

**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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12 January 2016

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; 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 Australia 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 the United States.

According to information we have received:

Australia is home to 5,687 people who were born in Somalia, most of whom migrated to Australia after 1992, according to the 2011 census. The 2011 census showed Victoria had the largest number of Somali-born migrants, followed by Western Australia, Queensland and New South Wales. The number of people in Australia with Somali ancestry is likely to be larger than that figure because of more recent migration and children born in Australia from Somali parents. A 2015 study estimates that approximately 7,500 Somali-Australians remit over A\$33.5 million per year to Somalia.<sup>1</sup> This figure is more than double the total Australian humanitarian and state-building assistance for Somalia of A\$15 million in 2014.<sup>2</sup> The total annual amount of remittances sent to Somalia by the worldwide Somali

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<sup>1</sup> Adeso, Global Center on Cooperative Security & Oxfam, 'Hanging by a Thread: The Ongoing Threat to Somalia's Remittance Lifeline', February 2015, p. 10.

<sup>2</sup> [http://foreignminister.gov.au/releases/Pages/2014/jb\\_mr\\_140910.aspx](http://foreignminister.gov.au/releases/Pages/2014/jb_mr_140910.aspx)

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

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”.<sup>5</sup> 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.<sup>6</sup> Another report states that one out of every three Somalis would not be able to pay for these necessities without these remittance flows.<sup>7</sup> Remittances therefore provide an “essential lifeline” to Somali households, many of which are highly dependent on a single remittance sender.<sup>8</sup> Remittances are further used to invest in new businesses and development projects.<sup>9</sup>

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 Australia 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.

On March 31, 2015, Westpac Bank, one of the largest commercial banks in Australia, ceased to provide banking services to Somali MTOs. According to various reports, Westpac was the last of the major commercial banks in Australia

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<sup>3</sup> 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.

<sup>4</sup> United States 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](http://www.americanbanker.com/issues/179_169/us-officials-caught-flat-footed-on-somali-money-transfers-1069713-1.html)

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

<sup>6</sup> 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.

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

<sup>8</sup> 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.

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

to offer services to Somali MTOs.<sup>10</sup> While it is possible that Somalia MTOs are able to use the services of other (smaller) banks for the purpose of remitting money to Somalia, there is great concern that the closure of accounts by bigger banks will have a ripple effect throughout the Australian commercial banking system.

The closure of bank accounts of Somali MTOs by commercial banks is a structural phenomenon occurring in Australia 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 after the terrorist attacks on the United States on September 11, 2001. In the United States, the 2001 Patriot Act significantly increased the duties and concomitant risks for banks. Australia introduced the Anti-Money Laundering and Counter-Terrorism Financing Act in 2006 (AML/CTF Act). The Australian AML/CTF Act obliges financial and other institutions to comply with strict customer due diligence and reporting requirements, among other requirements.

Recommendations by the Financial Action Task Force (FATF), an inter-governmental body of which Australia is a member, have furthermore 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 Government of Australia in these international fora therefore have an effect beyond its own borders. In addition, banks outside of the United States have 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, non-US banks have also been fined by US regulators.

Commercial banks in Australia and abroad have responded to these regulatory risks by closing the accounts of customers that are considered high-risk. Westpac has claimed publicly it is “finding it increasingly difficult to provide banking and payment services to remittance operators and companies due to the fast-changing international regulatory landscape and the compliance requirements on the global banking industry.”<sup>11</sup> The closing of accounts of Somali MTOs by Australian commercial banks are reportedly caused, at least in part, by both domestic and foreign AML/CFT laws and regulations. The fear of enforcement of those laws and regulations and the accompanying financial and reputational risks have apparently led banks to end their business relationships with these MTOs.

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<sup>10</sup> Adeso, Global Center on Cooperative Security & Oxfam, ‘Hanging by a Thread: The Ongoing Threat to Somalia’s Remittance Lifeline’, February 2015, p. 10; Reuters, ‘Australia’s Westpac to quit remittance business by March 31’, 22 December 2014, available from: <http://www.reuters.com/article/2014/12/22/australia-remittances-westpac-idUSL3N0U61NF20141222>

<sup>11</sup> The Guardian, ‘Life after losing remittances: Somalis share their stories’, 18 June 2015, available from: <http://www.theguardian.com/global-development-professionals-network/2015/jun/18/life-after-losing-remittances-somalis-share-their-stories-somalia>

The Australian Government has taken a number of actions that are relevant in this regard. A 2015 report sums up the actions taken by the Government, including the formation of an inter-agency taskforce and the organization of a multi-stakeholder meeting in December 2014.<sup>12</sup> This led to the establishment of a working group on this issue, involving relevant Government departments, the Australian Bankers' Association, and a number of Somali MTOs. The Government has also raised this issue in international fora, including in the FATF and G20 Development Working Group.

