

June 2022



UNITED NATIONS
HUMAN RIGHTS
SPECIAL PROCEDURES

SPECIAL RAPPORTEURS, INDEPENDENT EXPERTS & WORKING GROUPS



THE HUMAN RIGHTS AND RULE OF LAW IMPLICATIONS OF COUNTERING THE FINANCING OF TERRORISM MEASURES

Acknowledgements

This position paper on The Human Rights and Rule of Law Implications of Countering the Financing of Terrorism Measures is presented by Professor Fionnuala Ní Aoláin, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

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The position paper reflects consultations with civil society organizations held from March to May 2022. The Special Rapporteur extends appreciation in particular to the Global NPO Coalition on FATF and the European Center for Not-for-Profit Law, who contributed to the analysis and exploration of elements found throughout the position paper.

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INTRODUCTION

THIS PAPER SETS OUT THE POSITION of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights and rule of law implications of countering the financing of terrorism (CFT) measures implemented pursuant to international CFT norms and standards.

The paper proceeds in three parts. Part I sets out the applicable international legal framework, including CFT-specific instruments such as the International Convention for the Suppression of the Financing of Terrorism, Security Council Resolutions 1373 and 2462, and soft law standards like the Financial Action Task Force Recommendations, as well as the broader relevant norms under international human rights law, international humanitarian law, and international refugee law.

Part II offers a survey of the wide range of CFT measures that States have implemented to date in furtherance of this legal framework, drawing on the mandate's communications to States to date.¹ These measures include, among others, the criminalization of CFT offences under domestic law; the implementation of national risk assessments, including of the Non-Profit Organization (NPO) sector; the establishment of NPO registration and reporting requirements, including restrictions on foreign funding; the enhancement of governmental surveillance powers and information-sharing; and the adoption of enforcement measures, including prosecutions, administrative measures, and targeted financial sanctions.

The Special Rapporteur's mandate expresses deep concern that CFT measures have increasingly been implemented in marked contravention of fundamental international law norms, including CFT-specific obligations and broader international law obligations. The mandate emphasizes in particular the downstream harms of commonly practiced "human rights lite" CFT measures on individuals, groups—especially minority groups—and entities, particularly vis-à-vis the rights to freedom of opinion and expression, freedom of peaceful assembly and association, freedom of religion or belief, due process rights, and family rights. Such entrenched and non-compliant approaches risk contravening the fundamental international law requirements of legality, proportionality, necessity, and non-discrimination, and other binding State obligations under international law, and are ineffective and counterproductive to the very purpose of combating terrorist financing and money laundering. They pose further detrimental effects on broader counter-terrorism efforts, as well as rule of law, sustainable development, and anti-corruption priorities in the long run.

Drawing from this analysis, Part III concludes with specific recommendations directed to Member States, UN counter-terrorism entities, and other key stakeholders.

SCOPE & METHODOLOGY

FOR THE PURPOSES OF THIS POSITION PAPER, the Special Rapporteur limits her observations to the overarching, global trends in national CFT policy and practice, namely to the extent that they raise international law concerns, including under international human rights, humanitarian, and refugee law, pursuant to international treaty law, customary international law, and the general principles of international law.² References to specific domestic CFT frameworks are only intended to be illustrative, not exhaustive. The Special Rapporteur reserves further human rights-related observations on national, regional, and international CFT measures, including as part of the mandate's dedicated review and analysis of national CFT legislation and regulations.

The Special Rapporteur's mandate has commented on CFT-related issues since its establishment,³ and its **thematic focus on CFT has only grown in accordance with the international community's increased attention to CFT**—namely through the work of the UN Security Council and UN counter-terrorism entities, as well as the engagement by the Financial Action Task Force (FATF) and FATF-Style Regional Bodies. The position paper draws on the Special Rapporteur's prior reporting to the General Assembly⁴ and Human Rights Council⁵, the reporting of her predecessors,⁶ as well as the wealth of CFT-related research and analyses performed by other UN entities and international organizations, academics, policymakers, and civil society organizations of national and regional diversity.⁷ The Special Rapporteur's mandate affirms the centrality of the

work of grassroots civil society and humanitarian organizations on CFT in particular, as such organizations enjoy a unique vantage point illustrating how international, regional, and national CFT measures trickle down to the community and individual levels.

The Special Rapporteur looks forward to continuing her positive and constructive engagement with all multilateral entities currently working in the CFT space, including the Counter-Terrorism Committee and Counter-Terrorism Executive Directorate, the UN Office of Counter-Terrorism, and the Financial Action Task Force. She also looks forward to continued engagement with Member States, including through the provision of technical assistance on the development and implementation of human rights and rule of law compliant CFT measures.



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INTERNATIONAL LEGAL FRAMEWORK

CFT-Specific Instruments

International Convention for the Suppression of the Financing of Terrorism

The primary legal basis for combatting the financing of terrorism is the International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention). The Terrorist Financing Convention was adopted in 1999 and entered into force in April 2002. The text of the Terrorist Financing Convention stems from the work of an Ad Hoc Committee, which was established pursuant to General Assembly Resolution 51/210 to elaborate on an international convention for the suppression of terrorist bombings and nuclear terrorism. Although the initial mandate of the Ad Hoc Committee did not include terrorist financing, General Assembly Resolution 51/210 called on States to adopt measures:

*to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering.*⁸

The mandate of the Ad Hoc Committee to elaborate on a convention specific to CFT issues was augmented shortly following the bombings of U.S. embassies in Kenya and Tanzania in 1998. The international community decided at that stage to turn increased attention to the significance of terrorist financing and specifically, the linkages between ostensibly legal financial transfers and illegal terrorist activities.⁹ Initially only four States—the United Kingdom, Sri Lanka, Uzbekistan, and

Botswana—ratified the treaty, but the international community quickly mobilized around the Convention in the aftermath of the terrorist attacks of 11 September 2001. Today, there are 189 States parties to the treaty.

The stated purpose of the Terrorist Financing Convention is for Member States to adopt “effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators.” Most importantly, the Convention obliges States to criminalize terrorist financing offences, to be “punishable by appropriate penalties which take into account the grave nature of the offences.”¹⁰

Article 2 of the Convention defines the perpetrators of terrorist financing offences under the Convention as:

any person [who] by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [terrorist acts].

Terrorist acts comprise any act enumerated in the UN sectoral counter-terrorism treaties listed in the accompanying Annex (the twelve relevant counter-terrorism sectoral conventions and protocols)¹¹ and “[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act.”¹² The Convention thus applies to the financing of terrorist attacks on civilians and non-combatants,

including prisoners of war, captured fighters in non-international armed conflicts, and sick or wounded military personnel.¹³ The Convention defines “funds” broadly to include “assets of every kind, whether tangible or intangible, movable or immovable.”¹⁴

The mental element of intent is the crux of the terrorist financing offence provided for in the Terrorist Financing Convention.¹⁵ Article 2 stipulates that the perpetrator must provide or collect funds “with the intention that they should be used or in the knowledge that they are to be used” to carry out the enumerated terrorist acts. The Convention further clarifies that it is not necessary that the funds were in fact used to carry out the stipulated offence.

While the Terrorist Financing Convention limits the perpetrator of terrorism financing offences to “any person”—“cover[ing] individuals comprehensively” and “contain[ing] no exclusion of any category of persons,” whether public or private persons¹⁶—State financing of terrorism falls outside its scope. However, as the International Court of Justice has determined, State responsibility under the Convention would arise if a State party breaches its obligation “to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism committed by whichever person.”¹⁷ Indeed, the Terrorist Financing Convention requires the implementation by States of additional preventative and remedial measures, including “appropriate measures . . . for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offenses” and investigations into alleged terrorist-financing abuse, with “appropriate measures . . . to ensure that person’s presence for the purpose of prosecution or extradition.”¹⁸ The Convention also stipulates mutual inter-State co-operation and legal assistance, and recognizes the role of financial institutions and other professions in terrorist-financing detection and reporting.

Interface with Existing International Law Obligations

The Terrorist Financing Convention makes clear that any State CFT measures undertaken pursuant to the treaty must be compliant with international law.

Specifically, Article 21 stipulates that “[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.” Article 7 also underlines that criminal jurisdiction must be exercised “without prejudice to the norms of general international law.”

Specific human rights are also explicitly protected throughout the treaty.

For example, Article 17 provides that any individual subject to CFT measures or proceedings pursuant to the Convention “shall be guaranteed fair treatment . . . and applicable provisions of international law, including international human rights law.” Article 9 recognizes the right of detainees to be informed of their right to contact a consular representative.

UN Security Council Resolutions

In addition to the Terrorist Financing Convention, which is binding on its States parties, the international community has established other CFT obligations under the aegis of the UN Security Council. The Security Council first referred to “terrorist financing” in Resolution 1269 in October 1999. Prior to that, starting in the early 1990s shortly after the Lockerbie bombing, the Security Council acting under Chapter VII of the UN Charter called on specific States to “cease . . . all assistance to terrorist groups,” implicitly recognizing the instrumental role of State financing of terrorism.¹⁹

In the weeks following 11 September 2001, the UN Security Council acting under Chapter VII of the UN Charter adopted the **seminal Resolution 1373**, which requires all Member States to criminalize

terrorist financing and to prevent and suppress such acts. Though the Terrorist Financing Convention had not yet entered into force at the time, the Security Council incorporated certain of the Convention's substantive provisions. Among such provisions, the Security Council defined terrorist financing as the "wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts" and required States to criminalize the offence.²⁰

Resolution 1373 did not, however, explicitly adopt the definition of "terrorist acts" from the Terrorist Financing Convention,²¹ which as explained above comprises any act or omission constituting an offence within the scope of the relevant twelve conventions and protocols or "[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."²² **Such definitional ambiguity and potential misalignment raise concerns about the requisite clarity and legal precision under international law.** As discussed below in Section II.A on the Criminalization of Terrorist Financing, the absence of an internationally agreed-upon definition has in turn led to the fragmented adoption of varying definitions of "terrorist acts" and "terrorism" across national legal systems, many of which are overbroad and vulnerable to misuse.

