Financial Action Task Force (FATF) Actions on Myanmar: Unintended Consequences on Humanitarian Aid

February 2023

1. Background and Context

The people of Myanmar are facing a complex multidimensional crisis with ongoing, internal armed conflicts, insecurity, inflation, and socio-economic instability. Since 1 February 2021, thousands of civilians have been killed in the conflict, while 1.5 million people remain internally displaced. Food insecurity is on the rise and around 40% of the population is living below the poverty line, with basic infrastructure including health and education having collapsed. In 2023, 17.6 million people have been identified in need of humanitarian assistance in Myanmar (increased from 14.4 million in 2022), more than half of whom are women and girls and more than a third are children.

In 2022, a network of more than 200 local and international humanitarian actors reached 4 million persons in need across the country at great personal security risk amidst severe funding and access constraints. However, the Myanmar's Humanitarian Response Plan (HRP) was only 41 per cent funded in 2022, which impeded delivery of lifesaving assistance to people in need.

FATF's blacklisting of Myanmar, taken together with increasing economic sanctions and other legal and diplomatic measures from U.N. member states due to intensified human rights violations, and restrictive legal and administrative measures imposed by Myanmar's de facto authorities, have further weakened Myanmar's economy, and adversely affected the reach of NGOs and local civil society organisations (CSOs) supporting vulnerable communities.

These combined measures have obstructed remittances and foreign aid flows into the country, cutting off the people of Myanmar and NGOs supporting them, from access to necessary international and domestic financial systems to sustain operations/programmes aimed at saving lives.

Moreover, with the collapse of the local economy, the digital economy, and the inconsistent access to physical cash around the country, there has been an emerging reliance on a diverse range of solutions to support the supply and economic chains from collapsing. FATF blacklisting, in addition to other restrictions, are gradually limiting the scope of these diverse and complementary aid modalities.

2. Recent shifts in the aid environment

Along with the FATF measures, these recent developments are likely to impact the already fragile state of aid and make it more difficult to reach vulnerable people across the country with urgent lifesaving assistance, as follows:

a. *Organisation Registration Law (ORL) enacted*

Soon after the FATF decision, on 28 October 2022, Myanmar's de facto authorities issued a new Organization Registration Law -ORL, (State Administration Council Law No 46/2022). The key features of the law are as follows:[1]

- Mandatory registration of all NGOs and CSOs.
- Complex registration process and increased registration costs
- Restricted legal remedies and appeals
- Stricter reporting requirements
- Wide-ranging administrative actions and criminal penalties for non-compliance

The ORL constitutes a concerted attack on Myanmar civic space, which has already been under increasing threat in the post-coup period.[2] This law stands in violation of key international human rights standards such as the rights to freedom of expression, association, and peaceful assembly, among others. These set of rights allow NGOs to deliver their mandate without interference from

[1] For details, Lincoln Legal Services Myanmar, Newsletter 99, 1 November 2022

[2] OHCHR, Myanmar: UN Human Rights Office deeply concerned by new NGO law, 28 November 2022

authorities. The law imposes unreasonable and disproportionate limits on NGO activities through ambiguous provisions and by allowing space for broad, discretionary and arbitrary application of registration procedures by the de facto authorities to suppress and control civil society action and curb civic space.[3]

b. *State of emergency extended, and martial law declared.*

On 1 February 2023, Myanmar's de facto authorities announced an extension to the state of emergency by another six months. This is the third time that the state of emergency has been extended since the military takeover of 1 February 2021, although the Constitution only allows for two such extensions. The continued state of emergency is likely to delay the elections which were to be held in August 2023.

In addition to this, Myanmar's de facto authorities declared martial law in 37 townships across 8 regions and states,[4] across areas where the fighting between the Myanmar army and the resistance forces is most intense. This is in addition to the 12 townships mostly in Yangon and Mandalay, placed under martial law, in February 2021.

The de facto authorities cited reasons of 'security' and 'rule of law' for declaring martial law in these areas. These areas are now under the control of regional military commanders, who can initiate military court proceedings on 23 offences, ranging from 'spreading false news' to 'high treason', and sentences can include indefinite prison terms and death penalties. Human rights groups have warned that this action may lead to a rise in arbitrary arrests, torture and executions.

