

Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; 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:
OL THA 5/2021

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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 promotion and protection of the right to freedom of opinion and expression; 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, 43/4, 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 **28 June 2021 Thai Cabinet Resolution**, which requires the Council of State to incorporate **eight principles on anti-money laundering and countering the financing of terrorism into the forthcoming Draft Act on the Operation of Not-for-Profit Organizations**, in potential contravention of Thailand's international and human rights law obligations. We are concerned that, absent further review and revision, the incorporation of the eight enumerated principles may result in violations of fundamental human rights and freedoms guaranteed under international law, including under the International Covenant on Civil and Political Rights ("ICCPR") and International Covenant on Economic, Social and Cultural Rights ("ICESCR") to which your Excellency's Government acceded on 29 October 2006 and 5 September 1999 respectively.

As you will recall, concerns regarding the prior versions of the Draft Act on the Operations of NGOs and Draft Act on the Promotion and Development of Civil Society Organizations, which aimed at providing oversight of non-profit organizations (NPOs) operating in Thailand, were sent by Special Procedures on 26 March 2021 (OL THA 2/2021). At that time, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and Special Rapporteur on the situation of human rights defenders cautioned that the draft legislation did not appear to conform to international human rights law and standards. We note your Excellency's Government subsequent decision to consult some governmental authorities, and to revise the draft law to ensure compliance with international obligations.

We respectfully underline the continued importance of maintaining and upholding the fundamental guarantees of international and human rights law as your Excellency's Government moves to finalize the Draft Act on the Operations of NGOs. We stress that respect for international human rights law treaties and norms is a complementary and mutually reinforcing objective in any effective counter-terrorism effort at the national level. Consequently, we recommend careful consideration of the

concerns outlined below to ensure that the incorporation of the eight enumerated principles on anti-money laundering and countering the financing of terrorism into the draft legislation is necessary and compliant with international law.

Applicable International and Human Rights Law Standards

We respectfully call your Excellency's Government's attention to the relevant international human rights law provisions enshrined in the ICCPR. In particular, we consider international human rights standards applicable under ICCPR article 19, which guarantees the right of everyone to freedom of opinion and expression; ICCPR articles 21 and 22, which guarantee the rights of everyone to peaceful assembly and freedom of association; ICCPR article 25, which guarantees the right of every citizen to take part in the conduct of public affairs; ICCPR article 17, which protects against arbitrary or unlawful interference with a person's privacy, reputation and home; and ICESCR articles 3 and 6, which ensure the equal right of women to enjoy all enumerated economic, social and cultural rights, including the right to work. Pursuant to article 2 of the ICCPR and ICESCR, your Excellency's Government is under a duty to take deliberate, concrete and targeted steps towards meeting the obligations recognized in the respective Covenants, including by adopting laws and legislative measures as necessary to give domestic legal effect to the rights stipulated in the Covenants and to ensure that the domestic legal system is compatible with the treaties.

In addition, we 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, also known as the UN Declaration on Human Rights Defenders. In particular, the Declaration reaffirms each State's responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, including every person's 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" and "to solicit, receive and utilise resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means" (A/RES/53/144, art. 5).

We remind your Excellency's Government that your human rights obligations apply in full force in the context of counter-terrorism, including when enacting countering the financing of terrorism measures. The financing of terrorism has long been a concern for States as evidenced by the 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 and which was ratified by Thailand on 29 September 2004. Since then, a number of Security Council resolutions have expressly called for the criminalization of terrorism financing, including the landmark Security Council Resolution 1373 and Security Council Resolution 2462, the first comprehensive resolution addressing the prevention and suppression of terrorism financing. The latter resolution "[d]emands that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism [. . .] comply with their obligations under international law, including international humanitarian law, international human rights

law and international refugee law.”¹

In parallel, the Financial Action Task Force (FATF) has set forth international practices and guidelines aimed at preventing global money laundering and terrorist financing. The FATF recommendations, while non-binding, provide recognized international guidance for the countering of terrorism financing. 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 concerns (Recommendation 8). Such measures must be “focused and proportionate”; “a ‘one size fits all’ approach to address all NPOs is not appropriate.” FATF has reaffirmed that State compliance with Recommendation 8 and the other FATF Recommendations “should not contravene 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.”