Notably, Security Council Resolution 1373 also goes a step beyond the Terrorist Financing Convention in prohibiting direct State financing of terrorist acts. Paragraph 2 decides that all States:

*shall [r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists.*²³

Security Council Resolution 1373 further obliges States to:

*[p]rohibit their nationals or any persons and entities within their territories from making any funds . . . available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons[.]*²⁴

No humanitarian exemptions or exceptions are stipulated, although the resolution calls for the implementation of measures "in conformity with the relevant provisions of national and international law," underscoring specific obligations under human rights and refugee law, as well as UN Charter obligations.²⁵

Resolution 1373 also established the Counter-Terrorism Committee to monitor its implementation. The Counter-Terrorism Executive Directorate (CTED) was then created to support the work of the Committee, including by assisting Member States in their implementation of the resolution. Since the inception of these entities, CTED has "place[d] an emphasis on requirements relating to criminalization and prosecution of terrorism financing, effective freezing mechanisms, conducting terrorism-financing risk assessments, preventing the misuse of non-profit organizations and alternative remittance systems for terrorism-financing purposes, and detecting and preventing illicit cross-border transportation of currency" in its country assessments.²⁶ A fuller analysis of the multilateral counter-terrorism architecture is available in the Special Rapporteur's report to the General Assembly on the role of soft law on counter-terrorism measures and human rights.²⁷

Since adopting Security Council Resolution 1373, the Security Council has adopted several resolutions reaffirming the obligation to criminalize terrorist financing and to take measures to prevent and suppress specific, emerging terrorist financing threats, including in the following contexts:

- Security Council Resolution 2133 (2014): kidnapping and hostage-taking;
- Security Council Resolution 2178 (2014): alleged foreign terrorist fighters;

- Security Council Resolution 2195 (2014): transnational organized crime; and
- Security Council Resolution 2347 (2017): illicit trade and trafficking in cultural property.

In addition, the Security Council maintains six counter-terrorism targeted sanctions regimes or regimes that include counter-terrorism provisions,²⁸ which are discussed in more detail in the mandate's position paper on *The Impact of Counter-Terrorism Targeted Sanctions on Human Rights*.²⁹ Notably, one of these counter-terrorism sanctions resolutions, Security Council Resolution 2253 went beyond the scope of the Terrorist Financing Convention by stipulating that the Resolution 1373 obligation to prohibit nationals or persons within their territories from terrorist financing extends to making financing or finance-related services available "directly or indirectly, for the benefit of terrorist organizations or individual terrorists for any purpose, even in the absence of a link to a specific terrorist act."³⁰ This broader basis, absent the linkage to specific terrorist acts, reaffirmed FATF Recommendation 5 and the corresponding interpretive note, as described in further detail below.³¹

In 2019, building on the Terrorist Financing Convention and Security Council Resolution 1373, the Security Council adopted the **landmark Resolution 2462 under Chapter VII of the UN Charter**. Resolution 2462 calls on Member States to prevent and suppress the financing of terrorism by, *inter alia*, criminalizing terrorist financing and setting up effective mechanisms to prevent and freeze the funds or financial services of persons involved in or associated with terrorism. In defining the scope of terrorist financing that States must prohibit their nationals or persons in their territories from perpetrating, Resolution 2462—as with Resolution 2253 in the sanctions context—stipulates direct or indirect financing "for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act."³² In addition, Resolution 2462 "strongly urges" States to implement the Financial Action Task Force standards (discussed below).³³ Resolution 2462 also calls for increased governmental financial oversight and regulatory systems, as well as information-sharing by financial institutions.³⁴

Interface with Existing International Law Obligations

Security Council Resolution 2462 reaffirms the obligation of Member States to implement CFT measures in accordance with international law. Operative paragraph 5 requires the criminalization of terrorist financing to be done "in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law"; and paragraph 6 "[d]emands that Member States ensure that *all* measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law."

Paragraph 23 "[r]ecognizes the vital role played by non-profit organizations in national economies and social systems, calls on Member States to periodically conduct a risk assessment of its non-profit sector or update existing ones to determine the organizations vulnerable to terrorist financing and to inform the implementation of a risk-based approach, [and] encourages Member States to work cooperatively with the non-profit sector in order to prevent abuse of such organizations including front organizations by and for terrorists **while recalling that States must respect human rights and fundamental freedoms**[".]"

Paragraph 24 of Security Council Resolution 2462 further qualifies that any CFT-related measures must "take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors **in a manner consistent with international humanitarian law**."

Despite the explicit reference to the continued application of existing international law obligations, some States have sought to fulfill their purported CFT obligations pursuant to Security

Council resolutions at all costs—even when squarely contravening binding international law obligations, including under international human rights law and international humanitarian law. In this context, the Special Rapporteur reiterates her position on the quasi-legislative and quasi-judicial functions of the Security Council and the well-recognized principle of norm construction whereby all Security Council resolutions and any obligations stemming therefrom should be read subject to the confines of the UN Charter and the presumption that it was not the Council’s intention to violate fundamental rights.³⁵

At a fundamental level, the Special Rapporteur has reservations about the creation of Security Council-created CFT norms and obligations that substantively extend beyond the requirements enumerated under treaty law and procedurally digress from the traditional consensus-making procedures at the heart of international treaty-making. Indeed, the Security Council’s increased tendency of enacting “legislation for the rest of the international community”³⁶—often at the exclusion and marginalization of a majority of other States, as well as civil society actors and affected communities—has vast downstream consequences. These normative challenges are addressed in the Special Rapporteur’s 2018 General Assembly report on the normative effects of thematic Security Council resolutions (A/73/361).

UN General Assembly Resolutions

As described above, the UN General Assembly played a central role in the adoption of the Terrorist Financing Convention. Indeed, the General Assembly was the first to use the legal term “terrorist financing,” starting with its Declaration on Measures to Eliminate International Terrorism in 1994.³⁷ Since then, the General Assembly has continued leading multilateral CFT efforts.

In 2006, the General Assembly adopted by consensus the **UN Global Counter-Terrorism Strategy** in which all Member States agreed on a common strategic and operational counter-terrorism approach for the first time. CFT issues were included in the Strategy from the very start. Specifically, the General Assembly resolution states a commitment to “refrain from . . . financing, encouraging or tolerating terrorist activities” and to “cooperate to find, deny safe haven and bring to justice . . . any person

who supports, facilitates, participates or attempts to participate in the financing . . . of terrorist acts[.]”³⁸ The Strategy also “encourages” States to implement the Financial Action Task Force standards.³⁹ Subsequent biennial review resolutions of the Global Counter-Terrorism Strategy have reaffirmed these CFT obligations of Member States, and have also highlighted emerging CFT issues, such as the use of virtual assets and crowdfunding for financing terrorism.⁴⁰

Interface with Existing International Law Obligations

The General Assembly clarified in preambular paragraph 3 of its Plan of Action appended to Resolution 60/288 on the UN Global Counter-Terrorism Strategy that any measures undertaken pursuant to the Strategy “must comply with [State] **obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law and international humanitarian law.**”

Subsequent Strategy reviews have reiterated the obligation to ensure that CFT measures are human rights and rule of law compliant. In its resolution adopted on the Seventh Review of the Global Counter-Terrorism Strategy, the General Assembly recalled that:

*all measures undertaken by Member States to counter the financing of terrorism should comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, and urge[d] Member States, when designing and applying such measures, to take into account, in accordance with Security Council resolution 2462 (2019), the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.*⁴¹

The General Assembly also “reaffirm[ed] the need to fully respect the rights to freedom of expression and association of individuals in civil society and to freedom of religion or belief of all persons” when implementing CFT measures involving NPOs.^{42]}

The General Assembly has also supported the establishment of several new entities over the years to support the implementation of Member State commitments to CFT. In June 2017, the General Assembly established the United Nations Office of Counter-Terrorism (UNOCT),⁴³ and in 2020, it launched the UN Global Programme on Detecting, Preventing and Countering the Financing of Terrorism to support UNOCT’s efforts in CFT in particular.⁴⁴ Following the establishment of UNOCT, the UN Global Counter-Terrorism Compact was also signed by the Secretary-General as a coordination framework among 43 entities, including 40 UN entities.

Financial Action Task Force Recommendations

In parallel to the above developments, new inter-governmental outsource entities have come to the fore and shaped international CFT norms. Of most note is the Financial Action Task Force (FATF), which was initially established in 1989 by OECD States to combat money laundering. As of June 2022, the FATF membership comprised 37 member jurisdictions and two regional organizations. In addition, nine FATF-Style Regional Bodies are FATF Associate Members, which work in conjunction with the FATF to combat money laundering and terrorist financing.

