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The Impact of “Soft Law” and Informal Standard-Setting in the Area of Counter-Terrorism on Civil Society and Civic Space

Briefing paper prepared under the aegis of the Mandate of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

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EXECUTIVE SUMMARY

This briefing paper addresses the proliferation of new institutions and the “soft” law standards they produce, with particular emphasis on the implications of these developments on the functioning of civil society organizations and on civic space. It builds upon and supplements the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, submitted to the 74th session of the General Assembly.¹

Informal standard-setting in the counter-terrorism arena

International law-making in the area of counter-terrorism has undergone a significant shift in the aftermath of the 9/11 terrorist attacks. This shift in regulatory approach has been complemented by the increased role of non-UN processes and entities, as demonstrated by the establishment of specialized institutions and fora with regulatory or quasi-regulatory functions, active in the area of counter-terrorism. With their regulatory scope and influence ever expanding, these entities have substantially altered the governance landscape of global security.

In this context, soft law has become increasingly essential to the production of global norms and practice. It has played an important role in consolidating and developing international law, including international human rights law, by functioning as a ‘gap-filler’ in the absence of treaty agreement or customary international law consolidation and fleshing out existing norms by giving shape to the substance of obligations.

However, the counter-terrorism soft law terrain exhibits a tendency to marginalize the obligations that follow international human rights norms. Norm production occurs in a number of settings where human rights entity presence and capacity is limited, constrained, or lacks adequate resourcing. This includes civil society actors, especially those active in issues relating to human rights.

Civil society and informal standard-setting at the regional and international levels

International human rights law recognizes the right to participate in public affairs, with the promotion of equal participation of all members of society in public affairs also being vital to the implementation of the Sustainable Development Goals. Participatory policy and law-making promotes improved transparency, accountability, and legitimacy of decision-making, facilitates informed and inclusive processes and promotes the effectiveness and sustainability of laws and policies, including with respect to their implementation and enforcement.

Civil society in particular has a crucial role to play as an important vehicle for facilitating public involvement in decision-making processes. As such, trust-based collaborative partnerships with civil society are well placed to improve policy-making through enhanced identification of the policy needs of different groups and develop relevant solutions.

It is imperative that States create a safe and enabling environment in law and in practice that allows civil society, broadly defined, to participate in public affairs at the domestic, but also at regional, and international levels. Regional and international law and policy-making has however frequently been described as suffering from a ‘democratic deficit’, which commonly manifests in ways in which civil society actors are engaged in these spaces. This shortcoming is oftentimes even more conspicuous when it comes to informal intergovernmental fora with uncertain legal status, functioning based on flexible, and at times vague, ad hoc, or confidential rules of procedure.

In parallel, the direct and indirect impact of the activities and standard-setting carried out by such formal and informal international entities on human rights in general and civil society actors in particular is significant.

The close connection between the lack of incorporation of a meaningful human rights component in these settings and processes and the lack of participatory approaches to standard-setting needs highlighting. Consequently, *human rights-lite* spaces are characterized by exclusion or ad hoc, inconsistent, and unsatisfactory inclusion of civil society actors.

¹ A/74/335.

Building on the Special Rapporteur's report to the 74th session of the General Assembly, the briefing paper sets out practices related to standard-setting by informal bodies active in the area of counter-terrorism and explores questions related to civil society participation in these contexts. The example of the Financial Action Task Force (FATF) is used to make relevant challenges and potential solutions more accessible.

A closer look into the functioning of these standard-setting bodies reveals:

- A lack of detailed human rights benchmarking in relation to activities and standard-setting processes;
- Suggests that such informal entities show a tendency towards reduced transparency;
- Demonstrates that the flexibility of their mandates, allied with the lack of formal rules of procedure and the ad hoc nature of the norm production process, reduces human rights protections and in practice excludes civil society;
- Shows that standard-setting and implementation processes are also conducted without due concern for ensuring the participation of those affected by relevant laws and policies; and
- Brings into view that access to such institutions has proven difficult and inconsistent for many human rights entities, including international human rights mechanisms as well as independent civil society.

While the level of engagement with civil society and other human rights experts diverges across entities, it could, in general, use significant improvement. Relevant institutions and fora are therefore encouraged to take steps towards making their processes more participatory and be guided by international human rights norms and standards in this regard.

To markedly improve matters, States must, in line with international human rights law:

- Take measures aimed at facilitating civil society participation in such public interest processes;
- Ensure that the actors choosing to participate in regional and international processes are not subject to threats, intimidation, or acts of reprisal; and
- States supporting and financing counter-terrorism institutions and fora should develop policies and guidelines on facilitating civil society participation,



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to be made publicly available and disseminated to relevant stakeholders.

Difficulties in access can, among others, be led back to informal standard-setting bodies generally lacking formal accreditation mechanisms and clear rules governing civil society involvement. To tackle this shortcoming, relevant entities should:

- Establish civil society focal points;
- Develop processes for granting observer, consultative or participatory status to civil society organizations or set up alternative permanent bases for reliable and meaningful cooperation;
- Such status or other forms of cooperation should be based on clear, objective, transparent and non-discriminatory criteria and carried out in an accessible manner. Further, they should not be overly burdensome for civil society organizations who frequently grapple with shortages of monetary, human, and other resources; and
- Undertake regular and transparent public reporting on engagement with civil society actors, and have such engagement be subjected to independent external evaluation.

The expansion of informal standard-setting fora active in the counter-terrorism space has resulted in such entities shaping international, regional, and domestic processes within the global counter-terrorism architecture, including by influencing binding law-making at different levels of governance. This has also come with critical direct and indirect consequences affecting civil society organizations, impacting the way in which their functioning is regulated in law and practice. It also leads to far-reaching negative implications on the human rights of civil society and those associated with them. As such, these processes have interlocked with the worldwide trend of restricting civil society space.

Soft law also risks further undermining binding human rights law standards. Mitigating potential negative implications requires strong commitment to the meaningful incorporation and mainstreaming of human rights norms and standards into all stages of relevant activities and processes. The counter-terrorism soft law terrain would benefit from making their processes more participatory. This includes seeking out international law expertise, with particular emphasis on international human rights law, international humanitarian law, and refugee law. There is clear added value to consulting with international human rights mechanisms and other relevant experts, including the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and other relevant special procedure mechanisms,² the Office of the High Commissioner for Human Rights, and regional human rights bodies. Furthermore, meaningful implementation of the right to participate in public affairs, including through the inclusion of civil society actors – in particular, organizations working on issues relating to human rights law, international humanitarian law, and refugee law in the activities and processes of counter-terrorism soft law standard-setting – would go a long way towards improving human rights mainstreaming in this space and further compliance with relevant branches of public international law.

I. INTRODUCTION: SOFT LAW AND INFORMAL STANDARD-SETTING IN THE AREA OF COUNTER-TERRORISM

The legal regulation of terrorism has posed significant challenges to the global legal order for many decades. States have responded at the domestic, regional, and international levels through multiple legal and political avenues. Conventionally, international law-making in the area of counter-terrorism was primarily carried out through multilateral processes resulting in treaty instruments mainly agreed under the aegis of the United Nations. These more traditional means and methods of terrorism and counter-terrorism related law-making have however undergone a significant shift in the aftermath of the terrorist attacks of 9/11, albeit such processes remain important to date.

The Security Council, rejuvenated and increasingly active in the post-Cold War environment, became the leading organ to respond to the threat of terrorism at the international level. While the Council's contributions in this new role have significantly advanced the closing of legal and policy gaps in international counter-terrorism regulation, they also brought about distinctly negative effects on the overall advancement of meaningful protection for human rights within the counter-terrorism sphere. The implications of this augmented and ever-expanding regulatory role of the Security Council in counter-terrorism on the protection of human rights at the international and domestic level have been explored in detail by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (hereafter: Special Rapporteur) in her report to the 73rd session of the General Assembly.³

This shift in regulatory approach is complemented by the increased role of non-UN processes and entities, as demonstrated by the establishment of specialized institutions and fora with regulatory or quasi-regulatory functions, active in the area of counter-terrorism. A large number of such institutions and fora have emerged in recent years; in fact, almost all relevant entities have either been created post-9/11 or have taken up counter-terrorism related roles in the aftermath of the terrorist attacks on the World Trade Centre. Not unlike their numbers, their regulatory scope and influence has also been expanding.

