

Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders

REFERENCE:
AL SRB 3/2020

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Special Rapporteur on the rights to freedom of peaceful assembly and of association; and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 40/16, 41/12 and 43/16.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the use of the Serbian Law on the Prevention of Money Laundering and the Financing of Terrorism¹ (the "Serbian Law") to obtain banking documents and transaction information of NGOs, media associations, other non-profit organizations (NPOs), and individuals associated with those entities. The measures allegedly aim at restricting and coercing civil society actors for their work and criticism of the Government.

Concerns regarding the curtailment of civic space and the ability of human rights defenders to exercise fundamental human rights and freedoms in Serbia were the subject of previous communications sent by Special Procedures dated 3 April 2013 (SRB 1/2013) and 28 July 2014 (SRB 1/2014). We thank the Government for its response to this second communication.

Context

The financing of terrorism has been a concern for States evidenced by negotiation and agreement on the 1999 International Convention for the Suppression of the Financing of Terrorism which was designed to criminalize acts of financing terrorism.² In parallel, a number of Security Council resolutions expressly call for the criminalization of terrorism financing from references in the landmark Resolution 1373 to the more recent Resolution 2462, which is the first comprehensive resolution addressing the prevention and suppression of terrorism financing. That resolution also reaffirms that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law.³

¹ English translation available at https://www.legislationline.org/download/id/6047/file/Serbia_anti_money_laundering_law_2005_am2010_en.pdf.

² 189 States are parties to the Convention, including Serbia who ratified it on 10 October, 2002.

³ We highlight specifically that, in Resolution 2462, the Security Council "[demanded] that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law"; and paragraph 23 of the Resolution on non-profit organizations.

In parallel, the Financial Action Task Force (FATF) has set forth international practices and guidelines aiming at preventing global money laundering and terrorist financing,⁴ which are monitored by the Council of Europe Committee MONEYVAL (MONEYVAL). The FATF recommendations, while non-binding,⁵ provide recognized international guidance for the countering of terrorism financing.⁶ Specifically, Recommendation 8 provides guidance to States on the laws and regulations that should be adopted to oversee and protect NPOs that have been identified as being vulnerable to terrorist financing abuse.

In 2016, MONEYVAL rated Serbia as partially compliant in its implementation of Recommendation 8, which concerns the protection of non-profit organizations (NPOs) from terrorist financing abuse.⁷ Specifically, evaluators stated that “Serbia has not conducted any review of the NPO sector with regard to its size, relevance, activities and its vulnerability to [financing terrorism] threats or that of the adequacy of the domestic legal framework in this field”.⁸

The Serbian Law was passed on 14 December 2017, and appears to have been harmonized with these FATF recommendations. It was later on evaluated by MONEYVAL as largely compliant.⁹

According to the information received:

On 13 July 2020, the Serbian Administration for the Prevention of Money Laundering sent an official request to all commercial banks in Serbia to provide information and documentation related to all local and foreign currency accounts and transactions for 20 individuals and 37 NPOs¹⁰ dating

⁴ See FATF Recommendations, available at <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>; Resolution [CM/Res\(2010\)12](#) on the Statute of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), 13 October 2010.

⁵ On the role of “soft law” generally in the counter-terrorism contest see Report of the Special Rapporteur A/74/335

⁶ [Security Council Res. 2462](#) (2019), para. 4. We note that mandate of the FATF was extended to include the prevention of terrorism financing in the weeks following 11 September 2001, without any consultation with national parliaments or civil society, A/HRC/40/52, see para. 31.

⁷ MONEYVAL, Anti-Money laundering and counter-terrorist financing measures, Serbia, Fifth Round Evaluation Report, 2016, available at [https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/MONEYVAL\(2016\)2_MER_Serbia_en.pdf](https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/MONEYVAL(2016)2_MER_Serbia_en.pdf), para. 124.

⁸ *Ibid.*, para. 105.

⁹ We also note that in the Follow-up Report of Serbia of 2019, evaluators considered Serbia was considered as largely compliant with recommendation 8 and stated that “[t]he Serbian authorities provided an explanation on the features of NPOs that make them vulnerable to [financing terrorism] abuse. These features were identified as a result of the review. The authorities explained that a greater risk of abuse for [financing terrorism] purposes is posed by NPOs which operate in specific geographical areas”, <https://www.fatf-gafi.org/media/fatf/documents/reports/fur/Moneyval-Follow-Up-Report-Serbia-2019.pdf>, para. 17.