In April 1990, the FATF issued a report with 40 recommendations for combatting money laundering. In the weeks following the attacks of 11 September 2001, the FATF mandate was extended to include the prevention of terrorism financing. The FATF’s work resulted in the issuance of Special Recommendations on terrorist financing in October 2001, which were further revised in October 2004—culminating in the “40+9 Recommendations” on combatting money laundering and terrorist financing. In February 2012, the FATF published further revised Recommendations, fully integrating the Special Recommendations on terrorist financing with those on money laundering. The FATF

Recommendations and corresponding Interpretative Notes have been updated regularly ever since.⁴⁵

The FATF Recommendations encompass a wide range of CFT issues. Of most relevance to the present paper are the following Recommendations and Interpretative Notes:

- **Recommendation 1** recommends that member jurisdictions implement a risk assessment and apply a risk-based approach “to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified”;⁴⁶
- **Recommendation 5** recommends the criminalization of terrorist financing, reiterating the elements of the offence provided for in the Terrorist Financing Convention, but then going further, requiring the criminalization of the financing of terrorist organizations and individual terrorists even absent a link to a specific terrorist act;⁴⁷
- **Recommendation 6** recommends that targeted financial sanctions be adopted pursuant to the Security Council normative framework, including Security Council Resolutions 1267 and 1373;
- **Recommendation 8** recommends that member jurisdictions review and as appropriate, adopt and implement regulations that relate to the subset of NPOs that have been identified as being vulnerable to terrorist financing concerns, “apply[ing] focused and proportionate measures, in line with the risk-based approach” in order to protect such organizations from terrorist financing abuse.⁴⁸ The Interpretative Note to Recommendation 8 defines NPO as “a legal person or arrangement or organisation 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’”;
- **Recommendation 30** recommends that States have designated law enforcement authorities in charge of terrorist financing investigations, including in developing “a pro-active parallel financial investigation” in major cases;
- **Recommendation 31** recommends that “competent authorities should be able to obtain access to all necessary documents and information for use in those investigations, and in prosecutions

and related actions,” including “compulsory measures for the production of records held by financial institutions, DNFBPs and other natural or legal persons, for the search of persons and premises, for taking witness statements, and for the seizure and obtaining of evidence”; and

- **Recommendation 35** recommends that States adopt “a range of effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, available to deal with natural or legal persons,” including NPOs under Recommendation 8, that fail to comply with CFT requirements.

Interface with Existing International Law Obligations

The FATF has clarified in the Interpretative Notes to its Recommendations, as well as related guidance documents, that member jurisdictions must implement CFT measures in accordance with international and human rights law obligations.

The Interpretative Note to Recommendation 6 on targeted financial sanctions related to terrorism and terrorist financing stipulates 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 recognise the rights of innocent third parties.⁴⁹

In response to advocacy pinpointing the human rights deficient, sweeping nature of the original Recommendation 8 to protect against NPO terrorist financing,⁵⁰ the FATF also clarified in its Interpretative Note to Recommendation 8 that “[m]easures to protect NPOs from potential terrorist financing abuse should be targeted and in line with the risk-based approach” and that “[i]t is also important for such measures to be implemented in a manner which respects countries’ obligations under the Charter of the United Nations and international human rights law.”

Despite these recommendation-specific references to international law, the Special Rapporteur reiterates her concerns regarding the broader human rights deficits of the FATF norms and structure, as well as the legitimacy concerns stemming from the role of FATF and other “soft” entities in fast-tracking “soft” standards, including through the gold-plating of FATF Recommendations by the UN Security Council.⁵¹ The mandate is particularly concerned that the fora where international CFT guidance has been designed have been dominated by select States, at the exclusion or relegation of others. The Special Rapporteur observes for instance that the nebulous and indeterminate character of FATF’s legal status and mandate—as an “intergovernmental body” “not intended to create any legal rights or obligations”⁵²—has made it especially vulnerable to abuse,⁵³ compounded by the reality that only a small selection of dominant States enjoy decision-making power in shaping the standards. Indeed, while the nine FATF-style regional bodies have been established in the style of FATF and encompass over 190 member jurisdictions combined, such bodies only participate as associate members without decision-making or voting powers vis-à-vis the FATF standards.⁵⁴

The mandate commends the FATF Secretariat’s efforts to address these structural and other shortcomings, including through its project to analyze and understand better the unintended consequences resulting from the FATF Standards and their implementation—namely de-risking, financial exclusion, undue targeting of NPOs, and the curtailment of human rights (with a focus on due process and procedural rights).⁵⁵ The Special Rapporteur’s mandate looks forward to continuing its positive constructive engagement with FATF and the regional FATF-style regional bodies as they apply lessons learned from this workstream.

Concurrent International Law Obligations

The Special Rapporteur’s mandate reiterates its concerns that the burgeoning “soft” design of CFT standards by the Security Council, FATF, and other entities—absent the traditional consensus required to create international law and often at the exclusion or marginalization of other States, civil society



Photo by Mathias Reding

groups, and affected communities—risks ceding the multilateral space to the opaqueness of the traditional international law-making process and in turn, weakening the international rule of law.⁵⁶

The Special Rapporteur emphasizes that none of the CFT-specific obligations described above may supersede the concurrent international law obligations set out in this section. **It has been the mandate’s consistent position that any measures carried out pursuant to the above CFT-specific instruments must be in accordance with other international law obligations, including specific and well-defined international human rights, humanitarian, and refugee law obligations pursuant to customary international law, international treaty law, and the general principles of law.**⁵⁷ This position aligns with the specific provisions referenced in the text boxes above, which reaffirm the continued international law obligations of States, as well as the jurisprudence to date that recognizes how “the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights” and that any interpretation of obligations pursuant

to Security Council resolutions should be chosen to “avoid[] any conflict of obligations.”⁵⁸

Yet, as alluded to below and enumerated in further detail in Part II, States have increasingly violated existing international law obligations, including under international human rights law, international humanitarian law, and international refugee law, when implementing CFT measures pursuant to international CFT standards. In fact, CFT measures are increasingly being misused, with the CFT agenda invoked as cover to crack down on civic space. This all comes at a serious cost to the very integrity of the international rule of law.

International Human Rights Law

The implementation of CFT measures inevitably raises wide-ranging international human rights law considerations. For instance, CFT-related requirements for NPOs, including onerous financial transaction reporting requirements and restrictions on foreign funding, may directly affect the rights to freedom of association and impede on the capacity and ability to carry out legitimate human rights and humanitarian activities. Enhanced digital surveillance powers implemented for the stated purpose of

combatting terrorist financing, often absent any judicial oversight, impinge on the right to privacy. And listing procedures for terrorist financing perpetrators often raise issues of fair trial and due process rights, as well as broader social and economic rights challenges for those individuals and their families.

The following is a non-exhaustive list of rights and freedoms commonly implicated by CFT measures.

- Freedom of opinion and expression;⁵⁹
- Freedom of peaceful assembly and association;⁶⁰
- Freedom of religion or belief;⁶¹
- Right of minorities;⁶²
- Right to enjoy property, including through financial access;⁶³
- Rights to education and work;⁶⁴
- Equal rights of women;⁶⁵
- Right to freedom from interference with privacy, family, or home, or unlawful attacks on one's honor and reputation;⁶⁶
- Rights to freedom of movement and nationality;⁶⁷
- Right of every citizen to take part in public affairs, and associated public consultation rights;⁶⁸
- Due process and procedural rights, including the right to fair trial, the presumption of innocence, the right to appeal, and a right to effective protection by the courts;⁶⁹ and
- Right to an effective remedy.⁷⁰

These rights and freedoms are protected under customary and treaty law, including pursuant to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as regional human rights treaties. The UN Charter recognizes that in the event of a conflict between international agreements, the obligations under the UN Charter—including the “universal respect for, and observance of, human rights and fundamental freedoms”—prevails. Further, pursuant to Article 2 of the ICCPR and ICESCR, States parties are under a duty to give domestic legal effect and to take deliberate, concrete, and targeted steps to respect and ensure the Covenants’ rights to all individuals within their territory or subject to their jurisdiction, regardless of

nationality or statelessness.⁷¹ The Covenants thus establish obligations to respect, protect, and fulfill.

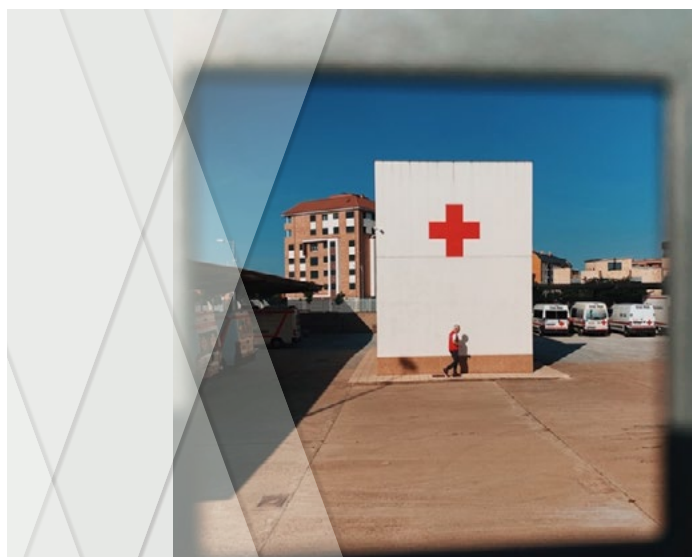
It is well-settled under international law that certain rights and freedoms, including the right to life, the right to be free from torture and other cruel, inhuman or degrading treatment, the right to be free from slavery or servitude, the right to freedom of thought, conscience and religion, and the right to be free from retroactive application of penal laws, are absolute and thus non-derogable.⁷² While other rights and freedoms, including the rights to freedom of expression, association and peaceful assembly, and privacy, may be subject to derogation in times of public emergency, including for specific, empirically-based national security aims, such **rights limitations must meet the objective criteria of proportionality, necessity, legality, and non-discrimination, as required under international law.** The Special Rapporteur’s mandate reaffirms in this context the prior mandate-holder’s position that “[t]he onus is on the Government to prove that a threat to one of the grounds for limitation exists and that the measures are taken to deal with the threat.”⁷³ Any interference “must not impair the essence of the right.” In other words, the distinction “between right and restriction, between norm and exception, must not be reversed.”⁷⁴

