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 independence of judges and lawyers

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(Please use this reference in your reply)

13 February 2025

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 independence of judges and lawyers, pursuant to Human Rights Council resolutions 49/10, 52/9, 50/17 and 53/12.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the "Stop Terror-Financing and Tax Penalties on American Hostages Act" (H.R. 9495) which passed the U.S. House of Representatives on 21 November 2024 and has been received by the Senate. In this connection, we wish to offer comments and suggestions on provisions of the Act which appear to be inconsistent with the obligations of your Excellency's Government under international human rights law.

H.R. 9495 merges two measures: firstly, it provides for tax relief to U.S. nationals while they are detained or held hostage abroad by terrorist groups, as well as their spouses; and secondly, it permits the Department of the Treasury to terminate the tax-exempt status of any non-profit organisation that it determines to be a "terrorist supporting organisation". We welcome the first measure as a necessary exemption from tax liabilities which supports the victims of terrorism, since under the current law tax relief from the Internal Revenue Service for those detained or held hostage abroad by terrorist groups is discretionary and restricted in amount and duration. If your Excellency's Government wishes to take further measures to support victims of terrorism, we recommend the best practices in the United Nations Model Legislative Provisions to Support the Needs and Protect the Rights of Victims of Terrorism.[1]

We wish to express several concerns, however, regarding the proposal to terminate the tax-exempt status of any non-profit organisation determined to be a "terrorist supporting organisation", including the vague and overbroad criteria for designations, lack of procedural fairness and effective judicial safeguards, and the potential chilling effect on humanitarian activities and the legitimate exercise of fundamental rights and freedoms by civil society. We note that 354 civil society organizations wrote to the House of Representatives in September 2024 opposing the

[1] https://www.un.org/counterterrorism/publication/The-Model-Legislative-Provisions#:~:text=The%20Model%20Legislative%20Provisions%20developed,legislation%20where%20no%20legislation%20exists.

bill due to concerns about its negative effects on their legitimate activities.[2] We are also concerned that a Bill which affects the rights of freedom of association has been proposed without thorough human rights impact assessment or the meaningful and inclusive participation of civil society, in order to prevent potential stigmatization (A/79/263, para. 72).

Overbroad definition of a "terrorist supporting organisation"

Section 4 of H.R. 9495 amends section 501(p) of the Internal Revenue Code to provide that an organisation will lose its tax-exempt status if it is designated by the Secretary of the Treasury as a "terrorist supporting organisation". The term "terrorist supporting organisation" is defined at section 501p(8)(B) as any organization which is designated by the Secretary as having provided, during the 3-year period ending on the date of such designation, "material support or resources" to a terrorist organisation "in excess of a de minimis amount". The definition of "material support" includes the provision of any property, financial assistance, training, expert advice or assistance, and personnel. The definition is derived from section 2339B of 18 U.S.C., which imposes criminal liability on individuals who knowingly provide material support or resources to a Foreign Terrorist Organization (FTO), including its conduits or personnel, or attempt or conspire to do so. In that context "material support" could even include training members of a terrorist organization on humanitarian and international law, peaceful dispute resolution, and petitioning the United Nations.[3] Further, an individual may be considered "personnel" if he or she engaged in "significant activity on behalf of an FTO relative to that FTO's goals and objectives".[4] It includes individuals who "work under that terrorist organization's direction or control or . . . organize, manage, supervise, or otherwise direct the operation of that organization"; and excludes "[i]ndividuals who act entirely independently of the [FTO] to advance its goals or objectives". The Court developed a seven-factor test to determine who constitutes "personnel".[5] The offence is among the most prosecuted federal anti-terrorism statutes since 11 September 2001. While the Secretary of State has a discretion to grant an exception (18 U.S.C. § 2339B(j)), which could be used to authorize humanitarian aid, the power has been seldom exercised in over 25 years.

We are concerned that the vague and overbroad underlying definition of "material support or resources" may capture conduct and activities that are not genuinely "terrorist supporting" and are not rationally connected to or are remote from the commission of terrorist violence. Particularly, the law risks deterring or inhibiting the legitimate provision of humanitarian or medical relief to individuals who live in territory under the de facto administrative authority of an FTO or live among members of FTOs. For instance, the construction of drinking wells and the delivery of medicine or food in such areas may foreseeably result in the designation of an organisation as "terrorist supporting" due to the direct or indirect benefit derived by the FTO or the unavoidable interactions with an FTO in areas they control.