In addition to the many state-centred initiatives, the landscape is augmented by public-private partnerships,⁴ reflecting the increasingly crucial role of the private sector in the area of counter-terrorism and underscoring the priority character of meaningful intersectoral cooperation in order to effectively tackle related threats. While few of these entities or initiatives have been set up with an explicit regulatory purpose in mind, their activities contribute to norm development in diverse and at times inconspicuous ways. The global counter-terrorism architecture enables coalitions of like-minded States as well as global multi-stakeholder networks, which are not formally legally constituted under international law and which operate on a stated voluntary basis to often entirely avoid the pathways of rule and obligation creation, particularly but not solely regarding human rights.⁵ As such, these initiatives have substantially altered the landscape of global counter-terrorism governance and their individual

² <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>

³ A/73/361.

⁴ Such as Tech Against Terrorism, a public-private partnership initiated by CTED and ICT4Peace and referenced in United Nations Security Council resolutions 2395 and 2396 (<https://www.techagainstterrorism.org/>); the Global Internet Forum to Counter Terrorism (<https://gifct.org/>); or GCTF-inspired institutions (https://www.thegctf.org/About-us/Inspired_Institutions).

⁵ Alejandro Rodiles, 'The Design of UN Sanctions Through the Interplay with Informal Arrangements', in Larissa J. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law* (Edward Elgar Publishing, 2017), at 180.

and aggregated impact and influence warrants due attention by relevant stakeholders.

Building on the Special Rapporteur's report to the 74th session of the General Assembly,⁶ this briefing paper addresses the proliferation of new institutions, many with selective membership, whose regulatory scope is increasing and expanding, and the use and application of soft law standards these entities produce, with particular emphasis on the implications of these developments on the functioning of civil society organizations and civic space, more broadly.⁷ Recognizing that large number of such entities have emerged in the past two decades, the briefing paper will present and analyse relevant issues primarily through the example of the Financial Action Task Force (FATF).

The notion of “soft law”

The notion of soft law and its scope remains controversial in international law. As a definitional departure point, the least contentious delineation is that soft law constitutes those international norms, principles, and procedures that are outside the formal sources enumerated in article 38(1) of the Statute of the International Court of Justice and, while lacking the requisite degree of normative content to create enforceable rights and obligations, are still able to produce certain legal effects.⁸ This briefing paper takes a broad approach to conceptualizing “soft law” standards by adopting a definition that encompasses non-legally-binding instruments and standards pertaining to preventing or countering terrorism and violent extremism, developed with the involvement of, or endorsed by, a formal or informal grouping of States and/or international or regional organizations.

Soft law has been increasingly essential to the production of global norms and practice in many areas of international law and policy, including counter-terrorism:

- It provides the benefits of speed, informality, less onerous procedural limitations, innovative modalities of engagement and analysis, and a variety of pathways to produce norms and standards in new and challenging global contexts;

- It is often produced by ‘like-minded’ groups of States with reasonable degrees of existing consensus on values, processes and outcomes;
- It has played an important role in consolidating and developing international law, including international human rights law;
- It functions as a ‘gap-filler’ in the absence of treaty agreement or customary international law consolidation and fleshes out existing norms by giving shape to the substance of obligations; and
- A number of soft law norms develop and augment binding standards and authoritatively interpret them.⁹ Moreover, in developing areas of law, soft law standards are often the only norms available to guide, constrain and support regulatory action.

The nature of norm production on issues related to counter-terrorism creates a particular set of pathways and has a specific soft law eco-system with a number of unique features:

- First, the scale of norm proliferation (while difficult to absolutely quantify), is exceptionally dense and produced in a relatively short period of time, compared with other regulatory arenas. The global counter-terrorism architecture can be described as one in which most entities can effectively shape an issue area regardless of their formal legal pedigree.¹⁰
- Second, the nomenclature of ‘soft’ law appears to understate the extent to which many of these normative guidelines, declarations, ‘good practice’, and technical rules function as distinctly hard in practice.
- Third, unlike many areas of international law where soft law holds less enforcement traction, the institutional landscape for counter-terrorism is distinct. Many counter-terrorism soft law norms come with capacity-building, technical expertise and support on a scale not found in other legal domains precisely because there is a global architecture to aid their direct implementation.
- Fourth, there is an important nexus between many of these normative soft law standards, which reinforce

⁶ [A/74/335](#).

⁷ On the impact of measures aimed at preventing and countering terrorism and violent extremism on civil society actors and civic space, see the report of the Special Rapporteur to the 40th session of the Human Rights Council, [A/HRC/40/52](#).

⁸ Soft law includes General Assembly resolutions, declarations, guidelines, technical manuals, opinions from quasi-judicial bodies and certain publications from UN entities.

⁹ Examples of this interaction include the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, also known as the Minnesota Protocol, and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

¹⁰ For a more detailed analysis see [A/74/335](#), paras. 16-20.

and build upon one another. They operate relationally in many areas and their legal status is both independent and interconnected. One observes cross-fertilization, cross-referencing, message duplication and recurrent invocations of the same rules, formulated in processes that are non-transparent and not accessible to all States. Steady norm proliferation builds upon and reinforces rule development, thereby consolidating the regulatory landscape in ways that are not seen in other international law arenas.

- Finally, in almost all of these arenas human rights and human rights entities are visibly side-lined or marginal to the norm production phase, as well as in oversight and implementation.

The Special Rapporteur underscored in her report to the 74th session of the General Assembly that the relationship between various aspects of the soft law production terrain is under-mapped and not well-understood.¹¹ This creates two opposing but intersectional trends. First, it results in **fragmentation** in international legal norms and standards governing counter-terrorism, which generates ineffectiveness and confusion. This thereby also leads to limiting or disregarding the application of primary legal regimes including international human rights law, international humanitarian law and refugee law. Second, these developments also present the challenge of **over-production** of standards with a concentration and exponential growth in one area of law with limited reference to and meaningful interaction with other relevant bodies of law. Without commensurate and equal processes aimed at reinforcement, development, and clarification happening in other areas (specifically international human rights norms and standards), the balance needed for internal consistency between legal regimes is lacking.



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II. ROLE OF CIVIL SOCIETY IN REGIONAL AND INTERNATIONAL STANDARD-SETTING

While decision-making in public matters primarily falls within the duties and responsibilities of public authorities, international human rights law recognizes the right to participation in public affairs¹², described by the UN Human Rights Committee as 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 [International] Covenant [of Civil and Political Rights]”.¹³ Public affairs is understood broadly to encompass the “exercise of political power, in particular the exercise of legislative, executive and administrative powers”¹⁴, covering all aspects of public administration. As set out below, participation in public affairs is also clearly relevant to the global and regional regulation of preventing and countering terrorism and violent extremism.

The need for the promotion of equal participation of all members of society in public affairs is further essential for the implementation of the Sustainable Development Goals (SDGs). Inclusive processes ensuring the involvement of all relevant stakeholders are vital to the spirit and purpose of the SDGs,¹⁵ particularly in relation to the furthering of Goal 16. The targets under Goal 16 of the Agenda for Sustainable Development highlight, among

¹¹ *Ibid.*, paras. 8-22.

¹² International Covenant on Civil and Political Rights, art. 25.

¹³ See Human Rights Committee, general comment No. 25 (1996) on participation in public affairs and the right to vote, para. 1.

¹⁴ *Ibid.*, para. 5.