Proportionality and necessity are well-settled international law requirements whereby certain fundamental rights and freedoms may be restricted by the State for the purpose of national security, public order, or other protective functions, but only if the limitation is necessary and the least restrictive measure available to meet the stated aim. Proportionality is embedded in, among other instruments, the ICCPR and ICESCR, and further enumerated in the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR.⁷⁵ The proportionality requirement has been authoritatively interpreted by the UN Human Rights Committee, including in the context of limitations to the right to freedoms of opinion and expression and the right of peaceful assembly.⁷⁶ **The Special Rapporteur’s mandate takes the position that proportionality is not only a well-settled requirement under international human rights law, but also a general principle of law that has been widely adopted in the jurisprudence of national (civil and common law) courts, as well as regional and international**

courts and tribunals, across diverse areas of law, including international human rights law, investment and trade law, humanitarian law, and criminal law.⁷⁷

In addition, the requirements of legality and non-discrimination—also general principles under international law—are non-derogable even in times of public emergency.⁷⁸ The requirement of legality requires any restriction on rights to be “determined by law,” encompasses both the criminalization of conduct and the sanctions thereof (the principles of *nullum crimen sine lege* and *nulla poena sine lege*), and comprises one of the most important tools to safeguarding individual rights and fundamental freedoms from arbitrary interference of the State. As the prior mandate-holder expressed, “[t]here is no need in this process for a balancing between human rights and security, as the proper balance can and must be found within human rights law itself. Law is the balance, not a weight to be measured.”⁷⁹

The principles of equality and non-discrimination are similarly hardwired into the international human rights framework and constitute indispensable legal norms to protect individuals and vulnerable groups from discriminatory treatment—whether as a victim of terrorism or victim of counter-terrorism.⁸⁰ Specifically, the fundamental principle of non-discrimination entitles “all individuals within [a State’s] territory”—regardless of nationality or immigration status—all rights and freedoms “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁸¹



Preliminary International Human Rights Law Considerations

- Are the offences of terrorism and terrorist financing defined under criminal law with sufficient precision and clarity, and circumscribed to prevent arbitrary or discriminatory enforcement?
- Is the exercise of fundamental rights and freedoms, such as the rights to freedom of expression, freedom of association and peaceful assembly, privacy, and work, restricted by the CFT law, regulation, or measure, either on its face or in practice? Is the stated aim of such restrictions legitimate and publicly available? Is the restriction the least intrusive means possible and proportionate to the benefit obtained in achieving the legitimate aim?
- Are individuals or entities targeted by the CFT measure on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status?
- Was civil society meaningfully and regularly included in the design and implementation of the CFT law, regulation, or measure?
- Are NPOs and their operations restricted, for instance through the application of NPO registration and reporting requirements that have the stated purpose of combatting terrorist financing? Are the CFT measures restricting NPO activity **absolutely necessary** to achieve the desired objective of reducing terrorist financing, and do they apply only to the organizations identified as vulnerable to terrorist financing abuse?
- Is the scope of available CFT investigative, surveillance, and adjudicatory powers narrowly tailored to the actual threat of terrorist financing? Are there avenues for independent, effective oversight and review?
- Are the sentences and administrative penalties for CFT offences, including asset seizure orders, proportionate to the severity of the alleged offence—including with consideration of the downstream harms to affected family members and communities?

International Humanitarian Law

CFT measures often interface with international humanitarian law in situations of international or non-international armed conflict. Today armed groups designated as terrorist organizations continue to engage in non-international armed conflicts and exercise significant control over entire populations and territorial expanses, including civilians, non-combatants and in certain circumstances, combatants, who may be in need of urgent humanitarian and medical assistance, as well as broader community development and peacebuilding programming.

As recognized above, the UN Security Council and General Assembly have recognized the potential effect of CFT measures on exclusively humanitarian activities. Humanitarian organizations too have observed that CFT measures may impinge on humanitarian action. For instance, humanitarian actors and medical care providers may be prosecuted and penalized for providing services like medical care and food delivery in regions where designated terrorist groups are in control or present.⁸² Donor agreements with implementing partners may also be suspended due to donor conditionality or host State provisions restricting operations in such areas.⁸³ Or financial institutions may delay or block the transfer of funds where the funds are being transferred to conflict-affected areas.⁸⁴

The Special Rapporteur emphasizes that neutral, independent, and impartial humanitarian assistance—and the requisite financing thereof—is a core component of protected activity under international humanitarian law. The CFT-specific obligations enumerated in the prior section therefore cannot supersede IHL obligations regarding such assistance.⁸⁵ Such IHL obligations stem from several international instruments, most notably the Geneva Conventions of 1949 and their Additional Protocols, and some are now found in customary international law. Such obligations include the obligation to protect the ability of impartial humanitarian organizations, such as the International Committee of the Red Cross, to carry out humanitarian functions.⁸⁶ The obligation not to divert or obstruct medical and humanitarian assistance applies to all parties to the conflict, including terrorist organized armed groups, and may in certain circumstances extend

to the provision of relief by such groups in territorial control.⁸⁷ The protection of engagement for humanitarian purposes is also protected under the UN Charter and ICCPR.⁸⁸ The Security Council similarly recognizes that all parties to armed conflicts must fully comply with their obligations under international humanitarian law to respect and protect humanitarian activities and personnel.⁸⁹

As clarified by the International Committee for the Red Cross, protected humanitarian assistance encompasses any function aimed at ensuring that a household or community “is able to cover its essential needs and unavoidable expenditures in a sustainable manner” and that “persons caught up in an armed conflict can survive and live in dignity.”⁹⁰ Such protection activities include all activities “aimed at ensuring full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law, including international humanitarian law, international human rights and refugee law”⁹¹ and necessarily encompass the financing that makes such assistance possible. Thus food, medical assistance, and other services offered for the benefit of civilians and persons affected by situations of armed conflict and/or in areas under control of non-State armed groups must not be contravened by CFT regulations or measures.

Preliminary International Humanitarian Law Considerations

- Is the State involved as a party to an ongoing armed conflict?
- Is the State in a post-conflict situation?
- Does the CFT law, regulation, or measure apply to humanitarian actors and related service providers operating in a situation of international or non-international armed conflict?
- Are designated terrorists or terrorist groups present where the humanitarian organizations are present?
- How have humanitarian organizations in the country settings under consideration and other stakeholders been consulted in the design, delivery, and assessment of the CFT measure?

- Are standing exemptions, derogation systems, temporary authorizations, or specific licenses for humanitarian and/or human rights activities available? What restrictions are in place for such procedures? How accessible and transparent are the procedures?
- Are there independent forms of oversight and due process safeguards in place?

International Refugee Law

CFT measures may also implicate State international refugee law obligations. For instance, the designation of certain States, entities, or individuals as high risk for terrorist financing may restrict the ability of refugees to access formal banking services or remittances, or the penalization of CFT offences may lead to the reassociated transfer or extradition of terrorist financing perpetrators.⁹²

The principal legal instrument governing protection for refugees is the 1951 Convention Relating to the Status of Refugees (Refugee Convention), which applies to all “refugees,” as defined in Article 1(2) as follows:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The Refugee Convention sets out basic standards for the treatment of refugees, including the rights to property, work, education, social security, and access to courts. The 1951 Refugee Convention also sets out the well-settled prohibition of **non-refoulement**, which stipulates that an individual may not be expelled or otherwise removed if there are reasonable grounds to believe that their removal will expose them to a real risk of torture or other cruel, inhuman or degrading treatment.⁹³



Photo by Markus Spiske

This requirement is also stipulated in the 1967 Protocol to the Refugee Convention,⁹⁴ as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and by other international and regional human rights bodies,⁹⁵ and is today **well-recognized as a norm of customary international law**.⁹⁶ The only recognized exception to the principle of non-refoulement is where “there are reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”⁹⁷

Preliminary International Refugee Law Considerations

- Does the CFT measure restrict the movement of refugees?
- Does the CFT law, regulation, or measure affect the ability of refugees to find work, education, and housing or to own property?
- Does the CFT law, regulation or measure affect the ability of refugees to access financial services, including mainstream banking services and also formal, cross-border remittances?
- Are there independent forms of oversight and due process safeguards in place for CFT measures affecting refugees?

2

OBSERVATIONS ON COMMON CFT PRACTICES



Photo by Davi Mendes

THE SPECIAL RAPPOREUR'S MANDATE REITERATES that, as reaffirmed in the CFT-specific instruments enumerated in Part I, Member States must ensure that “all measures taken . . . to counter the financing of terrorism . . . comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law.”⁹⁸ The **obligation to comply with international law extends to any and all CFT measures, and at every stage therein**—from the initial processes of drafting and debating legislative, executive, and regulatory measures, to the subsequent enforcement and review of such measures. As further affirmed by the UN General Assembly in the Seventh Global Counter-Terrorism Review, it is vital to “seek[] concrete solutions to mitigate the potential negative impacts when counter-terrorism legislation and other measures are applied contrary to international law, which may harm collective counter-terrorism efforts and infringe upon human rights, including by impeding the work and endangering development, peacebuilding and impartial humanitarian action and civil society.”⁹⁹

The mandate has closely monitored the adoption and consequent effects of State counter-terrorism measures, including measures intended to combat the financing of terrorism.