Context of the Cabinet Resolution

Since 1997, Thailand has been a founding member of the Asia/Pacific Group on Money Laundering (“APG”), the regional body tasked with monitoring compliance with international anti-money laundering and countering the financing of terrorism (“AML/CFT”) standards, including the FATF recommendations. APG assessed Thailand in its third round of mutual evaluations in December 2016 and issued a mutual evaluation report on Thailand in December 2017 (Thailand Mutual Evaluation Report, 2017). The report determined that further risk assessments of the NPO sector were “required to more effectively target risk-based measures and oversight” (Report, para. 4) and in response, the Thai Anti-Money Laundering Office (“AMLO”) performed an NPO risk assessment. The APG has since issued two follow-up reports on the mutual evaluation report and we understand that a third follow-up report is due in February 2022. The second follow-up report, dated July 2021, observed that pursuant to AMLO’s risk assessment, your Excellency’s Government established the Sub-Committee on NPO Law Revision to revise the domestic legal framework to address the deficiencies in the mutual evaluation report and ensure compliance with the FATF recommendations.

On 29 June 2021, the Thai Cabinet approved by resolution (the “Cabinet Resolution”) the incorporation of eight AML/CFT Principles (“AML/CFT Principles”) pertaining to NPO regulation and oversight into the forthcoming Draft Act on the Operation of NPOs (“Draft Act”). We understand that the principles were proposed by AMLO and are intended to reflect international AML/CFT standards and be responsive to the NPO risk assessment. The Cabinet Resolution cited the need to incorporate these eight AML/CFT Principles into domestic law in order to ensure compliance with Thailand’s international obligations as a member of the APG.

According to Section 1.1 of the Cabinet Resolution, the following eight AML/CFT Principles drawing from “international standards in AML/CFT” are to be

¹ Security Council Resolution 2462, para. 6. Security Council Resolutions 1456, 1624, 2178, 2242, 2341, 2354, 2368, 2370, 2395 and 2396; Human Rights Council resolution 35/34; and General Assembly resolutions 49/60, 51/210, 72/123, 72/180 and 73/174 also require that States ensure that any counter-terrorism measures taken comply with all of their obligations under international law.

incorporated in the Draft Act:²

1. “Registration [of NPOs, including foreign NPOs] and disclosure of registration information . . . including adequate and appropriate penalties”;
2. “Disclosure to the public of the objectives involving implementation by NPOs and the names of the directors or individuals in charge”;
3. “Preparation of annual financial reports with details of income and expenses”;
4. “Monitoring to ensure the disbursement of funds is in line with the stated objectives”;
5. “Measures to identify the beneficiaries of funds, and document the identity of the funders” including concerning the receipt of foreign funds;
6. “Retention of financial transaction data for at least five years and the disclosure of such information”;
7. “Penalties which are effective, proportionate and help to pre-empt the commission of wrongdoing”; and
8. “Disclosure of information supplied from NPOs to foreign organizations.”

We understand that the Draft Act is presently undergoing review by Committee No. 2 of the Council of State. The review process is anticipated to conclude by the end of 2021, at which point the draft legislation will subject to a public hearing. This communication is intended to support your Excellency’s Government and provide technical input as part of that review process.

Issues Concerning Human Rights

Procedural Issues

According to the information received, civil society and other concerned groups were invited to submit written feedback on the Cabinet Resolution’s eight AML/CFT Principles via an online platform from 1 July to 1 August 2021. To date, the Council of State has only organized official consultations on the AML/CFT Principles with some government authorities, but we understand that the Draft Act incorporating these AML/CFT Principles will be opened for consultation via a public hearing at a later date yet to be made public. We underline the importance of consulting all relevant governmental authorities as well as the national human rights institution. Although we commend these initial steps to promote public consultation, we are concerned that certain geographic and temporal limitations—namely inadequate consultation with non-capital parties and insufficient time allotted for review— risk violating the right of every citizen to take part in the conduct of public affairs (ICCPR article 25)—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 [ICCPR].” (CCPR/C/21/Rev.1/Add.7, para. 1).

We are concerned that many NPOs and concerned parties, particularly in regions outside Bangkok, including the Southern Border Provinces, may not have been aware of the Cabinet Resolution and subsequent 1 July to 1 August 2021 online submission period. We emphasize the importance of ensuring that the full spectrum of

² This is an informal translation of the resolution.

civil society and concerned groups are able to access and participate effectively in your Excellency's Government's public consultation processes. We highlight in this context that meaningful participation requires that "[r]elevant information [...] be proactively disseminated by making it available in a manner appropriate to local conditions and taking account of the special needs of individuals and groups that are marginalized or discriminated against." (A/HRC/32/28, para. 69.)