¹⁰ Belgrade Centre for Security Policy, Belgrade Center for Human Rights, Balkan Investigative Reporting Network, Proaktiv, Business Info Group, Center for the Rule of Law, Centre for civil society development Protekta, Center for Investigative Journalism of Serbia, Center for Research, Transparency and Accountability, European Movement in Serbia, Humanitarian Law Center, Catalyst foundation, Trag foundation, Civic Initiatives, Civic position, Helsinki Committee for Human Rights, Youth Initiative for Human Rights, Lawyers’ Committee for Human Rights, Crime and Corruption Reporting Network, Libek, National Coalition for Decentralisation, Non-Aligned Films, Novi Sad School of Journalism, Independent Journalists’ Association of Serbia, CANVAS, Bureau for Social Research, Youth Center CK13.

back to 1 January 2019. The latter targeted list included individuals and organizations known for their work on human rights, investigation of war crimes, monitoring of the government's work, and other forms of investigative journalism.

The banking transaction data was sought under the authority of article 73 of the Law. Article 73 grants the administration authority to request bank data if it "assesses that in connection with certain transactions or persons, there are grounds for suspicion of money laundering or terrorism financing."¹¹ The Serbian Law does not specify the standard used to evaluate the sufficiency of the "grounds for suspicion" needed to obtain the bank data. However, grounds for suspicion are defined in article 2 (1) of the Criminal Procedure Code as a group of facts that indirectly indicate that a crime has been committed or that a certain person has committed the crime. It remains unclear and undetermined how the NPOs would fulfil these requirements and whether these would apply to the criteria set by the FATF.

Government officials have reportedly denied such targeting in media statements, stating that everyone is equal before the law. According to information received, the competent authorities have not provided clear explanations on the legal basis and legal background of the request towards the banks but rather showed inconsistencies in their justifications. In several statements to the media, it was said that there is no suspicion regarding these organizations. Statements also conflated regular supervisory activities related to the implementation of the FATF Recommendation 8 with activities conducted during investigations. These inconsistencies would appear to indicate abuses of the mechanism established for the implementation of the FATF recommendations in Serbia, as a method of undermining and marginalizing civil society and free media by the authorities. In this perspective, it is alleged that many of the organizations being investigated were targeted due to their prior and sustained criticism of the Serbian Government.

Moreover, to date, the Government has not provided any information on the process or risk-related criteria used to generate the list sent to the banks.

Without prejudging the accuracy of the information received, we express our concern with the use of the Serbian Law to interfere with, and limit the freedoms of expression and association of persons belonging to NPO's and their right to take part in the conduct of public affairs, as well as rights of human rights defenders, pursuant to articles 19, 22 and 25 of the International Covenant on Civil and Political Rights (ICCPR) ratified by Serbia on 12 March 2001. The information received raises concerns that your Excellency's Government has employed its counter-terrorism financing oversight powers in a broad and arbitrary manner against NPOs and individuals and thus inconsistent with Serbia's obligations under international law.¹² In this regard, we wish to recall that while States have an obligation to adopt national

¹¹ Law on the Prevention of Money Laundering and the Financing of Terrorism, art. 73.

¹² See <https://www.coe.int/en/web/portal/-/moneyval-new-follow-up-reports-assess-measures-against-money-laundering-and-terrorist-financing-in-six-countries>

legislation to combat the financing of terrorism,¹³ the measures adopted must be in compliance in all respects with international law, in particular with human rights law.¹⁴ As the General Assembly noted in the United Nations Global Counter-Terrorism Strategy, effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.¹⁵ The ability of civil society to lawfully exercise its freedoms of expression, association and right to participate in the conduct of public affairs is critical to any effective counter-terrorism strategy, and protected by articles 19, 22 and 25 of the ICCPR. Civil society plays a vital role in channeling discontent and allowing for constructive engagement with States, and in directly undermining the factors leading individuals to be drawn to terrorism and violent extremism.¹⁶ The actions allegedly taken by your Excellency's Government may have serious implications for the right of NPOs to exercise these fundamental rights and freedoms.