¹⁵ See, for example, relevant targets under Goal 5 (Achieve gender equality and empower all women and girls), Goal 10 (Reduce inequality within and among countries), etc. For more information, see *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1. The realization of SDGs is impossible without meaningful participation of all relevant stakeholders at all levels, including making use of “the catalyzing potential of greater civil society engagement”. See, for example, *Together 2030. Realizing the SDGs for all: Ensuring inclusiveness and equality for every person, everywhere* (UN, 2019).

others, the need to “ensure responsive, inclusive, participatory and representative decision-making at all levels”.¹⁶ Means and modalities for public participation are varied and may include:

- public sharing of information;
- online and offline consultation and dialogue; and
- co-operation in the drafting, monitoring and evaluation of laws and policies.¹⁷

The tools for facilitating participation comprise:

- setting up dedicated websites;
- organizing hearings, both in public or confidential settings; and
- establishing multi-stakeholder committees and expert groups.

Chosen means, modalities, and tools are context-dependent but should enjoy the support of relevant stakeholders and cover all stages of the processes in question.

Benefits of participatory policy and law-making include, among others:

- Participatory policy and law-making promotes improved transparency, accountability, and legitimacy of decision-making;
- Participation facilitates informed and inclusive processes that contribute towards eliminating marginalization and discrimination; and
- Regular and continuous engagement with all relevant stakeholders ensures ownership in relation to relevant public policies by diverse segments of the public. This in turn promotes the effectiveness and sustainability of laws and policies, including with respect to their implementation and enforcement.

At the same time, as human rights actors, such as the Office of the United Nations High Commissioner, have consistently articulated, meaningful participation “requires a long-term commitment by public authorities, together with their genuine political will, an emphasis on agency and a shift in mindset regarding the way of doing

things.”¹⁸ These insights to the meaning of participation in public affairs are fully relevant to the counter-terrorism regulatory arena.

Civil society is essential to effective and rule of law compliant counter-terrorism policy and practice:

- Civil society has a crucial role to play in safeguarding democratic institutions and processes and ensuring good governance through respect for the rule of law.
- Civil society frequently serve as spokespeople for vulnerable and marginalized groups who are under-represented in political power structures and may face discrimination or suffer from unequal or oppressive power dynamics.
- Civil society in many contexts is predominantly female in its make-up and therefore engaging civil society constitutes an indispensable means to gender mainstreaming in counter-terrorism policy and practice.
- Civil society is essential to channelling discontent and allowing for constructive engagement with States.¹⁹
- Civil society engagement is further instrumental to directly undermining the factors leading individuals to be drawn to terrorism and violent extremism, as identified by the UN Global Counter-Terrorism Strategy,²⁰ and in the Secretary General’s Plan of Action to prevent violent extremism.²¹
- Civil society often plays an intermediary role between authorities and their constituents through its credibility and access to remote communities, and through speaking directly to the sources of grievances identified as factors conducive to terrorist and extremist violence.
- Civil society can also help fill a government gap by developing locally-driven initiatives that respond to community-specific needs because of its invaluable knowledge of local drivers and trends.

As such, civil society actors are an important vehicle for facilitating public involvement in decision-making processes. Trust-based collaborative partnerships with civil

¹⁶ See Target 16.7. Moreover, a series of other targets under Goal 16 stress the importance of developing effective, accountable and transparent institutions at all levels (16.6) and ensuring public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements (16.10).

¹⁷ See also OHCHR, *Guidelines on the effective implementation on the right to participate in public affairs*, para. 53.

¹⁸ *Ibid.*, para. 8.

¹⁹ UNDP, *Journey to Extremism in Africa: Drivers, Incentives and the Tipping Point for Recruitment* (2017).

²⁰ UN, Global Counter-Terrorism Strategy, A/RES/60/288, Annex, Pillar I: Addressing the conditions conducive to the threat of terrorism.

²¹ UN Secretary-General’s Plan of Action to prevent violent extremism, A/70/674.

society are well-placed to improve policy-making through enhanced identification of needs of different groups and corresponding policy and practice gaps as well as relevant solutions.

It is imperative that the vital role of civil society in relation to public interest processes, specifically regulatory processes relating to preventing and countering terrorism and violent extremism, is recognized by States. States must create a safe and enabling environment in law and in practice that allows civil society to participate in public affairs at the domestic, but also at regional and international levels.²² This includes protection of civil society actors from all threats, attacks, reprisals, and acts of intimidation against them or their next of kin and associates,²³ including threats coming from third parties, such as non-State actors.

States must ensure that the right to participation in public affairs is duly reflected in domestic legislation and is meaningfully implemented and facilitated by public authorities. Critically, we note that the right to participate in public affairs is inherently linked to a series of internationally guaranteed human rights, including freedom of expression and the right to access to information, the rights to freedom of assembly and association, the right to be free of discrimination, and the right to equal access to public services. Meaningful implementation of equal participation in public interest processes requires a comprehensive approach that takes into account the interdependence and indivisibility of all human rights.

Importantly, the right to take part in the conduct of public affairs **extends beyond local and domestic institutions and processes to also include standard-setting processes and fora at the international and regional levels.**²⁴

Regional and international law and policy-making has frequently been described as suffering from a ‘democratic deficit’,²⁵ among others due to the insufficiently comprehensive inclusion of citizens and constituencies in decision-making processes. This shortcoming also commonly manifests in ways in which civil society actors are engaged in these spaces.²⁶ The ‘democratic deficit’ has been intensely evident in the counter-terrorism arena post 9/11

and is oftentimes even more conspicuous when it comes to informal intergovernmental fora with uncertain legal status, functioning based on flexible, and at times vague, ad hoc, or confidential rules of procedure. This is an acute concern in the counter-terrorism context given the proliferation of such intergovernmental fora.

However, the direct and indirect impact of the activities and standard-setting carried out by these formal and informal international institutions and fora on human rights in general and civil society actors in particular is significant. The implications affecting civil society organizations and individuals affiliated with them are manifold, with this briefing paper exploring two such ramifications in detail:

- First, certain standards developed by these fora directly impact the functioning of civil society organizations. The most manifest example in this regard is Recommendation 8, developed by the Financial Action Task Force, addressing the abuse of not-for-profit organizations (NPOs) for terrorism financing purposes.²⁷
- Second, the far-reaching implications of counter-terrorism measures on civil society, including the frequent abuse of such laws and policies to target civil society and restrict civic space is well established.²⁸ The activities of entities engaged in counter-terrorism related standard-setting thereby indirectly affect civil society actors through the influence these standards may effect on domestic laws, policies, and practices.

Transparent and participatory governance in relation to global counter-terrorism regulation is an essential precondition to the rule of law and the protection of human rights.²⁹ As such, ensuring effective participation in public affairs including with respect to civil society actors should be a vital component of regional and international processes, including as regards [informal] intergovernmental institutions and fora active in the area of preventing and countering terrorism and violent extremism. In the following, we turn to outlining the main trends, practices and gaps vis-à-vis civil society participation in the activities and processes of these entities.

22 This also means that “the independence and pluralism of such actors should be respected, protected and supported, and States should not impose undue restrictions on their ability to access funding from domestic, foreign or international sources.” See OHCHR, *Guidelines on the effective implementation on the right to participate in public affairs*, para. 19(e).

23 *Ibid.*, para. 19(g); see also Report of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, A/HRC/42/30.

24 Human Rights Committee, general comment No. 25 (1996) on participation in public affairs and the right to vote, para. 5. See also SDG 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

25 See, for example, Raz, Joseph, “The Democratic Deficit”, Oxford Legal Studies Research Paper No. 63/2017 (January 14, 2018); Andrew Moravcsik, ‘Is there a ‘Democratic Deficit’ in World Politics? A Framework for Analysis’, *Government and Opposition*, 2004, 39(2), at 336-363.

26 OHCHR, *Guidelines on the effective implementation on the right to participate in public affairs*, para. 95.

27 FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (Paris, 2019). See also *infra* at Section III. A and V.A.

28 A/HRC/40/52.

29 Christopher C. Joyner, *International Law in the 21st Century: Rules for Global Governance* (Rowman & Littlefield Publishers, 2005).