We are also concerned that there will be insufficient time for the review process. We remind your Excellency's Government that the right to take part in the conduct of public affairs includes the ability to participate in decision-making processes before, during and after decision-making, including "from an early stage, when all options are still open," *i.e.*, prior to "any formal, irreversible decisions." (A/HRC/39/28, para. 70). Ongoing, representative dialogue with civil society and affected actors is needed to fulfill this right. We urge you to fully engage with civil society and concerned groups, and to allow for further revisions to the underlying AMLO risk assessment, AML/CFT Principles and Draft Act as appropriate, including in order to fully account for concerns expressed by affected actors and to comply with Thailand's international and human rights law obligations. We also underline that the public should be able to access revisions to the Draft Act incorporating the eight AML/CFT Principles as soon as they are available, in accordance with the principle of maximum disclosure. Moreover, sufficient time should be given before future consultation periods and written interventions should be paired with more interactive consultations, such as open hearings and plenary sessions, in order to allow for more meaningful public inputs and discussion.³

Substantive Concerns

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 "soft law" like the FATF recommendations. Indeed, FATF recognizes that international human rights law continues to apply in the context of counter-terrorism and that any measures adopted pursuant to Recommendation 8 must be "focused and proportionate" and in-line with a risk-based (*i.e.*, necessary) approach (FATF Recommendation 8 Interpretative Note, para. 8).⁴ The Interpretative Note to Recommendation 8 also stresses the vital role played by NPOs "providing essential services, comfort and hope to those in need around the world" and emphasizes that CFT measures "should not disrupt or discourage legitimate charitable activities." As the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has emphasized, FATF-compliant risk assessment proceedings must therefore 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. (A/HRC/40/52, para. 31).

We are concerned that the eight AML/CFT Principles may not be applied in a risk-based, targeted, and proportionate manner and may instead create undue disruption and discouragement of legitimate NPO activities. In particular, we are concerned that the incorporation of these AML/CFT Principles into domestic law may create overly broad and complex registration, reporting and disclosure requirements that impinge on the rights to freedom of opinion and expression, freedom of peaceful

³ OL THA2/2021 at 7; A/HRC/39/28, para. 74.

⁴ See also Human Rights Committee, General Comment 31, para. 6.

assembly and association, and privacy as guaranteed under the ICCPR. We recall that any restrictions on these rights on counter-terrorism grounds must comply with the objective criteria of legality, proportionality, necessity and non-discrimination under international law, including by being the least intrusive means capable to achieve a legitimate aim. (ICCPR, arts. 17, 19, 22; A/69/397, para. 30). States shall not invoke national security as a justification for measures aimed at suppressing opposition or to justify repressive practices against its population (A/61/267, para. 20).

Although the Thai Cabinet acknowledges that specific measures adopted must be “proportionate to the risks,” we caution that the broad AML/CFT Principles may be incorporated in the Draft Act in such a way that blanket registration and reporting requirements are adopted regardless of the degree of identified risk and the empirical basis for such findings. For instance, although the AMLO study indicated that there are differing degrees of terrorism financing risk depending on the type of NPO under consideration, the adopted principles do not seem to account for such differentiation. Nor do the principles appear to recognize the need to institute procedural safeguards and oversight in line with international human rights law and standards. We therefore caution of the possibility that the Draft Act incorporating these principles could be used to arbitrarily and disproportionately target NPOs, particularly those with diverse or critical views. As interpreted by the Human Rights Committee in General Comment No. 34 (CCPR/C/GC/34), the right to seek, receive, and impart information and ideas of all kinds stated in Article 19 of the ICCPR includes, *inter alia*, political discourse, commentary on one’s own and on public affairs, cultural and artistic expression, and discussion of human rights (Paragraph 11) as well as expression of criticism or dissent. In this context, we remind your Excellency’s Government of its obligation to “create and maintain a safe and enabling environment in which civil society and human rights defenders can operate free from hindrance and insecurity.” (A/HRC/RES/27/31).