3. De-risking and financial exclusion

Even before the FATF blacklisting of Myanmar in October 2022, banks in Myanmar were applying strict Know Your Customer (KYC) procedures for their NGO clients, who were unable to obtain registrations from the Myanmar de facto authorities, essentially de-risking these groups. Banks are concerned that they may be considered in breach of their Anti-Money Laundering/Combating the Financing of Terrorism (AML/CTF) duties if they continue banking with NGOs with expired or invalid registrations. As a result, NGO transactions are delayed, stopped, frozen or recalled, and some NGOs are shut out of the formal banking system. This continues to be the case since the FATF actions on Myanmar.

The current experience of NGOs demonstrates that the pretext of strict KYC and verification standards for AML/CFT compliance leads to de-risking that restricts or even prohibits the ability of NGOs to carry out their critical programming. FATF blacklisting of Myanmar, may be used as a justification by financial institutions within and outside Myanmar, to impose stricter and disproportionate due diligence requirements for international financial transfers, making the already challenging banking environment even worse for NGOs.

In recent months, NGOs have experienced increasing financial restrictions. Information collected through a survey among 45 NGOs (January 2023) operational in Myanmar showed that **57 per cent of respondents' banking experience has become worse in the last six months**, as compared to the last few years.

These financial challenges may be summarised as follows:

- Some 68 per cent of the respondents experienced delays in transferring funds.
- Some 33 per cent of the respondents' attempts at transferring funds were denied.
- Some 14 per cent of respondents' applications to open bank accounts were refused.
- A majority of funds transfers that were impacted were foreign remittances/transfers (55 per cent).

[3] For a detailed legal analysis, please read ICJ, Myanmar State Administration Council Organization Registration Law 2022: Legal Briefing, November 2022
[4] 11 of these townships are in Sagaing region and 7 in Chin. Other areas affected were Magway, Bago, Tanintharyi regions, and Kayah, Kayin and Mon states.

- Some 49 per cent received new/additional documentation requests or enhanced customer due diligence processes from banks.

To address these challenges, organisations are adopting the following strategies with limited results:

- Some 70 per cent of the respondents have explored another financial institution/ service providers
- Some 54 per cent of the respondents are operating using cash modalities.
- Some 38 per cent of the respondents are using informal financial modalities.
- Other options: Informal agents; mobile cash transfer platforms, use of non-banking institutions outside country for remittances

NGOs are using formal non-banking as well as informal financial services, including business-to-business cash transfers, mobile financial modalities, as well as informal systems. In many conflict-affected areas in Myanmar where formal banking options are not available, and for the provision of cross-border assistance, these alternative systems are the most quick and efficient and often, the only means to reach communities in need in Myanmar. However, NGOs are finding it more difficult to access them because the Central Bank of Myanmar (CBM) is tightening the KYC processes for these mechanisms.

The non-application of countermeasures in the FATF's decision to blacklist Myanmar has served as a mitigating step for NGOs operational in-country. However, financial institutions within and outside Myanmar continue to apply enhanced due diligence measures in a manner that amounts to de-risking and has resulted in disruption of humanitarian aid flows, despite the FATF's statement –

> *When applying enhanced due diligence measures, countries should ensure that flows of funds for humanitarian assistance, legitimate NPO activity and remittances are not disrupted.*

4. Undue targeting of NGOs through the imposition of bureaucratic and administrative impediments (BAI)

The timely and effective delivery of humanitarian assistance in Myanmar is heavily reliant on NGOs and CSOs. The prospects of securing adequate funding for Myanmar's HRP 2023 to reach populations in need, will be put at further risk by the strict legal and financial scrutiny imposed through the FATF actions, ORL and martial law under the extended state of emergency. The increasing disruption of local banking services will continue to limit the ability of both local and international organisations to withdraw cash and receive foreign remittances, thereby, affecting their ability to support people in need of assistance in Myanmar. Increased scrutiny of NGO bank accounts and funding sources by the CBM have led to delays or rejection of transactions, impacting the timely delivery of assistance as well as daily operations, including staff salaries and payments to humanitarian suppliers.

Some of the key bureaucratic and administrative impediments (BAI) confronting NGOs in Myanmar are as follows:

a. **Registration, MoUs and ORL**: The lack of a license to operate in Myanmar through valid registrations and Memoranda of Understanding (MoUs), has resulted in restricted access to banking and financial services. In this uncertain environment, more than 50 per cent of organisations have been unable to renew their registrations and MoUs due to continuing administrative barriers.