III. TRENDS AND PRACTICES REGARDING THE INVOLVEMENT OF CIVIL SOCIETY IN STANDARD-SETTING BY NEW COUNTER-TERRORISM INSTITUTIONS AND FORA

There is a spider's web of soft law standards coming from institutions and fora active in the area of counter-terrorism. These bodies were mostly established or have taken up counter-terrorism work within the past two decades. As set out earlier, the establishment of entities with global or regional scope, many of uncertain legal status and selective membership, created with limited reference to human rights in their constitutive documents means that structured, consistent, and well-defined human rights input is lacking in these settings.

In this context, the close connection and interaction between the lack of the incorporation of a meaningful human rights component in these settings and processes and the lack of participatory approaches to standard-setting is worth highlighting. As a result, **human rights-lite spaces are also characterized by exclusion or ad hoc, inconsistent, and unsatisfactory inclusion of civil society actors.** For this reason, this section will analyse the approach to human rights mainstreaming and participatory decision-making together, by way of a more detailed look into the practices of the Financial Action Task Force.

A. Financial Action Task Force

The Financial Action Task Force (FATF) was founded in 1989, at the initiative of the G7, with the aim to develop standards and policies to combat money laundering. The FATF's mandate was broadened to encompass terrorist financing in the aftermath of the 9/11 attacks. Its mandate³⁰ designates the FATF as “the global standard-setter for combatting money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction”, working towards “strengthening jurisdictions’

capacity to prosecute terrorist financing; developing the understanding of the nature of terrorist financing (TF) risk; and supporting the development of countering the financing of terrorism (CFT) regimes and enhancing dialogue in higher-risk regions.”

In this role, the FATF has developed a set of recommendations³¹ forming the basis of a coordinated response to the threat posed by money laundering, the financing of terrorism, and weapons of mass destruction. It promotes and monitors the implementation of these standards by developing guidance documents to inform domestic measures aimed at transposing the recommendations³² and by conducting periodic peer review to assess relevant progress at the country level. Though the recommendations and related guidance material are not legally binding,³³ States strive towards compliance due to the benefits linked to membership and the financial and economic disadvantages that non-compliance may trigger.

The Task Force currently counts 39 members, including 37 jurisdictions comprising the world's largest economies³⁴ as well as the European Commission and the Gulf Cooperation Council. A further 30 countries and organizations have been accorded observer status, including the International Monetary Fund, the World Bank, Organisation for Economic Co-operation and Development and United Nations entities such as United Nations Office on Drugs and Crime (UNODC), the Counter-Terrorism Committee Executive Directorate (CTED) and the Analytical Support and Sanctions Monitoring Team pursuant to resolutions 1526 (2004) and 2253 (2015). The FATF is at the centre of a very complex ecosystem comprising entities from most major international and regional organizations whose mandate and activities intersect with that of the FATF. Currently, the list of observers does not include any United Nations or regional human rights mechanisms.³⁵

Inspired by the FATF, nine FATF-style regional bodies (FSRBs) have been established and recognized by the FATF Plenary.³⁶ These regional bodies, together with the FATF, constitute the Global Network and encompass over 190 member jurisdictions. FSRBs are associate

30 FATF, 'Mandate', (Washington, DC, April 19, 2019)

31 FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (Paris, 2019).

32 Most importantly the Interpretive Notes, providing an official interpretation of the scope and requirements contained in the Recommendations.

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

34 FATF, 'Membership Policy' available at <http://www.fatf-gafi.org/about/membersandobservers/fatfmembershippolicy.html>.

35 These mechanisms could, in principle, request observer status in line with FATF rules governing such status. We are not aware of any human rights mechanisms having done so. At the same time, due to many human rights bodies struggling with lack of adequate funding that would allow them to carry out their roles unhindered, these bodies may lack the resources needed to take up the additional workload linked to being an observer to the FATF.

36 These bodies include: Asia/Pacific Group on Money Laundering (APG), Caribbean Financial Action Task Force (CFATF), Council of Europe Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL), Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), Eurasian Group (EAG), Financial Action Task Force of Latin America (GAFILAT), Inter-Governmental Action Group against Money Laundering in West Africa (GIABA), Middle East and North Africa Financial Action Task Force (MENAFATF), Task Force on Money Laundering in Central Africa (GABAC). These regional bodies, together with the FATF, constitute the Global Network.

members of the FATF and commit to endorsing FATF recommendations, guidance and other policy and promoting the “effective implementation” of these standards in their member jurisdictions through the use of the FATF assessment methodology and procedures, including mutual evaluations.³⁷ While FSRBs need to be recognized by the FATF as such, there is no formal hierarchy between the FATF and relevant regional bodies.³⁸ FSRBs are freestanding entities who operate in accordance with their own mandate and set up their own structure and rules for functioning.³⁹ This also results in separate and often diverging approaches in relation to integrating human rights norms and standards into their operation and establishing cooperation or consultation mechanisms with other stakeholders, including UN and regional human rights mechanisms and civil society (or the lack thereof). While FSRBs, as associate members, ‘participate’ in the development of FATF standards (without decision-making/ voting powers), the FATF is recognized as “the only standard-setting body and the guardian and arbiter of the application of its standard”.⁴⁰ The FATF plays an important role in ensuring consistency in the interpretation and application of its recommendations. However, the lack of a formal organizational hierarchy governing the relationship between FSRBs, on the one hand, and the FATF, on the other,⁴¹ poses challenges to achieving such consistency in practice.

A.1. The FATF’s standard-setting work and relevant implications on human rights

The FATF’s mandate contains no references to international law, international human rights law, or international humanitarian law. However, laws and policies related to the standards established by the FATF address issues such as criminalizing and prosecuting terrorist financing, targeted financial sanctions, tackling the risk of abuse of the not-for-profit sector for terrorist financing purposes, and thus engage human rights at multiple levels. Their impact is all the more significant as States generally adopt domestic laws and policies that enable them to implement FATF standards, thereby leading to the ‘hardening’

of these otherwise soft law standards at the national level with profound effects on human rights protections domestically.

Explicit references to obligations under the Charter and international human rights law have been introduced in the Interpretive Notes to FATF Recommendations,⁴² albeit relevant references are limited. While the Interpretive Notes recognize that “[i]n determining the limits of, or fostering widespread support for, an effective counter-terrorist financing regime, countries must also respect human rights, respect the rule of law, and recognize the rights of innocent third parties”⁴³ and highlight that human rights are to play a part in designation processes,⁴⁴ they do not elucidate how these standards are to be effectively complied with by implementing jurisdictions or how compliance is to be assessed by peer-review based evaluation. Moreover, these references only relate to limited aspects of certain recommendations as opposed to attempting the mainstreaming of human rights considerations throughout the mutual evaluation process.

There is therefore a distinct need for human rights benchmarking and guidance of similar levels of specificity and comprehensiveness as recommendations addressing financial measures to facilitate human rights compliant implementation.

FATF member jurisdictions are bound by their relevant international law obligations, specifically international human rights and humanitarian law, including during participation in FATF standard-setting processes and assessment proceedings as well as when transposing relevant standards domestically. Hence, the lack of human rights and international humanitarian law as reference points in the FATF mandate presents a significant shortcoming with far-reaching implications on human rights protection in the area of counter-terrorism financing at the global, regional, and domestic level and may lead to the de facto undermining of binding international law norms through soft law.

In addition to member jurisdictions of the FATF, member jurisdictions of FATF-style regional bodies have also

³⁷ FATF, ‘Mandate’, para. 12.

³⁸ FATF, *High-Level Principles for the relationship between the FATF and the FATF-style regional bodies*, (updated February 2019).

³⁹ While most FSRBs function as inter-governmental task forces without legal personality, similarly to the FATF, some FSRBs have legal personality. For example, MONEYVAL is a permanent body of the Council of Europe and the Eurasian Group has been established as a ‘regional intergovernmental organization’.

⁴⁰ FATF, *High-Level Principles for the relationship between the FATF and the FATF-style regional bodies*, (updated February 2019).