We further recall that Recommendation 8 notes that these measures should be “focused and proportionate” and in-line with a risk-based approach. A “one size fits all” approach to address all NPOs is not appropriate.¹⁷ Furthermore, the Interpretive Note to Recommendation 8 stresses the vital role played by NPOs “providing essential services, comfort and hope to those in need around the world,” and that the focused measures adopted by countries to protect NPOs from terrorist financing abuse “should not disrupt or discourage legitimate charitable activities.”¹⁸ In this sense, assessment proceedings should address not only problems caused by under-regulation of the NPO sector but also tackle shortcomings linked to over-regulation, a phenomenon negatively affecting civil society globally.¹⁹ Additionally, the note that complying with the FATF Recommendations should be implemented in a manner which respects a country's obligations under the Charter of the United Nations and international human rights law to promote universal respect for, and observance of, fundamental human rights and freedoms, such as freedom of expression, religion or belief, and freedom of peaceful assembly and of association.²⁰

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has previously called on the FATF and FATF-style regional bodies to implement human rights benchmarking and guidance with similar levels of specificity and comprehensiveness as the recommendations addressing financial measures to facilitate human rights-compliant implementation.²¹ The application and enforcement of “soft law” counter-terrorism

¹³ Security Council Res. 1373 (2001), para. 1; International Convention for the Suppression of the Financing of Terrorism, adopted by General Assembly Res. 54/109.

¹⁴ S/RES/2462 (2019), para. 6. See also, International Convention for the Suppression of the Financing of Terrorism, art. 21.

¹⁵ General Assembly [Res. 60/288](#). See also A/HRC/40/52.

¹⁶ A/HRC/40/52, para. 12.

¹⁷ Interpretive Note to Recommendation 8, pp. 58 and ff. See also FATF, Best Practices: Combating the Abuse of Non-Profit Organisations (Recommendation 8), paras. 7(b), 22.

¹⁸ FATF Recommendations, Interpretive Note to Recommendation 8.

¹⁹ Interpretive Note to Recommendation 8, pp. 58 and ff. See also e.g. [A/HRC/40/52](#); <https://www.ohchr.org/Documents/Issues/Terrorism/hrc-impactofsoftlaw.pdf>; Human Security Collective, ‘How Can Civil Society Effectively Engage in Counter-Terrorism Processes?’ (2017), p. 3; FATF, Best Practices: Combating the Abuse of Non-Profit Organisations (Recommendation 8), paras. 7(b), 22.

²⁰ Interpretive Note to Recommendation 8, pp. 58 and ff.

²¹ [A/74/335](#), para. 37.

standards, such as the FATF recommendations, cannot be allowed to result in a *de facto* undermining of binding international law norms.²²

In this view, we are also concerned that the information received does not demonstrate that measures were used in a risk-based (i.e. necessary) and proportionate manner, leading to a risk of undue disruption and discouragement of the NPOs legitimate activities.

We also wish to emphasize that the use of legislation to create undue and complex burdens on NPOs has the effect of limiting, restricting and controlling civil society.²³ The right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association to freely carry out its legitimate activities.²⁴ This includes the freedom “to solicit and receive voluntary financial and other contributions from individuals and institutions”.²⁵ This freedom to solicit and receive financial support is crucial to NPO operations. For example, experts have noted that profound limitations on access to foreign funding severely restrict the existence of NGOs, which are often wholly dependent on such funding, particularly affecting human rights and women’s organizations.²⁶ Additionally, the selection of NPOs for burdensome regulatory obligations based on their prior criticism of the government pressures NPOs against lawfully exercising their freedom of expression. A lack of an adequate risk-based justification for this limitation to the freedom of expression would entail that these measures would be taken in contravention of article 19 of the ICCPR.

If the NPOs targeted for enhanced oversight under article 73 of the Law were selected based on their prior criticism of the Government, this would represent a clear violation of their right to freedom of expression and right to take part in the conduct of public affairs.²⁷ Any restriction to the exercise of the rights protected by article 19 must be based on one of the exhaustively enumerated legitimate aims in article 19 (3). Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria.²⁸ We express concern that article 73 of the law, which enables the collection of banking data based on the finding of a “reason[] to suspect money laundering or terrorism financing,” does not appear to require an objective risk-based assessment. Further, your Excellency’s Government has not provided additional information about the risk-based criteria or process used to select the targeted NPOs. This creates a serious risk that the selection of NPOs may be made without an objective and reasonable criterion in violation of article 25 and inconsistent with the guidance found in Recommendation 8.