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2 https://www.aclu.org/documents/civil-society-letter-to-congress-opposing-hr-9495.

3 Holder v Humanitarian Law Project, 561 U.S. 1.

4 *United States v. Jama*, 217 F. Supp. 3d. 882 (E.D. Va. 2016).

5 Namely: (i) the nature of the assistance; (ii) the time period of support; (iii) whether the individual's activities are specifically and exclusively for the benefit of the FTO; (iv) the degree of coordination or direction with others associated with the FTO; (v) the nature and extent of the individual's contacts with the FTO; (vi) whether the individual self-identifies with the FTO; and (vii) whether the individual is reliably identified as being part of an FTO (para. 892).

We note that some proscribed terrorist organizations are de facto authorities performing a diversity of civilian functions, including governance, and engage in the provision of public utilities and humanitarian, medical, educational, and social services. In such contexts, coordination with FTOs may be the only, most effective, or safest way for organisations to distribute humanitarian aid. Moreover, it is unclear whether the provision of humanitarian aid may result in the designation of an organisation as "terrorist supporting" due to the mere fact that it defrays the cost of legitimate public services that are provided by the de facto FTO regime, and hence, enables other sources of its funding to be fungibly directed towards terrorist activities. Even where organisations seek to avoid cooperation with the de facto authority, it may nonetheless be necessary to pay "taxes" to use roads, ports and other infrastructure controlled by terrorist organisations. Cooperation with community leaders could inadvertently constitute "material support" if those leaders are deemed to be the "personnel" of an FTO under the seven-factor test outlined by the district court in *United States v. Jama*, 217 F. supp. 3d. 882 (E.D. Va. 2016), the application of which is highly uncertain.

We note that international humanitarian law requires all States to ensure the rapid and unimpeded flow of humanitarian relief and medical assistance; counter-terrorism measures can never justify denying humanitarian relief to civilians. We further highlight that Security Council Resolution 2664 (2022) and 2761 (2024) – both supported by the United States – create an exemption to the assets freezes in all Council counter-terrorism sanctions to allow funding, goods and services for humanitarian assistance or other basic human needs, which has vitally enhanced the flow of humanitarian relief while effectively countering terrorism. The resolution has greatly benefitted the approximately 110 million civilians living in areas affected by counter-terrorism sanctions, without evidence of diversion to terrorist groups. The proposed law is not consistent with international consensus to ensure that counter-terrorism measures do not impede humanitarian assistance.

We are further concerned that the proposed law may apply to non-government organizations, including faith-based organizations, who provide legitimate human rights advocacy and protection activities, including training and assistance relating to compliance with humanitarian and human rights law, protection of civilians, including women and children, humane treatment of prisoners, and accountability, peacebuilding and reconciliation. The definition of "material support" captures not only conduct that is not intended to, and does not contribute to, the commission of violence by a terrorist organization, but conduct that aims to prevent violence, protect victims, and hold perpetrators accountable. The application of the law in these circumstances could violate the right to freedom of expression, peaceful assembly and association under article 19, 21 and 22 of the ICCPR. We are further concerned that legitimate public interest reporting about terrorist organizations, based on interactions with such groups, could also fall foul of the proposed law, violating the right to freedom of expression and the media and the right to impart and receive information under article 19 of the ICCPR. Fear of the proposed law is also likely to have a chilling effect on the willingness of non-governmental organizations to engage with terrorist groups on human rights, humanitarian and peace-related activities, the willingness of donors to fund such activities, and the willingness of financial institutions to process payments.

We recall that in general comment No. 34, the Human Rights Committee stated that the right to freedom of expression in article 19 of the ICCPR extends to "political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse" (CCPR/C/GC/34, para. 11). The Committee indicated that "States parties should ensure that counter-terrorism measures are compatible with the requirements for limitations on freedom of expression under article 19 (3) of the ICCPR (para. 46) including that restrictions are authorized by law and strictly necessary and proportionate. We have previously warned against the labelling and stigmatization as "terrorist" of human rights defenders, humanitarian organizations, Indigenous Peoples and land rights activists, LGBTQI+ activists and movements, climate justice and environmental defenders, peaceful protesters and journalists reporting on protests (A/79/263); and of the mutually reinforcing harmful cycle between stigmatizing narratives spread by authorities and political actors and the expansion of restrictive legislation on peaceful assemblies and association (A/79/263).