⁴¹ *Ibid.*

⁴² Interpretive notes are designed to clarify the application of specific Recommendations and to provide additional guidance. The Recommendations, together with the Interpretive Notes as well as the FATF Glossary, comprise the FATF Standards.

⁴³ See ‘Interpretive note to recommendation 6’, in FATF *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations*, at 41.

⁴⁴ See ‘Interpretive note to recommendation 7’, in FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations*, at 51.

committed to implementing the standards developed by the FATF, effectively rendering these standards global. Furthermore, while the standards are not legally binding and can therefore be characterized as ‘soft’ law, consequences of non-compliance can be onerous and may negatively impact, among others, the respective country’s access to financial markets, trade, and investment. Given the weight of financial and economic power underpinning the (technically) legally non-binding set of standards, following the direction set by the FATF is not merely optional for States with lower levels of financial and economic development.⁴⁵ This puts considerable pressure on jurisdictions to ensure compliance and may incentivize a de-prioritization of human rights considerations.

The resulting ‘*human rights-lite*’ approach risks undermining the efficiency of counter-terrorism measures. Human rights compliance serves as a precondition for efficient counter-terrorism laws and policies. For example, overbroad definitions of terrorism and terrorism-related offences, including that of terrorist financing, can lead to relevant laws targeting conduct protected under international human rights law or, at least, not terrorist in nature, and thereby to the misapplication of law and of resources. Furthermore, violations of human rights have been shown to contribute to conditions conducive to radicalization to violence and terrorism, thereby boosting the risk of terrorism rather than countering it.⁴⁶

As the “first global standard-setter” to assess “not only whether countries have the necessary legal and institutional frameworks in place but also how effectively countries are implementing these frameworks”,⁴⁷ the FATF must meaningfully incorporate human rights considerations in its standard-setting and evaluation.

A.2. Inclusiveness and transparency of FATF standard-setting and related processes: the role of civil society and the non-profit sector

The FATF functions as the global standard-setter in the area of counter-terrorism financing and money laundering with decision-making powers assigned to its members. While associate members (FSRBs) and observers are involved in relevant processes, they have limited leeway to

influence standards that many of them eventually have to implement.

According to FATF rules, observer status can be granted to organizations that are “inter-governmental and international/regional in nature” and do not work “according to private sector mechanisms”.⁴⁸ This policy excludes the non-profit sector in general and civil society organizations in particular from becoming observers.

Private Sector Consultative Forum

At the same time, the FATF’s mandate lists “[e]ngaging and consulting with the private sector and civil society on matters related to the overall work of the FATF” among the functions of the Task Force and states that such engagement should be conducted “through the annual consultative forum and other methods for maintaining regular contact to foster transparency and dialogue.”⁴⁹ As a result, the Private Sector Consultative Forum was set up to provide a yearly platform for the FATF to engage directly with the private sector. Since 2016, the Global NPO Coalition on FATF⁵⁰ has been permitted to nominate four organizations to participate in the Forum ensuring some human rights/humanitarian presence in the room. In addition, the FATF committed to enhance engagement with non-profit organizations by holding annual meetings on specific issues of common interest and organizing ad hoc exchanges on technical matters.⁵¹ While these developments represent a step in the right direction, much of the FATF’s engagement with civil society is conducted on an ad hoc basis. This setting provides for considerable flexibility for the FATF but also means that civil society have no formalized expectations of participation.

⁴⁵ Keeping in mind that these standards are developed by a limited number of jurisdictions representing the world’s largest economies, concerns related to State sovereignty and the legitimacy of relevant regulatory processes are inevitably raised.

⁴⁶ See UN Secretary-General’s Plan of Action to prevent violent extremism, A/70/674; UNDP, *Journey to Extremism in Africa: Drivers, Incentives and the Tipping Point for Recruitment* (2017).

⁴⁷ FATF, ‘Mandate’.

⁴⁸ FATF, ‘Policy on Observers’ available at <http://www.fatf-gafi.org/about/membersandobservers/fatfpolicyonobservers.html>.

⁴⁹ FATF, ‘Mandate’, Objectives, Functions and Tasks, para. 3.i).

⁵⁰ <http://fatfplatform.org>.

⁵¹ Submission by the Global NPO Coalition on FATF in contribution to the report of the Special Rapporteur to be submitted to the 74th session of the General Assembly, available at: <https://www.ohchr.org/EN/Issues/Terrorism/Pages/SoftLaw.aspx>.

Recalling the significant impact FATF processes have on human rights protection, it is imperative that standard-setting and implementation processes are conducted transparently by ensuring the participation of those affected by relevant laws and policies.

FATF member jurisdictions have an obligation to organize inclusive consultations at the national level in line with their domestic processes and with due consideration of their international human rights obligations.

FATF standards have been referenced and endorsed in documents produced by UN entities and organs, most recently - and prominently - by the Security Council.⁵² Such endorsement should motivate the FATF to step up measures towards ensuring that its standards are designed and implemented in compliance with norms and standards adopted under the aegis of the UN, including international human rights law and with full respect for the right to participate in public affairs. Having UN-endorsed soft law standards fall short of these recognized binding norms would send a dangerous message that risks undermining globally recognized human rights norms.

UN entities should only endorse or adopt soft law standards, including those developed by the FATF, when they are fully compliant with international human rights law. Such compliance would also require that standards be developed through inclusive and participatory processes which demonstrate full respect for the right to participate in public affairs.

UN entities must develop concrete protocols and practices to review the compatibility of adopted soft law standards with international law, including international human rights law, international humanitarian law, and refugee law. They must further develop detailed guidance on the implementation of such standards in line with said international law norms, in particular when such guidance would serve as gap-filler.

IV. OVERARCHING CHALLENGES OF MAKING PROCESSES PARTICIPATORY IN THE COUNTER-TERRORISM-RELATED SOFT LAW ARENA

As outlined above, informal entities in general tend to be less transparent than international organizations:

- They often lack formal rules of procedure;
- They are highly flexible in the definition and adaptation of their mandates over time; and
- Precisely due to their informality, can more easily evade issues of responsibility.

Informal coalitions, networks and entities consisting of selective groups of like-minded actors abound in the counter-terrorism arena, and the selectivity is precisely part of their creation rationale and design. Access to these institutions has proven difficult and inconsistent for many human rights actors, including UN human rights mechanisms, such as the Special Rapporteur, with civil society registering similar concerns. These difficulties can, among others, be led back to such bodies lacking formal accreditation mechanisms.

The norm production process undertaken by such bodies tends to be ad hoc, not publicly announced in advance, and in some cases moves so swiftly that the capacity for external human rights experts to mobilize input will be virtually nil.

Not infrequently, UN human rights entities and civil society organizations will be brought in ‘late in the game’ to give views on almost fully finalized products. At this stage, if their views are critical of the lack of human rights substance or their advice is to bolster human rights content, they will be viewed as unhelpful, out of sync with the thinking of States, and unconstructive to the process. This, of course, sets human rights interventions up for failure or irrelevance. To boot, there are a host of State-established and quasi-independent think-tanks and outsource arenas busily producing a range of advice, standards, and inputs (often at the behest of or funded by States) to the counter-terrorism arena. There is little transparency to the funding, terms of reference, and relationship of these entities to State interests, creating circular and rapid production cycles for soft law that inadequately address the formal human rights obligations of States in norm-production.

⁵² S/RES/2462 (2019), S/RES/2482 (2019).

The Global Counter-Terrorism Forum (GCTF)

The GCTF is an “informal, action-oriented and flexible” intergovernmental platform for policy-makers and selected practitioners. Its aims include supporting the “balanced implementation of the Global Counter-Terrorism Strategy and the United Nations counter-terrorism framework more broadly” and developing a “close and mutually reinforcing relationship with the United Nations system”. As a result, GCTF good practice documents have influenced the outputs of United Nations organs and entities.

