social and cultural rights, as well as civil and political rights, of those directly affected by the wholesale closure of bank accounts of Somali MTOs.

3. Is the United States contemplating taking emergency measures to facilitate the flow of remittances from the Somali diaspora in the United States to Somalia?

4. Is the United States contemplating changing its existing AML/CFT laws and regulations to ensure that the negative consequences of restricting transfers through Somali MTOs are proportionate in light of the importance of not directly violating relevant economic, social and cultural rights, as well as civil and political rights?

5. Does the United States contemplate devising a comprehensive plan to clarify existing AML/CFT obligations of commercial banks and bring relevant stakeholders together, in the United States and abroad, specifically in relation to Somali MTOs?

6. What actions, if any, is the United States taking in the context of international organizations and fora, including, but not limited to, FATF, G7, G20, and World Bank, to address the issue of the closure of bank accounts of Somali MTOs?

7. In addition to earlier efforts by the United States Government, is the United States contemplating addressing the issue of the closure of bank accounts of Somali MTO through bilateral or multilateral cooperation with the most affected States, including Somalia, the United Kingdom, Australia and other diaspora States?

8. Could you provide us with an overview of the flow of remittances from the United States to Somalia over the last five years? Could you also indicate what evidence is available that Somali MTOs have been used for the purpose of money laundering or financing terrorism?

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

It is our intention to publicly express our concerns in the near future as, in our view, the information upon which a press release will be based is sufficiently reliable to

indicate a matter warranting immediate attention. The press release will indicate that we have been in contact with your Excellency's Government to clarify the issue/s in question.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

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

Philip Alston
Special Rapporteur on extreme poverty and human rights

Dante Pesce
Chairperson of the Working Group on the issue of human rights and transnational corporations and other business enterprises

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