The working group established by the Australian Government has resulted in some concrete action on the issue of remittances. In particular, it enjoined the Australian Transaction Reports and Analysis Centre (AUSTRAC) to determine whether there has been an overall reduction in remittances flowing out of Australia. AUSTRAC concluded that there has been no significant reduction, but would not specify whether certain corridors, such as Somalia, have been disproportionately affected, citing confidentiality clauses in AML/CTF legislation. The working group also created a process map of remittances to identify key risk points and then determine possible mitigation strategies to satisfy the risk tolerance of banks. Although MTOs put forward detailed proposals for the improvement of their self-regulation and the establishment of an MTO accreditation scheme to build confidence among banks, there appears to have been a lack of solutions-driven feedback and commitments on the part of the Government and banks. The working group wound up in September 2015, primarily because it was interfering with the remittance sector's attempts to engage in more detailed discussions with banks. However, the Australian Government has committed to continue assisting the remittance sector to engage directly with banks. Further, AUSTRAC will continue to monitor remittance flows out of Australia, and should they decline, the working group may be reconvened. We understand that a new AUSTRAC report on de-risking is forthcoming. A report on the outcomes of the working group has been made public in January 2016 and concluded that the closure of remittance business accounts has had minimal impact on the volume or value of funds flows through the sector, but despite this, continues to present difficulties for remittance businesses. It is unclear from reading the report whether certain particular remittances corridors, such as Somalia, have been disproportionately affected.

Despite the many initiatives, for which the Australian Government should be commended, most of these actions 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. Although some MTOs have been able to establish new banking arrangements, mostly with second-tier Australian banks, these arrangements are extremely fragile and sometimes last only weeks or months given the influence of first-tier bank practice and increased scrutiny of second-tier banks. Furthermore, a number of MTOs have quite recently ceased operations due to a lack of banking access, and others are considering doing the

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<sup>12</sup> Adeso, Global Center on Cooperative Security & Oxfam, 'Hanging by a Thread: The Ongoing Threat to Somalia's Remittance Lifeline', February 2015, p. 10-11.

same before the end of the year. 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 Australia, particularly having regard to the fact that the closure of these bank accounts is not only caused by domestic AML/CFT laws and regulations in Australia, but also by extraterritorial enforcement of United States AML/CFT laws and regulations and regulatory development at the international level.

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 and the denial of any reduction in the overall flow of remittances from Australia based on AUSTRAC data. 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> However, despite the increased attention to this issue by the Australian Government, which stands out in comparison to the response of some other diaspora countries, it appears that an effective and comprehensive solution to this important matter has yet to be achieved.

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 Australia. While the closures involve decisions by private corporations, there are strong indications that these decisions are influenced to a large degree by the regulatory environment in Australia for which your Excellency's Government is ultimately responsible. This regulatory environment is further shaped by actions taken by Australia and other States in the context of international organizations and other international fora, as well as by actions of foreign States, the most prominent of which is the United States. 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

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<sup>13</sup> 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.

<sup>14</sup> World Bank, 'Anti-Money Laundering Regulations: Can Somalia survive without remittances?', 2 November 2014.

<sup>15</sup> Foreign Affairs, 'Money Keeps Moving Toward Somalia, Sometimes In Suitcases', 15 May 2015.

impact on the enjoyment of human rights of Somali-Australians as well as people living in Somalia who are dependent on remittances from Australia.<sup>16</sup>

Thus the starting point for the analysis that follows is that the actions taken by banks in Australia 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 Australia. In particular, the cumulative effect of account closures in Australia appear 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 Australia. Before we address the intricacies of the obligations of Australia under international human rights law, it is important to keep this context in mind.

Australia is a State Party to the ICCPR. Article 2 (1) and 26 of ICCPR require Australia 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 Australia appear to affect in particular the Somali minority living in Australia. Since the decisions by banks are influenced to a large degree by the regulatory environment in Australia, 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.<sup>17</sup> The almost complete closure of bank accounts of Somali MTOs in Australia can be seen as both representing and leading to discrimination and stigmatization of Somali-Australians. The current situation therefore appears to necessitate positive measures by Australia aimed at protecting the Somali minority in Australia 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

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<sup>16</sup> “My brother lives in Australia, he works there as a truck driver. Every month he would send me \$200,” Maryan said. “But then last month he failed to send me the money because of Westpac closing accounts. To raise money, I sold my jewellery, and then I opened this small kiosk with \$600 so I could keep sending my son to school as I don’t want him to get recruited by al-Shabaab.” The Guardian, ‘Life after losing remittances: Somalis share their stories’, 18 June 2015, available from: <http://www.theguardian.com/global-development-professionals-network/2015/jun/18/life-after-losing-remittances-somalis-share-their-stories-somalia>

<sup>17</sup> 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.