NPO Registration and Reporting Requirements

We observe that the Cabinet Resolution requires the registration of all NPOs, including foreign NPOs, falling under the FATF definition (AML/CFT Principle 1). The stated justification for such registration is that “at present, there are many NPOs that are not registered.”⁵ We are concerned that a broad and mandatory registration principle will be incorporated into domestic law without sufficient regard to the requisite principles of proportionality and necessity. We bring your Excellency’s Government’s attention to our and the Human Rights Committee’s repeated findings that undue and strict registration requirements for NPOs may disproportionately obstruct their legitimate activities. (A/61/267, para. 23). As the Human Rights Council has urged, States implementing NPO registration procedures must ensure that they are “transparent, accessible, non-discriminatory, expeditious and inexpensive, allow for the possibility to appeal and avoid requiring re-registration, in accordance with national legislation, and are in conformity with international human rights law.” (HRC Resolution 22/6, para. 8). Further, we echo the Special Rapporteur on the right to freedom of peaceful assembly and of association’s observation that “the right to freedom of association equally protects associations that are not registered” and warning that “[m]andatory registration, particularly where authorities have broad discretion to grant or deny registration, provides an opportunity for the State to refuse or delay registration to groups that do not espouse ‘favourable’ views.”

⁵ Cabinet Resolution, art. 1.1(1).

(A/HRC/20/27, para. 96, A/HRC/26/29, para. 54). We underline that States are obligated to treat all associations equitably, and this treatment must be guided by objective criteria in compliance with the State’s human rights obligations.

We understand that the Cabinet Resolution also stipulates that all NPOs will be required to disclose to the public their objectives and the names of the directors or individuals in charge (AML/CFT Principle 2); prepare annual financial reports detailing their income and expenses (AML/CFT Principle 3); document beneficiaries and funders (AML/CFT Principle 5); retain financial transaction data for at least five years (AML/CFT Principle 6); and disclose any information supplied to foreign organizations (AML/CFT Principle 8). We are concerned that the incorporation of these AML/CFT Principles into domestic law will result in overly onerous and complex reporting and disclosure requirements.

We caution that expansive reporting requirements may contravene the legal requirements of proportionality and necessity, may deplete already-limited budgets, detract from the ability of the targeted NPOs to carry out their legitimate activities, and deter individuals from joining or leading associations altogether—all in potential violation of the rights to freedom of opinion and expression and freedom of peaceful assembly and association as guaranteed by the ICCPR. We’ve previously expressed concern that burdensome reporting requirements can be particularly consequential for smaller community-based organisations that may not have the established financial or administrative capacities and resources for such compliance measures, including access to the internet. (OL THA 2/2021, at 4.). Women-led grassroots organizations may be especially burdened, thus limiting their ability to delivery services in potential infringement on the equal right of women pursuant to ICESCR article 3 (A/HRC/40/52, para. 42; A/HRC/46/36, para. 13).

We remind your Excellency’s Government that “members of associations should be free to determine their statutes, structure and activities and make decisions without State interference” (A/HRC/20/27, para. 64), so that they can effectively exercise their rights to freedom of association, opinion and expression. 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, including the freedom “to solicit and receive voluntary financial and other contributions NPO reporting requirements.” (A/HRC/RES 22/6). This ability to solicit and receive financial contributions is vital to NPO operations. We thus emphasize that any reporting requirements incorporated in the Draft Act—including as they pertain to the documentation of expenditures and “procedures concerning the receipt of foreign funds”⁶—should not inhibit associations’ functional autonomy and operation. We caution that funding restrictions, particularly on foreign funding, may discriminately and disproportionately target certain associations with critical or diverse views. Undue limitations on foreign funding may disproportionately impact human rights and women’s organizations in particular. (A/HRC/40/52, para. 42).

Further, we warn that certain disclosure and data retention requirements may impinge on the right to privacy, as well the right to freedom of association. We caution that public disclosure requirements—including with respect to NPO registration information, the identity of NPO leaders, funders and beneficiaries, and any information supplied to foreign organizations—may implicate confidential and

⁶ Cabinet Resolution, 1.1.

politically sensitive information, unduly impinge on fundamental privacy rights (and violate applicable privacy laws) and may expose individuals to serious risks of reprisals. We emphasize that the protection of individual information is often vital to supporting an enabling environment for civil society. In addition, we warn that requiring the identification and disclosure by NPOs of all beneficiaries is discouraged by FATF, may not always be practicable and may "impede the ability of NPOs to provide much-needed services." (FATF Recommendation 8 Interpretative Note, para. 6(b)(v) n.30). We also note the importance of limiting the use of any personal data for specific enumerated purposes and instituting safeguards of data privacy to protect against the unauthorized retrieval and use of such data.