Snapshot of UN Special Procedures Communications on National Legislation or Regulations

(listed in reverse chronological order)

- **Israel** (OL ISR 6/2022): Counter-Terrorism Law No. 5776-2016 of 2016 grants the Ministry of Defense authority to designate as a “terrorist organization” an organization that, *inter alia*, finances an already-designated terrorist organization.
- **Tunisia** (OL TUN 4/2022): Draft decree revising Decree No. 88 of 2011 imposes limitations on NPO activities, expansive reporting requirements, foreign funding approvals, and involuntary dissolution without a court order.
- **Qatar** (OL QAT 1/2022): Law No. 20 of 2019 Promulgating the Law on Combatting Money Laundering and Financing of Terrorism provides for expansive NPO registration requirements, surveillance powers, and broad administrative penalties.
- **New Zealand** (OL NZL 1/2021, Reply on 8 March 2022): Counter-Terrorism Legislation Act 2021 prohibits the financing of terrorism, including the reckless provision of material support to entities known to participate in terrorist acts.
- **Thailand** (OL THA 7/2021, Reply on 22 December 2021; OL 5/2021, Reply on 1 October 2021; OL THA 2/2021): Draft Amendment of the Anti-Money Laundering Act, Cabinet Resolution on eight AML/CFT principles, Draft Act on the Operations of NGOs, and Draft Act on the Promotion and Development of Civil Society Organizations all introduced burdensome financial and reporting obligations for NPOs, broad ministerial oversight, and extensive penalties.
- **Zimbabwe** (OL ZWE 3/2021, Reply on 20 December 2021): 2021 Private Voluntary Organisations Amendment Bill seeks to bring Zimbabwe into compliance with FATF recommendations including by, *inter alia*, providing for the designation of high-risk NPOs and restrictions based on political activities.
- **Venezuela** (OL VEN 8/2021): Administrative Ruling No. 42.116 creates a new “Unified Registry of Obligated Entities with the National Office to Counter Organized Crime and Terrorism Financing,” requiring all NPOs regardless of risk to register and satisfy uniform requirements, with unregistered NPOs vulnerable to dissolution.
- **Egypt** (AL EGY 6/2021): Law 149/2019 and its 2021 By-Law limits civil society’s access to funding and grants the executive broad supervisory control and discretion to regulate and dissolve civil society organizations.
- **Belarus** (OL BLR 2/2021, Reply on 17 May 2021): Law No. 14-Z and Decree No. 153-1 grant the Ministry of Justice authority to establish expansive reporting requirements for all public associations and foundations and stipulates liquidation as a possible sanction, among others, for NPOs that fail to comply with foreign aid restrictions or that participate in the activity of an unregistered association.
- **Turkey** (OL TUR 3/2021, Reply on 16 April 2021): Law No. 7262 on Preventing Financing of Proliferation of Weapons of Mass Destruction introduces restrictions and oversight rules for NGOs, business partnerships, associations, and fundraising.
- **Nicaragua** (OL NIC 3/2020): Law No. 977 revises the Penal Code to broaden the scope of terrorist financing offences and introduces new regulatory standards for NPOs.
- **Saudi Arabia** (OL SAU 12/2020): 2017 Law on Combatting Crimes of Terrorism and its Financing authorizes financial data monitoring and asset seizure, *inter alia*, for terrorist financing.
- **Serbia** (AL OTH 71/2020, Reply on 15 December 2020): Serbian Administration for the Prevention of Money Laundering’s request sought from Serbian commercial banks “all local and foreign currency accounts and transactions for 20 individuals and 37 NPOs,” including human rights and humanitarian organizations and journalists.

As described in this Part, common CFT measures to date include the criminalization of CFT offences under domestic law; the implementation of national risk assessments, including of the NPO sector; the establishment of burdensome NPO registries and reporting requirements, including restrictions on funding by sources; the enhancement of governmental surveillance powers, as well as domestic and international information-sharing; and the adoption of enforcement measures and penalties, such as prosecutions, administrative measures, and targeted financial sanctions. Private actors like financial institutions have also undertaken measures in the name of purported CFT obligations.

This Part analyses each category of common CFT measures in turn, pinpointing **the areas particularly vulnerable to human rights abuse** and offering recommendations for strengthening human rights mainstreaming. The mandate offers three overarching preliminary observations:

First, CFT measures are rarely implemented with the requisite due diligence and ex ante impact assessments to satisfy international law obligations, particularly the objective requirements of necessity, proportionality, non-discrimination, and legality.

Second, the misuse of CFT measures to discriminately target civil society actors and minorities has come at a severe cost to the most fundamental civil, political, economic, social, and cultural rights and structurally, to the very integrity and fabric of the international rule of law.

Third, the implementation of CFT soft law norms that were developed outside traditional multi-lateral fora—often in spaces where a select few dominant States determined the standards for the rest of the international community—introduces serious legitimacy challenges.

Criminalization of Terrorist Financing

The defining trend in the national implementation of the international CFT framework has been the criminalization of terrorist financing offences under domestic law. A core challenge in this respect lies in the lack of a universally accepted, precise definition of “terrorism.” Although the Terrorist

Financing Convention defines terrorism—or at least the terrorist acts that the terrorism-financing offence stipulated under the treaty may contribute to¹⁰⁰—UN Security Council and General Assembly resolutions on CFT have failed to adopt a common, consistent definition, thus reflecting continued Member State disagreement on its precise contours.

This mandate has repeatedly highlighted how the absence of a universally agreed upon definition of terrorism remains the source of rampant human rights abuse, the closing of civic space, and other challenges at the national level.¹⁰¹ The Security Council’s additional references to “terrorism in all forms and manifestations,” including in Security Council Resolution 2462,¹⁰² risks opening the door to abuse. Moreover, national attempts to criminalize the financing of “violent extremism” create further definitional challenges since “violent extremism” like “terrorism” similarly lacks any international definitional consensus. In this context, the mandate underscores the model definition of terrorism recommended by the first Special Rapporteur Martin Scheinin and reiterates concerns about the ongoing creep of securitization into the “pre-criminal” space, including through the criminalization of “violent extremism” or more frequently in practice “extremism,” as evidenced for instance in the Commonwealth of Independent States.¹⁰³

Putting aside the definitional issues surrounding the underlying act of terrorism, there is also broad divergence in the definition of “terrorist financing” as adopted by States. The mandate notes the breadth of the term “funds” in the Terrorist Financing Convention and recognizes the need to encompass the full range of the potential act of financing, especially amidst a changing technological landscape that increasingly includes virtual assets and crowdfunding. However, such new technologies also introduce new challenges, particularly vis-à-vis fundamental rights to privacy and data protection, as discussed further in Section II.D below.

The Special Rapporteur also underscores that the requisite mental element under the Terrorist Financing Convention is the specific intent that the funds be used or knowledge that they will be used to carry out a terrorist act.¹⁰⁴ As intended at the time of the drafting of the Terrorist Financing Convention, the qualification that the requisite intent be

“unlawful[]” in addition to “willful[]” was added in order “to cover the possibility that a donation might have the unintended result of funding terrorism when an organisation has both peaceful aims (health services) and terrorist activities.”¹⁰⁵

The Special Rapporteur’s mandate observes that, in contrast, the Security Council has stipulated much broader definitions of terrorist financing offences, including the direct or indirect financing of “terrorist organizations or individual terrorists for any purpose.”¹⁰⁶ In turn, States have adopted national CFT laws with a wide range of mental elements, including strict liability or reckless or negligent terrorist financing offences, which go beyond the minimum intent or knowledge threshold set by the Terrorist Financing Convention.¹⁰⁷

The Special Rapporteur cautions against vague, imprecise or overbroad formulations of the definition of terrorist financing, which may be expansively and arbitrarily applied to criminalize and penalize protected, non-violent conduct and groups, such as human rights defenders, humanitarians, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists, and the media.¹⁰⁸ Vague definitional frameworks under criminal law contravene the fundamental requirement of legality, and open the door to serious human rights abuse, especially vis-à-vis the rights of expression and opinion, association and peaceful assembly, and religion and belief.

As the Special Rapporteur has previously documented, the overly broad definitions of terrorist financing offences risks targeting families, including women and children, with potentially devastating **direct and indirect impacts on fundamental economic and social rights.** For instance, pursuant to the Netherlands’ criminalization of terrorist financing, Dutch authorities have brought cases concerning families’ attempts to transfer money to women and children in camps in Northeast Syria. In one case, parents were penalized for sending money to their daughter in Syria whose husband was a sanctioned individual. Defense counsel asserted that they had “no reason to think that [the] daughter would use the money for anything other than for setting up an escape to the Netherlands, necessary living expenses of her children and necessary

Communication Spotlight

In January 2022, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Working Group on Arbitrary Detention; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on minority issues; Special Rapporteur on the right to privacy; and Special Rapporteur on freedom of religion or belief jointly issued OL NZL 1/2021, which assesses the international and human rights law compliance of New Zealand’s Counter-Terrorism Legislation Act 2021.