If these allegations are accurate, they would contravene provisions of the ICCPR, including articles 19, 22 and 25, which guarantee the freedoms of opinion, of expression, and of association and the right to take part in the conduct of public

²² *Ibid.* para. 38.

²³ A/HRC/40/52, Recommendation d, p. 17.

²⁴ [CCPR/C/88/D/1274/2004](#), para. 7.2.

²⁵ Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, General Assembly [Res. 36/55](#), 25 Nov. 1981, art. 6(f). See also A/HRC/23/39 and A/61/267.

²⁶ A/HRC/40/52, para. 42.

²⁷ According to the Human Rights Committee, citizens may take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. See general comment No. 25, para. 8.

²⁸ *Ibid.*, para. 4.

affairs, as well as the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

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 provide information on how the assessment of the threats and vulnerabilities of the NPO sector was carried out and address if such assessment was carried out in line with FATF guidance, including with the proper involvement of the NPO sector.
3. Please provide any information about the process and criteria that were used to select the targeted organizations and individuals, and any information about how those factors were risk-based and proportionate to the threat presented.
4. Please provide information on internal control and oversight mechanisms of the Administration for the Prevention of Money Laundering.
5. Please provide information on what steps are being taken to ensure that measures taken to combat anti-money laundering and terrorism financing do not infringe upon the rights to freedom of association, opinion, and expression as well as the right to take part in the conduct of public affairs guaranteed under the International Covenant on Civil and Political Rights.
6. Please indicate what measures have been taken to ensure that human rights defenders and other civil society actors are able to freely carry out their legitimate activities, including the freedom to solicit and receive financial support from domestic and international sources.
7. Please indicate what remedial measures are taken when measures to combat anti-money laundering and terrorism financing are undertaken without due process of law, or in contravention of domestic legal standards. Specifically, what measures to address financial and reputation harm to individuals negatively affected are undertaken.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also

subsequently be made available in the usual report to be presented to the Human Rights Council.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

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.

A letter of similar content has been sent to the Financial Action Task Force and to the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism - MONEYVAL.

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

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Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Clement Nyaletsossi Voule
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Mary Lawlor
Special Rapporteur on the situation of human rights defenders

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, we would like to draw your Excellency's Government's attention to articles 19, 22 and 25 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Serbia on 12 March 2001, which guarantee the right to freedoms of opinion, expression, association and to take part in the conduct of the conduct of public affairs.

Freedom of opinion and expression

We wish to recall that article 19 of the ICCPR provides for the rights to freedom of opinion and expression. The right to freedom of expression affords particularly strong protection to debates on public affairs, reporting on human rights issues, and criticism of government actions.²⁹ As expressed by the Human Rights Committee, "[a] free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights."³⁰ The interference in the freedom of the press is therefore a particularly serious restriction of the rights under Article 19 of the ICCPR. As further expressed by the Committee, "the penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression."³¹

Paragraph 3 of article 19 sets out the requirement that any restrictions to the right to freedom of expression must be provided by law, pursue a legitimate aim and be necessary and proportionate. While national security and public order provide for a legitimate basis for restricting the right to freedom of expression, any such restriction must be strictly construed. As highlighted by the Human Rights Committee, extreme care must be taken to ensure that counter-terrorism measures are compatible with the requirements set out in paragraph 3.³² The State has the burden of proof to demonstrate that any measure taken restricting the freedom of expression is compatible with article 19.³³

Freedom of Association

We also wish to remind your Excellency's Government that article 22 of the ICCPR guarantees the right to freedom of association. No restrictions may be placed on the exercise of this right unless they are "prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, [and] public order [...]" Any limitations of the rights must be implemented pursuant to a domestic legal basis that is sufficiently foreseeable, accessible and provides for adequate safeguards against abuse.

²⁹ General Comment no. 34 para. 38; A/HRC/27/29 para. 26.

³⁰ General Comment no. 34, para. 13.

³¹ *Ibid.*, para 42.

³² *Ibid.*, paras. 30 and 46.

³³ *Ibid.*, para. 27.

We also highlight that “the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”³⁴.

In order to meet the proportionality and necessity test, any restrictive measures adopted must be the least intrusive means capable to achieve the desired objective (legitimate aim).³⁵ States shall not invoke national security as a justification for measures aimed at suppressing opposition or to justify repressive practices against its population.³⁶ The onus is on the Government to prove that a threat to one of the legitimate aims exists and that the measures are taken to deal with the threat.³⁷ The right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association to freely carry out its legitimate activities.³⁸ This includes the freedom “to solicit and receive voluntary financial and other contributions from individuals and institutions.”³⁹

We also remind your Excellency’s Government that the right to freedom of association is an essential component of democracy as it empowers individuals to “express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable”, as enunciated in the Human Rights Council Resolution 15/21.