Inadequate procedural fairness

The procedure for designation raises several concerns relating to the right to fair hearing and effective remedies under article 14 and 2(3) of the ICCPR. Under section 501(c) the Secretary of the Treasury must notify the intention to designate an organisation as "terrorist supporting" and provide a description of the material support or resources that formed the basis of the designation, to the extent that it deems disclosure to be consistent with "national security and law enforcement interests". Before the designation comes into effect, the organisation has 90 days to satisfy the Secretary under section 501(c)(ii) that it did not provide the material support or resources to a terrorist entity, or made reasonable efforts to have such support or resources returned, and certifies in writing that it will not provide any further support to terrorist organisations. The Secretary may rescind the designation if: (i) it determines the designation was erroneous; (ii) it is satisfied (following a written certificate from the organisation) that the organisation did not receive the notice and that the grounds under section 501(c)(ii) would have led the Secretary to rescind the designation; or (iii) the period of suspension has ended.

An organisation that is designated as "terrorist supporting" may seek administrative review through the IRS Independent Office of Appeals or judicial review in U.S. district courts under the amended section 501(p)(8)(E)–(F). U.S. district courts are provided with exclusive jurisdiction to review a final determination of the designation under section 501(p)(8)(F). The section further provides that where the determination was "based on classified information (as defined in section 1(a) of the Classified Information Procedures Act), such information may be submitted to the reviewing court *ex parte* and in camera."

The procedure for designation does not appear to meet due process requirements under international law. First, section 4 permits the Secretary to unilaterally designate an organisation as "terrorist-supporting" without specifying any legal standard of proof, let alone a sufficiently protective one (such as reasonable grounds to believe based on convincing evidence). This reposes extraordinary, relatively unfettered discretion on the decision-maker and necessarily calls into the question the substantiation, justification and credibility of designations. Further, it increases the risk of abuse

through politically motivated or retaliatory designations against organisations that, for example, are critical of U.S. foreign policy, support self-determination struggles or whistle-blow on government misconduct.

Secondly, the Secretary is not required to disclose the basis of the decision if the Secretary determines that it would be inconsistent with "national security and law enforcement interests". The terms "national security and law enforcement interests" are undefined, thereby granting the Secretary further broad discretion whether to disclose the basis of the decision. This also deviates from the established standard of "classified information" in section 1(a) of the Classified Information Procedures Act. The absence of clear criteria for the Secretary to make this determination risks the arbitrary or abusive non-disclosure of information that is necessary for organisations to adequately defend themselves during the 90-day notice period. It also undermines the effectiveness of the right of review because the petitioner may not know the basis of the allegations against it.

Thirdly, administrative review of the merits of the designation by the IRS Independent Office of Appeals is not sufficiently independent of the original decision-maker, since it is still part of the executive authority headed ultimately by the Secretary of the Treasury. Fourthly, while judicial review is available, as mentioned it must apply an overbroad statutory definition of material support; there is no standard of proof that the court can review; and classified information may be withheld from the petitioner, and even from the court unless the Secretary exercises the discretion to submit it to the court ex parte and in camera. The absence of a requirement to disclose a sufficiently specific amount of evidence to the petitioner may breach of the principle of equality of arms and the right to fair hearing protected under article 14(1) of the ICCPR (general comment No. 32). We are deeply concerned that the procedure may undermine the judiciary's role as a check on executive overreach and permit decisions to escape rigorous and independent judicial scrutiny. Further, the reputational and financial costs of responding and contesting the designation in court may effectively impede the functioning of a civil society organisation.

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 explain how the proposed amendment complies with the obligations of your Excellency's Government under international human rights law and international humanitarian law.

3. Please indicate how your Excellency's Government intends to ensure that the proposed definition of "terrorist supporting" does not capture and will not deter legitimate activities protected under international humanitarian law and human rights law, including humanitarian and medical relief and the exercise of freedoms of expression and association, including by human rights defenders, the media, journalists' organizations, universities and civil society organizations.

4. Please indicate how the power to terminate the tax-exempt status of an organisation will be limited by law and safeguards to preclude arbitrary, abusive or politically motivated determinations.

5. Please explain what opportunities will be provided for further civil society consultation on the Act between now and its adoption.

6. Please explain how the Act is consistent with the principle of equality of arms, the right to fair hearing, and the right to an effective remedy given the possible non-disclosure of essential information used to make the determination, the absence of a standard of proof, the lack of independent administrative review, and the limits on the ability of the courts to review the measure.

This communication, as a comment on pending or recently adopted legislation, regulations 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 stand ready to provide your Excellency's Government with any technical advice it may require in ensuring that its legislation is fully compliant with international human rights standards

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

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

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