The mandate holders raised human rights concerns regarding, *inter alia*, section 10 of the Act, which extended the criminalization of terrorist financing from the collection of funds for, to the provision of material support to, the commission of terrorist acts or for use by entities known to carry out or participate in such acts. The definition of the offences includes the absence of “lawful justification nor reasonable excuse,” which lacks the requisite legal precision under international law and risks criminalizing and chilling protected humanitarian and human rights activities in conflict regions. The provision also introduces the *mens rea* requirement of recklessness, which the mandate holders found might inappropriately extend liability to persons or organizations lacking any knowledge of criminal or terrorist links, “but whose family loyalties, charitable instincts, naivete, or bad luck render them connected, however unwittingly and indirectly, to terrorist acts or organizations.”

medical care.”¹⁰⁹ Women may be especially vulnerable in this regard as they may have less access to information including knowledge of a spouse’s or family member’s activity or may not be in a position to challenge such behavior even where it is known.¹¹⁰

Overbroad CFT definitions may also have a particularly disproportionate impact on NPOs. The Special Rapporteur has identified instances where NPO leaders and members rightly fear that criminal prohibitions against terrorist financing are so broad and vague that they will end up being sanctioned for carrying out their legitimate activities, even when they have taken every feasible precaution to avoid the provision of indirect support to terrorist groups.¹¹¹ The ripple-on effects can be extensive. For instance, upon Israel's designation of six Palestinian civil society organizations as "terrorist organizations," the organizations' funders reportedly delayed their financial contributions to those organizations¹¹² and members of the organizations were subject to travel restrictions.¹¹³ There the applicable CFT law defined a "terrorist organization" to include a body of persons that directly or indirectly assists a designated terrorist organization, including by financing it—where there is a "substantial or ongoing contribution" to or "substantial affiliation" with the organization.¹¹⁴

In addition, humanitarian actors operating in conflict zones, have been precluded from delivering core humanitarian assistance due to the serious risk of criminal liability, including for incidental transactions and logistical arrangements intended to provide humanitarian assistance and protection to civilian populations.¹¹⁵ Such obstruction of the legitimate activities of NPOs may constitute violations of the fundamental rights to freedom of association, freedom of expression, and the right to work and development, among others.

For these reasons, precise definitions for both "terrorism" and "terrorist financing" are obligatory, in accordance with the objective criteria of legality, necessity, proportionality, and non-discrimination. States should repeal overly broad legal provisions for terrorist financing, including under PCVE laws, to ensure international law compliance.

National Risk Assessment

The Special Rapporteur has previously reported how in the aftermath of 11 September 2001, the international community generally took a blanket approach to counter-terrorism measures, under a zero-risk imperative that left no room for determining the necessity and proportionality of such

measures.¹¹⁶ Today, many States continue to take a risk-avoidant CFT approach, absent any empirical basis. Where States have performed national risk assessments, the assessment reports and findings are often not readily available in the public domain, making it difficult for external parties to assess the adequacy of the assessment done.¹¹⁷ The Special Rapporteur highlights in this regard the incredibly complex social challenges of assessing risk in the first place, and the dangers documented in the field of criminal justice of risk assessments superseding the rule of law and replacing traditional due process safeguards.¹¹⁸

The mandate is particularly concerned by the undue focus on combatting purported terrorist financing risks posed by NPOs. The mandate has documented the increasing adoption of sweeping CFT-related restrictions on the NPO sector absent country-specific, empirical risk assessments of the sector. As the FATF recently concluded, "most countries are not yet conducting adequate risk assessments of their NPO sector [pursuant to Recommendation 8]."¹¹⁹ The UN Counter-Terrorism Implementation Task Force Working Group on Tackling the Financing of Terrorism has cautioned, "[i]t is important to be realistic about the actual use of this sector for terrorism financing. As a percentage of the total NPO financial flows, [terrorism funding]-related funds are very small."¹²⁰ The FATF similarly found in a 14-country survey that "the abuse of the NPO sector by terrorist entities is, in the context of the global NPO sector, a low-probability risk."¹²¹ In the mutual evaluation report of Saudi Arabia, MENA FATF found the use of CFT legislation appeared to be used to "divert attention and resources to specious cases from more important cases of terrorism financing."¹²² **In this regard, the Special Rapporteur observes that more attention should be placed on empirically documented cases of terrorist financing outside the NPO sphere, including in situations where States and UN entities may themselves be vulnerable to diversion.**

The mandate cautions against the baseless and disproportionate targeting of the NPO sector under the cover of vague CFT risk assessments, reiterating the call by the Special Rapporteur on freedom of association and peaceful assembly for "sectoral equity, noting that commercial companies and other

entitles have been abused for terrorist purposes.”¹²³ The Special Rapporteur reiterates the important role that properly performed risk assessments play in addressing the ongoing challenges stemming from *overregulation* of the NPO sector in particular.¹²⁴ The absence of an adequate risk assessment paired with overregulation opens the door to the arbitrary and disproportionate targeting of NPOs—thus impinging on the protected rights to freedom of opinion and expression and freedom of association and assembly.

Where risk assessments are performed, the mandate emphasizes that comprehensive, transparent, empirically-based, inclusively-performed, and human rights-centered risk assessments are necessary to ensure human rights and rule of law compliance. Otherwise, a State will not be able to

meet the requirements under international law of necessity, proportionality, and non-discrimination as it will neither be able to identify the sources and causes of terrorism-financing risks nor understand how to mitigate them in actuality. Procedurally, an effective and human rights-compliant risk assessment of the NPO sector requires adequate and meaningful NPO engagement and public consultation, particularly with a geographically and substantively diverse range of NPO, including women and youth-based organizations. Local communities and community-based organizations should be centered in consultative processes, with foreign NPOs playing a supporting role.¹²⁵ The Special Rapporteur commends in this regard the implementation of risk assessments by formal partnership of government and NPO actors.



Photo by Christine Roy

Communication Spotlight

In December 2021, the Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on the promotion and protection of human rights while countering terrorism issued OL ZWE 3/2021, which assesses the international human rights law compliance of Zimbabwe’s 2021 Private Voluntary Organizations Amendment Bill.

The mandate holders expressed concern that, in an attempt to implement FATF Recommendation 8, the Bill introduces registration and reporting requirements for designated “high risk” private voluntary organizations—without providing any objective criteria for or specificity of the risk assessment process. They warned that the lack of clarity gave state authorities “an overly broad margin of discretion to unduly interfere with the right to freedom of association” and could be vulnerable to misuse through unfair treatment or harassment of NPOs, including those working on issues of governance and human rights.

Good Practice Spotlight

In Tunisia, a formal partnership of state institutions and local NPOs updated the State’s sectoral risk assessment, with the guidance and expertise of a formal consortium comprising Al Kawakibi Democracy Transition Center, Human Security Collective, Greenacre Group, International Center for Not-for-Profit Law and European Center for Not-for-Profit Law, resulting in Tunisia being rated fully compliant with FATF Recommendation 8.^{126]}

Such consultative processes are in line with the right of every citizen to take part in the conduct of public affairs¹²⁷—a right that “lies at the core

of democratic government based on the consent of the people and in conformity with the principles of the [ICCPR].”¹²⁸ Security Council Resolution 2462 confirms this obligation of Member States to “work cooperatively with the non-profit sector in order to prevent abuse of such organizations including front organizations by and for terrorists, while recalling that States must respect human rights and fundamental freedoms.”¹²⁹ The Special Rapporteur’s mandate emphasizes the utility of shadow risk assessments of the NPO sector led by local NPOs, where a sectoral risk assessment is either outdated or not being conducted and/or where formal State-NPO collaboration is not plausible.¹³⁰ The mandate also underlines the importance of establishing formal avenues for civil society and the general public not just to provide inputs to risk assessments, but also to review and challenge the findings of State assessment reports.¹³¹

The inclusion of civil society is not just important as a matter of international law, but for purposes of effective and inclusive CFT policy. There is mounting evidence that on the one hand, “NPOs do not have sufficient information on the existence of a particular segment within the sector that is at higher risk of being abused for TF, or whether activities involving TF vulnerabilities have been identified” and on the other hand, “NPOs have relevant information on measures taken by the sector to mitigate risk of abuse for TF— for example, due diligence practices and participation in self-regulatory systems—that has not been shared with their national authorities.”¹³² The requisite civil society participation extends to the design, delivery, and assessment of the CFT measures discussed below, in line with right to participate in the creation of the legal framework that governs and impacts the sector.

NPO Registration and Reporting Requirements

While the mandate recognizes that States are responsible for setting up the necessary regulatory framework to protect NPOs from terrorist financing abuse, and such regulatory measures may include NPO registration and reporting requirements, it is concerned by the growing trend of States adopting sweeping and politically motivated NPO requirements under the guise of CFT. Before turning to

the unique challenges raised by misuse of CFT measures to crack down on civil society, the Special Rapporteur observes that the interface of CFT measures with civil society must be situated within the broader trend in recent years of overregulation of civic space. As documented in the mandate's 2019 report to the Human Rights Council on the impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders, civil society space has been increasingly shrinking around the globe since 2001, and this trend is deeply linked to the expansion of security measures and an unaccountable global counter-terrorism architecture.