   The enactment of the ORL has added more complex layers and considerations to the registration process, as new requirements and reporting actions, have been put in place. Yet, banks continue to ask for valid registration and MoU documents and support letters from de facto Line Ministries/Departments as part of KYC processes, which are either not being issued or there are significant delays in obtaining them.

   Banking restrictions may be reinforced on NGO transactions by the CBM, who may not be fully aware of the current status of the ORL. NGOs in the process of registration, and sub-grant partners without current registration/in the registration process, are likely to face increased financial scrutiny, delays and restrictions.[5]

b. **Physical access barriers and interference in activities**: Physical access of NGOs to communities in need in conflict-affected and hard-to-reach areas are regularly impeded through movement restrictions, such as delays and denials of travel authorisations for humanitarian workers and checkpoint investigations and delays, placed mainly by the authorities but also by other conflict parties.

   Attempts to interfere in the implementation of humanitarian activities were reported in the form of additional administrative requirements to secure access, which is contrary to international law and humanitarian principles. The administrative reporting burden for NGOs has escalated in the past year by means of an increased number of information requests, including private and confidential staff and beneficiary data, in violation of global data protection standards. The enactment of the ORL and imposition of martial law is expected to result in additional scrutiny, including financial scrutiny of NGO operations.

c. **Heightened safety and security risks for NGO staff and volunteers:** The introduction of sweeping administrative actions and strict criminal penalties under the ORL for breaches of organisational duties and obligations under the ORL[6] significantly raises the risks for NGO staff and volunteers. For example, the new requirement of at least 40 per cent of INGO boards/executive committees' to be comprised of Myanmar nationals exposes national board members and their families to higher risk levels and potential harassment: Further, the law states that any official of the organisation has to take responsibility for the relevant organisation, which means that such official shall be deemed personally liable for breaches of the provisions of the law and shall be punished with a fine or imprisonment or both.

   The intensification of bureaucratic and administrative impediments, including the imposition of arbitrary financial regulations on NGOs, has exposed individual staff of NGOs and local partner organisations, mainly Myanmar nationals, to heightened safety and security risks with increasing threats to their personal safety including physical violence, arrests and detentions.

5. Requests of support from FATF Member States

a. **Recognise the devastating humanitarian impact of blacklisting on 17.6 million people in need in Myanmar**, who will be denied access to basic services such as food, shelter, health, and education, if Myanmar loses access to the international financial system and aid flows are unduly restricted. NGOs in Myanmar are heavily reliant on funding from several key FATF Member States, including the US, the UK, Germany, and Australia. To ensure effective and efficient use of their funds, FATF Member States are therefore urged to review the listing of Myanmar as a 'high-risk jurisdiction' owing to the severe impacts of such a designation on the needs of vulnerable communities of Myanmar.

b. **Review FATF's enhanced due diligence requirements and issue additional guidance as appropriate, to counter the unintended consequences of FATF blacklisting on Myanmar**, such as the recent introduction of extreme legislative and other measures adopted by Myanmar's de facto authorities, that have jeopardised and curtailed legitimate NGO operations and humanitarian aid flows.

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[5] A credible legal organisation advised that all financial transactions by NGOs are expected to be conducted through formal banking channels under scrutiny of the Central Bank of Myanmar (CBM). This, however, is not just limited to NGOs and businesses, too, face similar restrictions. Currently there are no reports of INGO transactions being stopped by banks due to the ORL. There are no known CBM instructions restricting INGO/NGO transactions based on registration status under the ORL. Use of informal financial modalities has become more challenging, and may face increasing scrutiny.

[6] Chapters 7, 8, 9, 10 of the ORL

c. **Put in place clear, systemic and sustainable safeguards in line with the risk-based approach and proportionality principle**, to mitigate the unintended negative effects of FATF actions on Myanmar.

d. **Recognise and enable both formal and informal financial aid modalities in Myanmar in the current political and operational environment to avoid de-banking and financial exclusion**. Alternative money transfer modalities are widely used and accepted for humanitarian actors across all regions of the world where there are sanctions, such as Syria, Nigeria, Afghanistan, Yemen, and elsewhere. FATF actions Myanmar should not disable these modalities and cut off millions of vulnerable persons in Myanmar, from urgent lifesaving assistance.