The GCTF’s principles recognize the need for all counter-terrorism measures to be “fully consistent with international law, in particular the Charter of the United Nations, as well as international human rights, refugee and humanitarian law”. However, if measured solely on detailed and sustained human rights benchmarking, GCTF outputs contain little external evidence of systematic integration of human rights norms and standards in the Forum’s activities.

The GCTF Political declaration states that Forum members are “cognizant of the importance of engaging and involving civil society and local communities [...] as they are critical to building individual and community resilience against violent extremism while simultaneously enhancing trust and strengthening social cohesion”. At the same time, independent civil society has limited access to the GCTF and little knowledge of its inner workings. In accordance with the GCTF’s Terms of Reference, “appropriate civil society experts, that demonstrate support for the GCTF’s founding principles and objectives [...] are eligible, in principle, to participate in appropriate meetings.” It is at the discretion of the host or co-hosts of a GCTF activity to identify “appropriate” civil society experts to be included and their participation must garner the approval (or at least non-objection) of other members involved. Civil society organizations that have sought to acquire such access have, however, not been consistently welcomed. Some have reported hostility to human rights language and issues, in particular when brought in late in the day to incorporate into draft documents or in the context of the surrounding conversations that appear to be weak in terms of human rights content.

For a more detailed analysis, see the report of the Special Rapporteur to the 74th session of the General Assembly, A/74/335, paras. 47-54 and para. 55 (r)-(s).

The level of engagement with civil society and other human rights experts diverges across entities but could, in general, use improvement. Some encouraging signs have been noticeable on part of entities such as the Global Internet Forum to Counter Terrorism⁵³ and Tech Against Terrorism⁵⁴, both currently in the process of reforming their governance structure. While civil society and human rights experts have largely been absent from these governance structures, proposed updated structures include advisory boards with substantial civil society presence. Both entities have also conducted civil society and other stakeholder consultation in relation to the structural reform they are undergoing. As both processes are work in progress, it remains to be seen whether the promise of meaningful civil society inclusion will materialize.

It bears restating that the right to take part in the conduct of public affairs extends beyond local and domestic institutions and processes, also to standard-setting processes and fora at the international and regional levels. This is particularly valid in relation to State-led initiatives in the global counter-terrorism space. Relevant institutions and fora are therefore encouraged to take steps towards making their processes more participatory and be guided by international human rights standards as authoritatively interpreted by international human rights mechanisms, including the Human Rights Committee, and the OHCHR Guidelines on the effective implementation on the right to participate in public affairs.⁵⁵

⁵³ <https://gictf.org>

⁵⁴ <https://www.techagainstiterrorism.org>

⁵⁵ Requested by the Human Rights Council in resolution 33/22 (A/HRC/RES/33/22) and presented to the Council during its 39th session (A/HRC/39/28). Human Rights Council resolution 39/11 (A/HRC/39/11) “took note with interest” of the Guidelines and presented them as a set of orientations for States and other stakeholders.

In this respect, the following recommendations are highlighted with the aim of guiding entities involved in counter-terrorism related informal standard-setting.

- In line with international human rights norms and standards, States must take measures aimed at facilitating civil society participation in such processes and ensure that the actors choosing to participate in regional and international processes are not subject to threats, intimidation, or acts of reprisal.⁵⁶
- Counter-terrorism institutions and fora should develop policies and guidelines on facilitating civil society participation, which should be made publicly available and disseminated to relevant stakeholders. These policies and guidelines should address means and modalities to be used with the aim of ensuring civil society engagement. Such means and modalities could include the granting of observer, consultative, or participatory status to civil society organizations; organizing of consultation processes, to be undertaken with the meaningful engagement of civil society; webcasting of events, etc.⁵⁷ Involvement of civil society includes granting access to relevant information⁵⁸ and the possibility for these actors to make their views known and have it disseminated among participants involved in the process.
- Good practice for relevant entities would include establishing robust civil society focal points and developing processes for granting observer, consultative, or participatory status to civil society organizations, or setting up alternative permanent bases for reliable and meaningful cooperation. These should be based on clear, objective, transparent, and non-discriminatory criteria, carried out in an accessible manner. Further, they should not be overly burdensome for civil society organizations who frequently grapple with shortages of monetary, human, and other resources.
- Standard-setting entities are further encouraged to undertake regular and transparent public reporting on engagement with civil society actors, and have such engagement be subjected to independent external evaluation.

V. THE IMPACT OF SOFT LAW AND INFORMAL STANDARD-SETTING ON CIVIL SOCIETY ACTORS AND CIVIC SPACE

The effects of the activities and soft-law-related standard-setting carried out by formal and informal international institutions and fora on the promotion and protection of human rights in general and on civil society actors in particular is significant. In the following, we will address some critical consequences affecting civil society organizations and individuals affiliated with them, focusing on 1) the direct impact such standard-setting has on the functioning of civil society organizations and how their functioning is regulated at the national level; and 2) the far-reaching negative human rights consequences of counter-terrorism measures and how these affect civil society, particularly in contexts where such norms and standards are developed and implemented without due consideration for the right to take part in public affairs.

A. Impact of soft law and informal standard-setting on the functioning of CSOs

Many jurisdictions have decided to regulate the functioning of and impose certain obligations on civil society organizations and the non-profit sector, more generally, as a counter-terrorism measure aiming at preventing or curbing the misuse of non-profit organizations by terrorist groups or individuals, in particular in relation to terrorist financing. The source of such binding domestic regulation, in many States, can be led back to Recommendation 8 of the Financial Action Task Force. As such, Recommendation 8 has served as the textbook example for ways in which soft law standards, which are developed in closed settings by a small number of States and lack an adequate evidentiary basis,⁵⁹ may turn into binding standards at the domestic level and have implications on the functioning of civil society organizations worldwide. Concerningly, the FATF has also “proved to be a useful tool for a number of States as a means of reducing civil society space and suppressing political opposition”⁶⁰ and has caused “incalculable damage to civil society.”⁶¹

⁵⁶ OHCHR, *Guidelines on the effective implementation on the right to participate in public affairs*, para. 96.

⁵⁷ *Ibid.*, para. 98.

⁵⁸ Such information would include documents relating to standard-setting processes, including background documents, draft soft law instruments, etc.

⁵⁹ Recommendation 8, as initially adopted, asserted that the NPO sector was “particularly vulnerable” to abuse by terrorist actors, despite the lack of evidentiary foundation to back such sweeping assumption. Therefore, the Interpretive Note to Recommendation 8 has, in its earlier form, stated that it had been “demonstrated that terrorists and terrorist organizations exploit the NPO sector to raise and move funds, provide logistical support, encourage terrorist recruitment, or otherwise support terrorist organizations and terrorist activity.” Conversely, see e.g. Emile van der Does de Willebois, ‘World Bank Working Paper no. 208, Nonprofit Organizations and the Combatting of Terrorism Financing. A proportionate response’ (2010). See also, FATF, ‘Risk of Terrorist Abuse in Non-Profit Organizations’ (2014).

⁶⁰ A/70/371, para 24.

⁶¹ Lauren Mooney, ‘Counter-Terrorism Measures and Civil Society: Changing the will, finding the way’, CSIS, (March 2018), at 5.

Recommendation 8 aims at ensuring that non-profit organizations⁶² are not exploited by terrorist organizations “(i) to pose as legitimate entities; (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; or (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes, but diverted for terrorist purposes.”⁶³

Whereas FATF standards have in general not undergone meaningful human rights scrutiny, Recommendation 8 has been subject to detailed human rights analysis by diverse stakeholders, including the mandate of the Special Rapporteur,⁶⁴ other human rights mechanisms, and civil society.⁶⁵ These stakeholders expressed serious concerns in respect of the adverse impact of relevant laws and policies on the legitimate functioning of civil society organizations and their contribution to restricting civic space in many jurisdictions. In particular, they noted that a number of the measures States were advised to take in line with Recommendation 8 could seriously limit the ability of NPOs and civil society to operate. Such measures included the obligation to register, to maintain information on the purpose and objectives of NPOs’ activities, to issue detailed annual reports and to maintain records of all transactions. These obligations may be construed as entailing onerous requirements in which case they may function as obstacles to the unimpeded functioning of organizations, if not accompanied by adequate safeguards. Under certain circumstances, they may result in endangering members and staff of such organizations as well as persons affiliated with them, including beneficiaries. In addition, dissuasive sanctions such as the freezing of accounts, removal of trustees, fines, de-certification, de-licensing and de-registration, were applied in many jurisdictions without due regard for the principles of necessity and proportionality, non-discrimination and due process.