Amidst these overarching trends, NPO registration, reporting, and supervision requirements on the basis of CFT have repeatedly been applied absent any discernible linkage to an empirically-based risk assessment—and to *all* NPOs, rather than a subset of NPOs identified as particularly vulnerable to terrorist financing pursuant to FATF Recommendation 8. The trend of over-regulation appears to have only escalated amidst the COVID-19 pandemic.¹³³ Indeed, in some cases, States have been inspired to adopt analogous if not identical measures as other States to target civic space.¹³⁴ According to one study of 729 respondents from 17 countries across Latin America, only 15% of the respondents considered that their respective country had taken measures according to identified risks.¹³⁵

The FATF rightly notes that “[n]ot all NPOs are high risk and some may represent little or no risk at all. It may be possible that existing measures are sufficient to address the current TF risk to the NPO sector identified in a country.”¹³⁶ Yet, as the FATF recently concluded in its stocktake analysis of the unintended consequences project, “there continue to be countries that incorrectly implement the Standards and justify restrictive legal measures to NPOs in the name of ‘FATF compliance’, both unintentionally and, in some cases, intentionally.”¹³⁷ For instance, the stated purpose of Turkey’s Law No. 7262 on Preventing Financing of Proliferation of Weapons of Mass Destruction, which instituted new NPO restrictions and financial requirements and sweeping executive powers and penalties, was

to comply with the FATF Recommendations and Security Council resolutions, including Resolution 1373.¹³⁸ Thailand, Serbia, Albania, and Nicaragua, among other States, have similarly instituted new restrictive NPO registration, reporting, and surveillance requirements seemingly in an effort to meet the FATF standards.¹³⁹

In its stocktake analysis, the FATF described several forms of misapplication of the standards against NPOs, including:

1. intrusive supervision of NPOs;
2. restrictions on NPOs’ access to funding and bank accounts; and
3. forced dissolution, de-registration or expulsion of NPOs.¹⁴⁰

Indeed, CFT NPO restrictions have included the mandatory obligation for all NPOs to hire a compliance officer; the requirement to monitor and share a list of all individual beneficiaries to the State, and record and evaluate all financial transactions in order to report any suspicious transactions; exorbitant registration or permit fees; and the discretion of State authorities to request any and all documentation without justification, often within a very short timeframe.¹⁴¹ Undue limitations on foreign funding and labelling as “foreign agents” have also become commonplace among States purporting to implement NPO restrictions in the name of CFT.¹⁴²

Communication Spotlight

In November 2021, the Special Rapporteur on the promotion and protection of human rights while countering terrorism; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; and Special Rapporteur on human rights defenders issued OL VEN 8/2021, raising concerns regarding an administrative ruling and circular, as well as the broader CFT regulatory framework in Venezuela.

The mandate holders expressed concerns that the administrative ruling's new registration and reporting requirements—including for all NPOs to register, receive a certificate of compliance, and satisfy uniform reporting requirements including the identification of all personnel, members, donors, beneficiaries, and partner organizations, as well as the registration of financial movements—were overburdensome and in some cases, duplicative of existing registration and reporting mechanisms. They cautioned against the blanket, one-size-fits-all approach, absent the requisite distinction based on evidence of risk. They also observed with particular concern that under the new regulatory framework, NPO registration, and therefore legal recognition, could be denied “for reasons of public order and sovereignty.” In this regard they noted the persistently hostile climate in which human rights organizations work in Venezuela and the potential abuse of the regulatory framework to target such organizations and human rights defenders, as well as government dissenters.

The Special Rapporteur's mandate underlines that CFT cannot be used as pretext to implement overbroad, disproportionate NPO operating requirements. Doing so comprises a flagrant violation of international human rights law.

Overbroad NPO registration and reporting requirements can have grave human rights consequences, with devastating downstream effects. In many cases, CFT requirements absent adequate safeguards and tailoring to the specific risk at hand will be vulnerable to arbitrary and discriminatory enforcement, targeting human rights defenders, civil society actors, minority groups, journalists, or anyone with diverse or critical views. As interpreted by the Human Rights Committee in General Comment No. 34, the right to seek, receive, and impart information and ideas of all kinds stated in Article 19 of the ICCPR includes political discourse, commentary on one's own and public affairs, cultural and artistic expression, and discussion of human rights, as well as expression of criticism or dissent. The cumulative impact, not just on the organizations and their members, but also on those individuals' families and wider communities cannot be understated,

particularly vis-à-vis their social, cultural, and economic rights.

Undue registration and reporting requirements for NPO operations may also detract from the ability of NPOs to carry out legitimate activities in line with their mission; may deplete already-limited budgets and administrative resources; and may deter individuals from joining or leading associations altogether—all in potential violation of the rights to freedom of opinion and expression and freedom of peaceful assembly and association, as well as fundamental economic, social, cultural, and other rights central to the NPOs' activities and very existence.¹⁴³ Small, community-based and women-led organizations are particularly at risk under these regulatory frameworks, as they often lack the administrative infrastructure necessary to comply with rigorous reporting and auditing requirements, including data collection capabilities and access to the internet.¹⁴⁴

The labelling of certain NPOs as “foreign agents” or similar terminology based on the receipt of foreign funding also risks undermining and stigmatizing those NPOs and their members going forward.¹⁴⁵ These reputational harms may have lasting effects, potentially undermining public confidence in the work of NPOs and even creating the counterproductive result of incentivizing less transparent ways to transfer and raise funds.¹⁴⁶

Overbroad registration and reporting requirements absent a humanitarian exemption may further interfere with humanitarian aid organizations operating in territories where groups considered “terrorist” or “violent extremist” are active.¹⁴⁷ In Nigeria, for instance, the Borno state, as well as international donors, reportedly promulgated increased restrictions for aid groups operating in the state, including limitations to the financial assistance and material support that could be given to armed opposition groups. In one case, this meant that aid groups were restricted from providing assistance to people who had been kidnapped or in the territory controlled by the designated groups for more than six months.¹⁴⁸ This squarely contravenes international humanitarian law.

Given these potentially detrimental consequences, the Special Rapporteur underlines that, in order to be human rights and rule of law compliant, any

NPO regulatory measure adopted for the purpose of CFT **must be narrowly tailored, necessary, and proportionate** to the empirical reality of the differentiated CFT risk identified and the stated aim of mitigating such risk. The mandate echoes the Special Rapporteur of freedom of assembly's position that "[i]n order to meet the proportionality and necessity test, restrictive measures must be the least intrusive means to achieve the desired objective and be *limited to the associations falling within the clearly identified aspects characterizing terrorism only*. They must not target all civil society associations[.]"¹⁴⁹ FATF has further emphasized that "it is [...] important that the measures taken do not disrupt or discourage legitimate charitable activities and should not unduly or inadvertently restrict NPOs' ability to access resources, including financial resources, to carry out their legitimate activities."¹⁵⁰

Good Practice Spotlight

The Special Rapporteur commends the recent amendment of Nigeria's 2022 Money Laundering (Prevention and Prohibition) Act de-listing NPOs among Designated Non-Financial Institutions—thus, no longer subjecting NPOs to the same onerous registration and reporting obligations.¹⁵¹ This legislative amendment followed an extensive, six-year constructive dialogue between NPOs and government authorities.

NPO registration procedures or national registries must be "transparent, accessible, non-discriminatory, expeditious and inexpensive, allow for the possibility to appeal and avoid requiring re-registration, in accordance with national legislation, and [] in conformity with international human rights law."¹⁵² The mandate notes the limited resources with which many NPOs, especially smaller, community-based organizations, operate and cautions against exorbitant registration fees that may preclude organizations from performing their core activities or operationalizing in the first instance. Moreover, even if an association fails to register, it must be treated equitably, guided by the State's international human rights obligations. As the Special Rapporteur on the right to freedom

of peaceful assembly and of association has clearly stated, "the right to freedom of association equally protects associations that are not registered."¹⁵³ Given the diversity of associations operating and contributing to free civic space and the enabling environment foundational to any effective counter-terrorism effort, the diversity of community and informal associations must be equally protected pursuant to international law.

Subsequent NPO reporting and auditing requirements must be equally transparent, accessible, non-discriminatory, and proportionate. International best practice stipulates that associations should be "free to determine their statutes, structure and activities and make decisions without State interference"¹⁵⁴ Indeed, the right to freedom of association relates not only to the right to form and register, but also guarantees the right of such an association to freely carry out its legitimate activities, including the freedom "to solicit and receive voluntary financial and other contributions."¹⁵⁵ Members of associations should also have the right to due process and to appeal any penalties enacted due to a purported failure to comply with national reporting requirements.

Any NPO supervisory or oversight body should be designed in a way that can effectively facilitate the rights to freedom of association in a professional, consistent, and apolitical manner. This mandate again refers to the Special Rapporteur on the rights to freedom of peaceful assembly and of association, who has stressed that "[a]ny decision rejecting the submission or application must be clearly motivated and duly communicated in writing to the applicant. Associations whose submissions or applications have been rejected should have the opportunity to challenge the decision before an independent and impartial court."¹⁵⁶

Further, the Special Rapporteur emphasizes that any disclosure requirements imposed on NPOs as part of CFT-related procedures must comport with privacy requirements under international human rights law, as well as any applicable regional or national privacy laws. Public disclosure requirements—including with respect to the identity of NPO leaders, funders and beneficiaries, and information supplied to foreign organizations—may implicate confidential and politically sensitive information, unduly impinging on fundamental privacy rights and exposing individuals

to serious risks of reprisals. It is well-settled that protecting such individual information is vital to supporting an enabling environment for civil society. The use and disclosure of any personal data must therefore be narrowly tailored to specific, enumerated purposes and sufficient procedural safeguards should be in place to protect against the unauthorized retrieval and use of such data.

State Surveillance and Oversight

The Special Rapporteur observes that many States have invoked sweeping powers to enact expansive digital and physical surveillance programs for purposes of CFT,¹⁵⁷ sometimes pursuant to FATF Recommendation 31, which stipulates that investigators must have access to “all necessary documents and information” related to these types of offences, and should be able to use investigative techniques like “undercover operations, intercepting communications, accessing computer systems and controlled delivery.” State oversight programs have included physical surveillance, digital surveillance, including of financial transactions and communications technologies, as well as related information-sharing by intelligence agencies.

Communication Spotlight

In October 2021, the Special Rapporteur on the promotion and protection of human rights while countering terrorism; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the human rights of migrants; Special Rapporteur on minority issues; Special Rapporteur on the right to privacy; and Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance issued OL OTH 229/2021, raising concerns regarding two pending EU legislative measures.