culture [...]”. Somali-Australians are such a minority that ‘exists’<sup>18</sup> in Australia. The Human Rights Committee (HRC) has interpreted the term ‘culture’ broadly and explained that “culture manifests itself in many forms”.<sup>19</sup> 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-Australians to enjoy their own culture. Somali-Australians 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.<sup>20</sup> Sending remittances can be seen as an integral part of the culture of Somali-Australians.<sup>21</sup> 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.”<sup>22</sup> 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.”<sup>23</sup> Based on article 27 ICCPR, Australia 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 Australia may be said to fulfill a legitimate objective, they should not encroach on the rights of Somali-Australians if that encroachment is not strictly necessary and if there are less restrictive measures available to achieve the same objective.<sup>24</sup> While it is clear that the impact of these laws and regulations on the rights of Somali-Australians 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 Australia being used to launder money or to finance terrorism. There are

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<sup>18</sup> “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.

<sup>19</sup> Human Rights Committee, General Comment No. 23 (art. 27), 26 April 1994, CCPR/C/21/Rev.1/Add.5, para. 7.

<sup>20</sup> 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.

<sup>21</sup> “[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.

<sup>22</sup> Center on Global Counterterrorism Cooperation, ‘Capitalizing on Trust: Harnessing Somali Remittances for Counterterrorism, Human Rights and State Building’ (2012), p. 9.

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

<sup>24</sup> 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.

furthermore many less restrictive measures to meet the objectives of the AML/CFT laws and regulations of Australia.

The closure of overwhelming majority of bank accounts held by Somali MTOs in Australia in response to the current regulatory AML/CFT framework does not only impact the human rights of Somalia living in Australia, but may 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 Australia.

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.”<sup>25</sup> Second, the drying up of remittance flows from Australia 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 Australia may be tantamount to a deprivation of the right to life.<sup>26</sup>

As a State Party to the ICESCR, which does not contain a jurisdictional clause, Australia is required to take steps, individually and “through international assistance and co-operation” to achieve progressively the full realization of the rights recognized in the ICESCR (article 2 (1)). The Committee on Economic, Social and Cultural Rights (CESCR) has underlined the essential role of international cooperation and assistance in facilitating the full realization of the relevant rights in the ICESCR, as is also evident from article 11, 15, 22 and 23 of the Covenant.<sup>27</sup> Article 4 of the Convention on the Rights of the Child (CRC), to which Australia is also a State Party, requires Australia to undertake all appropriate measures for the implementation of the economic, social and cultural rights recognized in the CRC, “where needed, within the framework of international co-operation.”

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<sup>25</sup> Available at: <http://diplomat.so/2015/02/08/somalias-prime-minister-we-call-on-the-united-states-to-reconsider-on-remittances-to-somalia/>

<sup>26</sup> “[...]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.

<sup>27</sup> CESCR, General Comment No. 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant) (1990), para. 13.

It is important to add that the obligations of Australia toward people living in Somalia can also be traced back to other sources of law. Australia 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.<sup>28</sup> 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 also 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* (underlined added).”<sup>29</sup> The importance of acting in accordance with the UN Charter and international human rights law has often been reaffirmed, most notably in the context of Security Council resolutions dealing with measures to counter terrorism.<sup>30</sup> 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.<sup>31</sup> It can thus be argued that Australia 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.<sup>32</sup>

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 Australia leave private banks discretion whether to close the bank accounts of Somali MTOs, it should be underlined that Australia 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 are especially relevant in this regard. In particular, Guiding Principle 3 sets out

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<sup>28</sup> *Namibia*, Advisory Opinion, 1971, I.C.J. Rep 16, para. 131.

<sup>29</sup> CESCR, General Comment No. 3 (1990), para. 14.

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

<sup>31</sup> “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.

<sup>32</sup> 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 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.

“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 Australia 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.”<sup>33</sup> In conformity with Guiding Principles 2 and 3, and the commentary to Guiding Principle 3, Australia 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 Australia of the human rights of Somali-Australians 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:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please indicate whether Australia 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 closure of bank accounts of Somali MTOs.
3. Is Australia contemplating taking emergency measures to facilitate the flow of remittances from the Somali diaspora in Australia to Somalia?
4. Is Australia 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

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<sup>33</sup> HRC, 2012 Concluding Observations: Germany, UN Doc. CCPR/C/DEU/CO/6 (12 November 2012), para. 16.

importance of not directly violating relevant economic, social and cultural rights, as well as civil and political rights?

5. Does Australia contemplate devising a comprehensive plan to clarify existing AML/CFT obligations of commercial banks and bring relevant stakeholders together, in the Australia and abroad, specifically in relation to Somali MTOs?
6. What actions, if any, is Australia 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 Australian Government, is Australia 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 States, the United Kingdom, and other diaspora States?
8. Could you provide us with an overview of the flow of remittances from Australia 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

Bahame Nyanduga  
Independent Expert on the situation of human rights in Somalia

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