In response to these concerns, the FATF revised Recommendation 8.⁶⁶ The amended Recommendation embraces a risk-based approach calling for the application of effective and proportionate measures responding to identified

threats of terrorist financing abuse, only targeting NPOs that have been found at risk. The Interpretive Note to Recommendation 8—also employed as benchmark for the evaluation process—stresses the vital role played by NPOs “providing essential services, comfort and hope to those in need around the world,” as well as the need to ensure that “legitimate charitable activity continues to flourish” and is not unduly restricted by measures taken to counter terrorism.⁶⁷ Importantly, the Interpretive Note emphasizes that relevant measures must be “implemented in a manner which respects countries’ obligations” under the UN Charter and international human rights law.⁶⁸

The responsiveness demonstrated by the FATF to concerns expressed by relevant stakeholders, including the Special Rapporteur’s mandate, is welcomed.⁶⁹ A particularly encouraging development in this context relates to the requirement that assessment proceedings address not only problems caused by under-regulation of the sector but also tackle shortcomings linked to over-regulation, a phenomenon negatively affecting civil society globally.⁷⁰ Acknowledging the potential implications on civil society and humanitarian action, the importance of a human rights-minded evaluation approach, applied consistently throughout FATF and FSRB member jurisdictions is not to be understated. At the same time, due attention needs to be paid to concerns raised by relevant stakeholders that the consistent implementation of the revised rules by governments and evaluators needs further improvement, given in particular the effects of such rules and practices on the perceived and actual legal obligations and practices of States.⁷¹

B. Impact of counter-terrorism soft law on human rights, including civil society actors

The negative effects caused by measures aimed at preventing and countering terrorism and violent extremism on civil society and individuals affiliated with such civil society organizations, including members of groups that such organizations work to support, is well-documented.

62 The FATF defines non-profit organizations as “[a] legal person or arrangement or organization that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of ‘good works’”. See ‘Glossary of the FATF Recommendations’ available at <https://www.fatf-gafi.org/glossary/fatfrecommendations/n-t/>.

63 FATF Interpretive Notes to Recommendation 8, at 53.

64 [A/HRC/40/52](#) and [A/70/371](#).

65 See the Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, submitted to the 23rd session of the Human Rights Council, [A/HRC/23/39](#); and Ben Hayes, ‘Counterterrorism, Policy Laundering and the FATF: Legalizing Surveillance, Regulating Civil Society’, Transnational Institute/Statewatch, available at <http://www.statewatch.org/analyses/no-171-fatf-report.pdf>.

66 Specifically, by removing the labelling of NPOs as “particularly vulnerable” to terrorist financing abuse.

67 Interpretive Notes to Recommendation 8, at 52-53.

68 *Ibid.* at 52.

69 The openness to engagement with external stakeholders on part of the FATF does not seem to be an outlier: the FATF Secretariat has also encouraged an open and robust exchange of views with the current Special Rapporteur, a development welcomed by the mandate holder.

70 See e.g. [A/HRC/40/52](#); Human Security Collective, ‘How Can Civil Society Effectively Engage in Counter-Terrorism Processes?’ (2017), at 3.

71 Submission by the Global NPO Coalition on FATF in contribution to the report of the Special Rapporteur to be submitted to the 74th session of the General Assembly, available at: <https://www.ohchr.org/EN/Issues/Terrorism/Pages/SoftLaw.aspx>.

The Special Rapporteur found that civil society space has been shrinking around the globe in past years and consistently since 2001, noting that it was no coincidence that the proliferation of security measures to counter terrorism and to prevent and counter violent extremism, on the one hand, and the adoption of measures that restrict civic space, on the other, were happening simultaneously.

The mandate of the Special Rapporteur has produced a detailed, empirically-based assessment of the scale of misuse of such laws and policies that identifies relevant trends and patterns in State practice.⁷²

The Special Rapporteur found that civil society space has been shrinking around the globe in past years and consistently since 2001, noting that it was no coincidence that the proliferation of security measures to counter terrorism and to prevent and counter violent extremism, on the one hand, and the adoption of measures that restrict civic space, on the other, were happening simultaneously.⁷³

It has to be noted in this respect that, in many jurisdictions, security and counter-terrorism related regulatory processes suffer from lacking or inadequate implementation of the right to participate in public affairs, including through consultative processes involving civil society. Lack of consultation is commonly defended by invoking an urgency to legislate that requires fast-tracked processes.⁷⁴ This shortcoming leads to the adoption of laws and policies that are not sensitive to the legitimate needs of

civil society organizations and the constituencies these organizations represent, frequently among the most disadvantaged or marginalized in the respective society. In turn, the implementation of such laws and policies exacerbate the problem, weakening civil society and its ability to influence those exercising political power and thereby reducing the chance of relevant processes being participatory in the future.

The consequences on civil society actors are harrowing. Many jurisdictions and contexts see;

- Civil society stigmatized, discriminated against, and subjected to defamatory campaigns and harassment;
- Conduct protected under international human rights law criminalized; and
- The use of national security or counter-terrorism legislation to crack down on civic space and its actors.

The link between assaults on civil society and security frameworks is demonstrated by trends and figures. Since its inception, 66 percent of all relevant communications⁷⁵ sent by the mandate of the Special Rapporteur related to the use of measures aimed at preventing or countering terrorism and violent extremism or broadly defined security-related measures on civil society. This figure underscores the abuse and misuse of counter-terrorism measures against civil society and human rights defenders.⁷⁶ The findings further affirm that targeting civil society is not a random or incidental aspect of counter-terrorism law and practice and highlight the shrinking space for civil society as a structural global challenge.

The lack of an internationally accepted definition of terrorism and terrorist acts led to the adoption of over-broad definitions⁷⁷ in many jurisdictions, with numerous relevant laws encompassing a broad range of conduct, including conduct that is protected under international human rights law.⁷⁸ Such challenges are even more pronounced when it comes to terrorism-related offences, such as financial or material support to terrorism.⁷⁹

⁷² A/HRC/40/52.

⁷³ See also A/RES/68/181.

⁷⁴ Between 2001 and 2018, at least 140 governments adopted counter-terrorism legislation. See Lauren Money, 'Counterterrorism measures and civil society: changing the will, finding the way', CSIS, March 2018. According to Human Rights Watch, at least 47 countries have passed laws relating to foreign terrorist fighters since 2013. See Letta Tayler, 'Overreach: How New Global Counterterrorism Measures Jeopardize Rights', Human Rights Watch (2017).

⁷⁵ It should be noted that these figures reflect only the cases that have been submitted directly to the Special Rapporteur. Methodologically, these numbers likely reflect substantial under-reporting.

⁷⁶ In the last two years, the number has been slightly higher, at 68 percent.

⁷⁷ Under international law, all counter-terrorism laws "must be limited to the countering of offences within the scope of, and as defined in, the international conventions and protocols relating to terrorism, or the countering of associated conduct called for within resolutions of the Security Council, when combined with the intention and purpose elements identified in Security Council resolution 1566 (2004)." See E/CN.4/2006/98, para. 39.

⁷⁸ Similarly, no definitions of violent extremism have been advanced at the international level. This shortcoming once again allows States to adopt highly intrusive, disproportionate, and discriminatory measures with broad and highly problematic human rights implications. While addressing the implications of such laws and policies goes beyond the scope of this briefing paper, they have been addressed by the Special Rapporteur and other human rights mechanisms. See, for example A/HRC/40/52, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism (A/HRC/31/65) and Report on Best Practices and Lessons Learned on How Protecting and Promoting Human Rights Contribute to Preventing and Countering Violent Extremism. Report of the United Nations High Commissioner for Human Rights (A/HRC/33/29).