Right to take part in the conduct of public affairs

We also recall the right to participation in the conduct of public affairs⁴⁰ protected under article 25 of the ICCPR, a right that “lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.”⁴¹ Citizens take part in the conduct of public affairs by exerting influence through public debate and dialogue.⁴² “These public participation rights encompass the right[s] [...] to voice criticism and to submit proposals aimed at improving the functioning and inclusivity of all governmental bodies engaged in the conduct of public affairs”.⁴³ This participation is supported by ensuring freedom of expression, assembly, and association.⁴⁴ The existence of independent and diverse media sources, able to comment on and inform public opinion on political issues without undue censorship or restraint, has been recognized by international human

³⁴ ECtHR, *Sunday Times vs. United Kingdom*, Application no.6538/74; 26 April 1979, para.49.

³⁵ [A/61/267](#), para. 23.

³⁶ *Ibid.*, para. 20.

³⁷ *Ibidem.*

³⁸ [CCPR/C/88/D/1274/2004](#), para. 7.2.

³⁹ Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, General Assembly [Res. 36/55](#), 25 Nov. 1981, art. 6(f).

⁴⁰ Public affairs is understood broadly to encompass the “exercise of political power, in particular the exercise of legislative, executive and administrative powers”, covering all aspects of public administration. Human Rights Committee, General Comment No. 25 (1996), para. 5.

⁴¹ *Ibid.*, para. 1.

⁴² *Ibid.*, para. 8.

⁴³ [A/HRC/27/29](#), para. 21.

⁴⁴ Human Rights Committee, General Comment No. 25, para. 8.

rights mechanisms as an essential underlying guarantee that supports the right to political participation.⁴⁵

Additionally, the OHCHR has acknowledged the importance of protecting the civil society actors concerned with political and public affairs, particularly those advocating for human rights.⁴⁶ OHCHR further noted that activities of civil society organization have been subjected to discriminatory restrictions related to registration requirements and sources of financing.⁴⁷ These forms of discrimination leave civil society organizations unable to freely exercise their rights to contribute to the public debate on issues of concern.⁴⁸

Human Rights Defenders

We would like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,⁴⁹ also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.

It also provides that everyone has the right, individually and in association with others, "at the national and international levels [...] to form, join and participate in non-governmental organizations, associations or groups" (Article 5) and "to solicit, receive and utilise resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means." Human rights defenders play a significant role in combatting terrorism. Unduly restrictive measures, which can lead donors to withdraw support from associations operating in difficult environments, can in fact undermine invaluable initiatives in the struggle against terrorism and extremism, and ultimately have adverse consequences on peace and security.⁵⁰

We would also like to refer to Human Rights Council resolution 22/6, which urges States to ensure that measures to combat terrorism and preserve national security are in compliance with their obligations under international law and do not hinder the work and safety of individuals, groups and organs of society engaged in promoting and defending human rights.

Furthermore, we would like to bring to the attention of your Excellency's Government the following provisions of the UN Declaration on Human Rights Defenders:

⁴⁵ *Ibid.*, para. 25.

⁴⁶ A/HRC/27/29, para. 24.

⁴⁷ *Ibidem.*

⁴⁸ *Ibid.*, para. 84. See also [A/HRC/13/22](#).

⁴⁹ Adopted by General Assembly resolution 53/144 (of 9 December 1998).

⁵⁰ [A/HRC/23/39](#), para. 25.

- Article 6 (a) – which provides that everyone has the right, individually and in association with others to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;
- Article 6 (b) & (c) – which provide that everyone has the right, individually and in association with others to freely publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; and to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and to draw public attention to those matters;
- Article 13 – which provides the right for everyone, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means,

Soft Law Terrorism Instruments: standards developed by the Financial Action Task Force

We also wish to note that there has been a noticeable shift in the counter-terrorism arena from a primary focus on treaty agreements to other forms of law-making and norm enforcement by States in the past two decades (see A/73/361). Norm production occurs in several “soft law” institutional settings in which the presence and capacity of human rights entities are limited or constrained or lack adequate resources.⁵¹ Many of these new “soft law” generating entities, such as the FATF,⁵² have significantly contributed to an exponential growth in counter-terrorism law that has lacked a commensurate development of human rights law to provide balance.⁵³

The FATF is an exclusive, State-created forum to which civil society and other relevant stakeholders particularly UN and other regional human rights entities have no consistent access.⁵⁴ The mandate of the FATF contains no references to international law, international human rights law or international humanitarian law.⁵⁵ Explicit references to obligations under the Charter and international human rights law have been introduced in the Interpretive Notes to FATF Recommendations, though relevant references are limited.