We respectfully urge your Excellency's Government to ensure that any procedures governing NPO registration and reporting under the Draft Act are transparent, accessible, non-discriminatory, expeditious, inexpensive and allow for possibility of appeal. In regards to the latter, we refer to the Special Rapporteur on the rights to freedom of peaceful assembly and of association's observation that "[A]ssociations whose submissions or applications have been rejected should have the opportunity to challenge the decision before an independent and impartial court." (A/HRC/20/27, para. 61)

Monitoring Powers and Independent Oversight

According to the information received, the principles adopted in the Cabinet Resolution also provide for your Excellency's Government's monitoring of NPO expenditure (AML/CFT Principle 4). The Cabinet Resolution's stated justification for this Principle is that "there is not yet any clarity concerning the registrar's power to investigate, as well as the authority to ensure auditing and ensure whether the expenses have been used in line with the objectives or not."⁷

We caution that broad and absolute governmental oversight powers may be employed to target NPOs carrying out legitimate and permissible activities, in a manner inconsistent with international law. The authority to monitor and surveil NPO financing and communications may deter legitimate NPO activities and may also infringe on the right to privacy. For instance, as previously communicated to your Excellency (OL THA 2/2021), the unchecked ministerial discretion to dictate the criteria, methods and conditions for NPO registration may give rise to the discriminate and disproportionate targeting of NPOs and human rights defenders, particularly those critical of the government or working on politically sensitive issues. We remind your Excellency's Government that the right to assemble peacefully and associate freely extends to "persons espousing minority or dissenting views or belief, human rights defenders . . . and others, including migrants, seeking to exercise or promote those rights." (A/HRC/26/29, para. 22; A/HRC/RES/24/5).

We underscore the importance of having clear, comprehensive and human rights- and rule of law-informed guidance regarding the implementation of any such monitoring and surveillance powers. We recall the Human Rights Committee's determination that the right to privacy requires robust, independent oversight systems to supervise the implementation of these measures, including through the involvement of the judiciary and the availability of effective remedies in cases of abuse. (CCPR/C/IT/CO/6, para. 36).

⁷ Cabinet Resolution, art. 1.1.

Criminalization and Penalties

We understand that the Cabinet Resolution stipulates “adequate and appropriate penalties” for non-compliance with registration requirements (AML/CFT Principle 1) and more generally, “effective and proportionate” penalties to “preempt the commission of wrongdoing.” (AML/CFT Principle 7). The stated rationale for such penalties is that “existing penalties are inadequate, ineffective, inappropriate and fail to preempt the commission of wrongdoing by NPOs.”⁸

While we recognize the need to prevent and deter terrorism financing and terrorism-related offenses, we recall that criminal penalties are often misused by authorities as a tool to silence civil society actors and human rights defenders and may disproportionately impinge on the rights to freedom of opinion and expression and freedom of peaceful assembly and association (A/HRC/26/29, para. 60). Criminal penalties may deter individuals from taking part in even the legitimate activities of NPOs. Moreover, where penalties penalize and stigmatize individuals disproportionately and unnecessarily, such stigmatization may affect not only their expression and association rights, but also socioeconomic rights protected under the ICESCR like the ability to find work and housing.

As such, we reiterate the importance of ensuring that any penalties incorporated in the Draft Act are not only strictly proportional to a legitimate aim, but also absolutely necessary. We underscore that any individuals involved in unregistered associations should never be subject to criminal sanctions for failure to register. Further, we recall that suspension and involuntary dissolution are the severest forms of restrictions on the right to freedom of association and should only be permitted based upon a judicial decision of independent courts (A/HRC/20/27, para. 75). In this respect, we urge your Excellency’s Government to ensure the availability of independent oversight mechanisms and judicial review to minimize arbitrariness and abuse in the implementation of any penalties.

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 concerns.
2. Please provide any information on how the eight AML/CFT Principles were decided upon by the AMLO, including any underlying empirical data, and explain how the implementation of the Principles will comply with your Excellency’s Government’s international and human rights law obligations, including the treaty obligations under the ICCPR to safeguard the rights to freedom of opinion and expression and freedom of peaceful assembly and association.
3. Please provide any information on the remaining stages of the legislative process with regard to the Draft Act, including your Government’s plans for consultation with civil society and concerned groups.

⁸ Cabinet Resolution, art. 1.1.

4. Please indicate what remedial measures are available when AML/CFT measures are undertaken without due process of law or in contravention of domestic legal standards—including measures to redress financial and reputational harm, as well as violations of data privacy rights.

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

We hope these comments and analysis will contribute to the ongoing review process of the Draft Act and we remain at your disposal to provide any technical assistance to the authorities upon request.

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

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