⁷⁹ Sweeping definitions of "association with," "support," or "assistance" to terrorist organizations have further been highlighted as potentially criminalizing legitimate conduct, including that of organizations carrying out activities that are exclusively humanitarian and impartial in nature. See, for example, ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (31IC/11/5.1.2).

Civil society actors and their activities have often come within the purview of such laws, with negative effects at times also amplified by soft law standards and related processes. For example, FATF Recommendation 5 requires States to address terrorist financing, and the Interpretive Note to Recommendation 5 instructs them that “[t]errorist financing offences should extend to any person who wilfully provides or collects funds or other assets by any means, directly or indirectly, with the unlawful intention that they should be used, or in the knowledge that they are to be used, in full or in part: (a) to carry out a terrorist act(s); (b) by a terrorist organization; or (c) by an individual terrorist.”

While the aim of the FATF is to facilitate the establishing of effective counter-terrorist financing regimes, peer review-based evaluation processes do not seem to engage with overbroad domestic definitions of terrorism and terrorist financing, despite the fact that such definitions inevitably undermine the efficiency of counter-terrorism efforts. The evaluations also do not include a human rights component that would aid in flagging inconsistencies with human rights norms and standards that also negatively impact efficiency of measures and use of resources, including in cases where legitimate activities of civil society fall within the scope of State definitions.⁸⁰

Against this background, we reiterate the need for human rights benchmarking and guidance of similar levels of specificity and comprehensiveness as to the recommendations addressing financial measures, in order to facilitate human rights-compliant implementation.

Incorporating human rights considerations into the evaluation process is also in the interest of improving the efficiency of counter-terrorism action.

States must take a participatory approach to domestic law and policy-making in the transposition and implementation of regional and international soft law standards, particularly when these standards have been adopted through processes that do not meaningfully include the right to take part in public affairs.

VI. CONCLUSIONS AND RECOMMENDATIONS

The past two decades have witnessed the expansion of informal standard-setting fora active in the counter-terrorism space. A mapping of relevant developments shows that such entities play an increasingly influential role in the global counter-terrorism architecture.⁸¹ Their clout frequently points beyond the confines of their membership and mandate (often defining them as non-normative bodies), in light of relevant initiatives having demonstrably shaped international, regional, and domestic processes, including by influencing binding law-making at different levels of governance.

Such role inevitably comes with responsibilities, particularly in view of implications of counter-terrorism standard-setting on the promotion and protection of human rights. Mitigating potential negative impacts calls for strong commitment to the meaningful incorporation and mainstreaming of human rights norms and standards into all stages of relevant activities and processes.

This requires the implementation of the right to take part in public affairs at all levels of governance, including through the meaningful involvement of civil society organizations broadly construed. In fact, insufficiently participatory processes and lack of human rights mainstreaming seem to go hand in hand.

These shortcomings may lead to a series of negative consequences, including the undermining of binding human rights law standards as well as harmful impact on the functioning of civil society organizations impeding the important public interest work they do.

The counter-terrorism soft law terrain could benefit from making relevant processes more participatory with a focus on seeking out international law expertise, with particular emphasis on international human rights law, international humanitarian law, and refugee law. There is also clear added value to consulting with international human rights mechanisms and other relevant experts. **Furthermore, meaningful implementation of the right to participate in public affairs, including through the inclusion of civil society actors, in particular organizations working on issues relating to human rights law, international humanitarian law, and refugee law in the activities and processes of the counter-terrorism soft law standard-setting would go a long way towards improving human rights main-**

⁸⁰ The guidance included in the Interpretive Note in relation to Recommendation 5 similarly lacks any references to human rights norms and standards.

⁸¹ A/74/335.

streaming in this space and further compliance with relevant branches of public international law.

Building on and complementing the Special Rapporteur's report to the 74th session of the UN General Assembly, this paper advances the following recommendations:

Global counter-terrorism architecture

- The various entities which make up the global counter-terrorism architecture are under a devolved obligation to implement the right to take part in public affairs in the context of their operation;
- All counter-terrorism entities should therefore take steps towards making standard-setting and evaluation processes more participatory, including by making them consistently accessible to a diverse representation of States and civil society stakeholders. They should be guided in this respect by relevant international human rights standards, as authoritatively interpreted by international human rights mechanisms, as well as the OHCHR Guidelines on the effective implementation of the right to participate in public affairs;
- In line with international human rights norms and standards, States should take measures aimed at facilitating independent civil society participation in regional and international standard-setting processes and ensure that actors choosing to participate in such processes are not subject to threats, intimidation, or acts of reprisal against them, their next of kin or other associates;
- Counter-terrorism institutions and fora should develop policies and guidelines on facilitating regular, sustained, and effective civil society participation. These policies and guidelines should address means and modalities to be used with the aim of ensuring meaningful civil society engagement. Meaningful engagement of civil society includes granting access to relevant information and the possibility for these actors to make their views known and disseminated among other participants involved in the process;
- Relevant entities should establish civil society focal points and develop processes for granting observer, consultative, or participatory status to civil society organizations, or set up alternative permanent bases for reliable and meaningful cooperation. These should be based on clear, objective, transparent and non-discriminatory criteria, carried out in an accessible manner and should not be overly burdensome for civil society organizations who frequently grapple with shortages of monetary, human, and other resources;
- Counter-terrorism institutions and fora should develop robust assessment and review processes to evaluate how well their policies and guidelines on including civil society participation are working in practice;
- Counter-terrorism institutions and fora should develop gender-sensitive policies and guidelines to enable the effective participation of women and girls in counter-terrorism law and policy development in line with the obligations outlined in United Nations Security Council resolution 1325;
- The production of soft law counter-terrorism instruments should be benchmarked against human rights treaty obligations, and comprehensive, detailed, and relevant inclusion of human rights standards should be consistently applied in counter-terrorism soft norm-making;
- Civil society and human rights experts must be meaningfully and consistently given access to the counter-terrorism architecture and relevant processes whether these are led by United Nations entities or other initiatives, institutions, or fora;
- Counter-terrorism entities should strive towards greater transparency and openness in their work, consistent with the meaningful implementation of the right to take part in public affairs;
- All counter-terrorism entities should explicitly and consistently address the human rights obligations of States in the development of their standard-setting work and integrate such obligations consistently into their activities and resulting outputs; and
- United Nations entities should establish mechanisms to assess if soft law standards developed outside of the UN aegis are compliant with international law, including international human rights law, international humanitarian law, and refugee law, before they are mainstreamed as UN-endorsed standards, to ensure their legitimacy and rule of law compliance.

Financial Action Task Force

- Amend the mandate of the Financial Action Task Force to include among its objectives and functions the task of ensuring that FATF standards are developed and implemented in compliance with international law, including international human rights law, international humanitarian law, and refugee law;
- Meaningfully incorporate human rights norms into the recommendations elaborated by the Task Force;
- Include human rights benchmarking in FATF guidance documents, together with detailed directions for the human rights-compliant implementation of its standards;
- Establish processes to ensure that FATF-style regional bodies implement Task Force standards in compliance with international law and work towards furthering consistency aimed at a human rights-sensitive global application of the standards;
- Ensure that the FATF Secretariat has relevant expertise by adding specialized staff with proven expertise in international human rights law, international humanitarian law, and refugee law. Encourage Task Force-style regional bodies to develop specialized expertise in these areas and provide support in this respect. The FATF is encouraged to consider seeking out and establishing cooperative arrangements with international and regional specialized mechanisms, including United Nations human rights mechanisms, to ensure that the Task Force and Task Force-style regional bodies can benefit from specialized input and advice; and
- Recalling the significant impact FATF activities have on human rights protection, it is imperative that standard-setting and implementation processes are conducted transparently by ensuring the regular, sustained, and effective participation of those affected by relevant laws and policies, including independent civil society actors.