⁵¹ A/74/335, para. 21.

⁵² The mandate of the FATF explicitly states that it is “not intended to create any legal rights or obligations”.

⁵³ A/74/335, para. 21.

⁵⁴ The annual Private Sector Consultative Forum provides a platform for the Task Force to engage directly with the private sector. Since 2016, a limited number of civil society stakeholders including the Global NPO Coalition on FATF has been permitted to nominate organizations to participate in the Forum, ensuring some human rights and humanitarian presence in the proceedings. In addition, the Task Force committed to enhancing engagement with non-profit organizations by holding annual meetings on specific issues of common interest and organizing ad hoc exchanges on technical matters. Much of the engagement of the Task Force with civil society is conducted on an ad hoc basis, which provides for considerable flexibility for the Task Force but leaves civil society with no expectations of formalized participation. See also, A/74/335, para. 42.

⁵⁵ A/74/335, para. 33.

FATF-style regional bodies (FSRBs), such as MONEYVAL, are associate members of the FATF and commit to endorsing FATF recommendations, guidance and other policy and promoting the “effective implementation” of these standards in their member jurisdictions through the use of the FATF assessment methodology and procedures, including mutual evaluations.⁵⁶ While FSRBs, as associate members, ‘participate’ in the development of FATF standards (without decision-making/ voting powers), the FATF is recognized as “the only standard-setting body and the guardian and arbiter of the application of its standard”.⁵⁷

Although their recommendations and related guidance material are not legally binding, States strive towards compliance, owing to the benefits linked to membership and the financial and economic disadvantages that non-compliance may trigger.⁵⁸ Importantly, member jurisdictions are bound by their relevant obligations under international law, specifically international human rights and humanitarian law, including during participation in Task Force standard-setting processes and assessment proceedings, as well as when transposing relevant standards domestically.⁵⁹

We remind your Excellency’s Government that the obligations of treaty and customary international law in the human rights domain are binding and thus must be ensured when a State is, in parallel engaging implementation ‘soft law’ such as FATF recommendations.

Moreover, experts, including the Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism, have previously noted that a previous version of Recommendation 8, had been inappropriately used as a tool by a number of States to reduce civil society space and suppress political opposition, and has caused “incalculable damage to civil society”.⁶⁰ The Special Rapporteur noted that the discourse and rhetoric of compliance with FATF recommendation lend legitimacy to States that, without due respect for their international human rights obligations, treat “soft law” as “hard law” by implementing the provisions of Recommendation 8 through wholesale measures that strictly regulate civil society, in violation of the principles of proportionality and necessity, regardless of actual activities, evidence of collusion in terrorism financing, and risk of collusion, which has been widely disputed and its significance minimized.⁶¹ While revised Recommendation 8 embraces a risk-based approach calling for the application of effective and proportionate measures responding to identified threats of terrorist financing abuse, due attention needs to be paid to concerns raised by relevant stakeholders that the human rights compliant and consistent implementation of the revised rules by governments and evaluators needs further improvement, given in particular the effects of such rules and practices on the perceived and actual legal obligations and practices of States.⁶²

⁵⁶ FATF, ‘Mandate’, para. 12.

⁵⁷ FATF, *High-Level Principles for the relationship between the FATF and the FATF-style regional bodies*, (updated February 2019).

⁵⁸ *Ibid.* para. 29.

⁵⁹ *Ibid.* para. 38.

⁶⁰ [A/HRC/40/52](#), para. 6; [A/70/371](#), para. 24; Center for Strategic and International Studies, “Counterterrorism measures and civil society”, p. 5.

⁶¹ [A/HRC/40/52](#), para. 31.

⁶² [A/74/335](#), para. 36; <https://www.ohchr.org/Documents/Issues/Terrorism/hrc-impactofsoftlaw.pdf>, para. 16.