The mandate holders cautioned that, in the name of CFT, the EU sought to expand the EU-US agreement on cross-border access to electronic evidence, including the collection, transfer, access, and retention of personal data, including financial information. They cautioned that such measures posed a special risk to the rights of privacy and data protection and raised fair trial concerns with regard to the disclosure of evidence obtained through classified intelligence processes.]

The mandate cautions that State surveillance and oversight measures in the CFT space are particularly vulnerable to human rights abuse as they are typically covert in nature and performed by the State security apparatus, which makes it difficult for other governmental entities let alone the public to ensure accountability.¹⁵⁸ Such programs increasingly utilize vast data sets combined with artificial intelligence and algorithms to identify and flag potentially illicit financial flows.¹⁵⁹ In some cases, States remotely and covertly access personal devices and data, including through microphones, cameras, or GPS-based technologies.¹⁶⁰

CFT surveillance measures most fundamentally limit the right to privacy. Undue interference with the right to privacy risks limiting the free exchange of ideas and can have a chilling effect on the rights to freedom of expression, association, and religion or belief. The Special Rapporteur agrees with the assessment of others that financial data is highly sensitive and high-risk data, revealing not only financial information, but also broader factors like “family interactions, behaviours and habits, and the state of their health, including mental health.”¹⁶¹ As the Special Rapporteur on freedom of religion or belief has reported, the securitization of online activity has provided a wide margin of operation for national authorities against civil society in particular, typically without proper scrutiny or oversight.¹⁶² The UN Special Rapporteur on freedom of expression has noted with regard to government hacking in particular that the technique constitutes an extremely intrusive measure, a “new form[] of surveillance” that also opens the door to States “alter[ing] – inadvertently or purposefully – the information contained therein,” which in turn “threatens not only the

right to privacy [but also] procedural fairness rights with respect to the use of such evidence in legal proceedings.”¹⁶³ Equally concerning is the common practice of information “pulling” where data is taken from servers in other countries without the requisite consent of those States.¹⁶⁴ Such practices squarely contravene fundamental State sovereignty principles.

Overexpansive surveillance programs, especially using algorithms and artificial intelligence, may also be **vulnerable to discriminatory impacts**, targeting minorities and other particular groups. In this context, the Special Rapporteur echoes the concern lodged by Privacy International that “[g]iven the tiny amount of illicit financial flows that are detected, the danger is that using data and analytics in this context may reinforce existing bias in historical data whilst ignoring genuine criminality that doesn’t ‘fit the mould.’”¹⁶⁵



Photo by Mourya Pranay

The mandate recognizes that legally based and rule of law compliant monitoring of financial data and other digital communications, as well as the exchange of information therein, may be necessary for CFT purposes. Further, **States must respond to the emerging risks posed by newer technologies like online crowdfunding, virtual currencies, and prepaid cards.**¹⁶⁶ In this vein, the Security Council has called on States to improve the traceability and transparency of such financial transactions.¹⁶⁷ **However, the mandate also underscores the importance of new banking and financial technologies for enhancing financial inclusion.** Digital financial services can offer affordable and convenient tools for improving economic opportunities and ultimately, livelihood promotion, development, and security—in line with the 2030 Agenda for Sustainable Development and 17 Sustainable Development Goals.¹⁶⁸ The sweeping surveillance of financial transactions, with the corresponding power of de-risking (as discussed in Section II.E below), poses drastic implications for financial access, as well as the right to privacy and a range of associated economic and social rights.

As set out further in the mandate’s forthcoming position paper on digital surveillance, specifically spyware, any surveillance and intelligence-gathering activities implemented in the context of counterterrorism must be implemented in accordance with international law. The mandate echoes the findings of the High Commissioner for Human Rights that any laws authorizing surveillance “need to be sufficiently precise,” circumscribing with “reasonable clarity” any discretion given to government actors, in deciding whom to surveil.¹⁶⁹ In particular, intelligence agencies and law enforcement must determine before launching any such programs whether the proposed, targeted surveillance program is necessary and proportionate to the specified CFT aim. **An ex ante human rights due diligence assessment is procedurally crucial** in this respect, as well as a clear understanding of the precise bounds and limitations of the proposed program. Robust, independent oversight systems to supervise intelligence entities and the implementation of these measures are also necessary—including through the involvement of an independent judiciary and the availability of effective remedies in cases of abuse.¹⁷⁰ As the Special Rapporteur on the promotion and

protection of the right to freedom of opinion and expression has clarified, “national laws must. . . [e]nsure that a surveillance operation be approved for use against a specific person only in accordance with international human rights law and when authorized by a competent, independent and impartial judicial body, with all appropriate limitations on time, manner, place and scope of the surveillance.”¹⁷¹

Even with regard to interferences that conform to the ICCPR, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis. Compliance with Article 17 of the ICCPR requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited. Searches of a person’s home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. So far as personal and body searches are concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.

UN Technical Assistance and Capacity Building

The Special Rapporteur’s mandate observes that many Member States have relied upon the technical assistance and substantive expertise of international organizations, particularly UN counter-terrorism entities, in implementing CFT programming. For instance, since mid-2018, the UN Counter-Terrorism Centre has reportedly delivered over thirty CFT capacity-building workshops, engaging nearly 2,000 officials and stakeholders from over 30 countries.¹⁷² The Special Rapporteur has previously identified structural shortcomings in the UN counter-terrorism

architecture’s demand-driven service model, noting the common failure to adequately mainstream international law and human rights in such programming.¹⁷³

The Special Rapporteur welcomes the ongoing efforts by UN counter-terrorism entities to build their human rights and gender in-house expertise.¹⁷⁴ In this regard, the Special Rapporteur notes the UN Office of Counter-Terrorism’s (UNOCT) recent establishment of a Human Rights and Gender Section. The Special Rapporteur also recognizes that UN counter-terrorism entities have at least acknowledged the need to account for potential human rights and rule of law consequences of their CFT work. For instance, the Special Rapporteur notes that the Framework document for Counter-Terrorism Committee visits to Member States aimed at monitoring, promoting and facilitating the implementation of Security Council resolutions 1373 (2001), 1624 (2005), 2178 (2014), 2396 (2017), 2462 (2019) and 2482 (2019) and other relevant Council resolutions (S/2020/731) and other Security Council and Counter-Terrorism Committee guidance appear to institute international law-compliant benchmarking, including vis-à-vis the legality, proportionality, and necessity of measures, independent oversight and accountability, as well as engagement with NPOs.¹⁷⁵ However, the Special Rapporteur remains fundamentally concerned that the UN Counter-Terrorism Committee and Counter-Terrorism Committee Executive Directorate’s (CTED) own activities in implementation of its mandate lack the very transparency, accountability, and public engagement that it calls for from Member States—namely because its country visit reports are not publicly accessible, with the exception of one report.¹⁷⁶ As the Special Rapporteur has previously identified, this constitutes a key challenge in any formal evaluation of the nature, scope, and adequacy of the human rights advice given to States.¹⁷⁷ It also makes it impossible to assess the compatibility of CTED advice with the guidance and oversight of human rights treaty bodies (e.g., the Human Rights Committee and Committee on Economic, Social and Cultural Rights) and recommendations to States under the Universal Periodic Review process.

Further, although the Counter-Terrorism Committee Technical Guide reaffirms that Member States must implement CFT measures in compliance with their

obligations under international law, including international humanitarian law, international human rights law, and international refugee law, it qualifies the applicability of international law, observing that “international human rights and humanitarian law obligations undertaken by States around the world differ” and that “[s]ome States are not party to certain of the universal human rights or international humanitarian law instruments.”¹⁷⁸ The guide goes on to recognize that “[n]onetheless, human rights are inherent to all human beings and are universal, inter-related, interdependent and indivisible,” that certain rights are non-derogable (with reference to ICCPR Article 4 and Human Rights Committee General Comment No. 29), and that “[s]ome *principles*, such as the absolute prohibition of torture, are considered to have attained the status of *jus cogens*.”¹⁷⁹ However, the Special Rapporteur is concerned that the guide falls short of recognizing the corollary State *obligations* stemming from customary international law, not just treaty law. Further, she cautions against the false equivalence of treaty and customary sources of international law and Security Council resolutions and emphasizes the importance of interpreting obligations stemming from Council resolutions in accordance with the UN Charter and the concurrent international law obligations set out in Part I. Such interpretative restraint on the part of CTED is especially important given its mandate as a special political mission tasked with facilitating implementation of those very resolutions.

The Special Rapporteur has similar international law concerns regarding the Global Counterterrorism Forum’s Good Practices Memorandum for the Implementation of Countering the Financing of Terrorism Measures while Safeguarding Civic Space, the culmination of an initiative on “Ensuring the Effective Implementation of Countering the Financing of Terrorism Measures While Safeguarding Civic Space” jointly led by UNOCT, the Netherlands, and Morocco.¹⁸⁰ The Special Rapporteur positively notes the Memorandum’s recognition of the negative consequences of CFT on civic space, humanitarian action, and fundamental rights, as well as the repeat reference to “applicable obligations under international law, including international human

rights law, international refugee law, and, in the context of armed conflicts, international humanitarian law.”¹⁸¹ However, the Special Rapporteur cautions against generic references to international law absent concrete reference to specific sources of international law—including the treaty and customary international law sources set out in Part I—the State obligations therein, and clear human rights guidance. Otherwise, such binding international law obligations risk becoming vulnerable to obfuscation or circumvention. The result of such obfuscation is to potentially undermine fundamental and binding treaty obligations—an outcome that is neither in the long-term interests of States, nor in the interest of the maintenance of balance in the multilateral system, within which treaty obligations function as an integral part of State practice.

The Special Rapporteur’s mandate reaffirms its position here that **human rights benchmarking should be instituted in the design, delivery, and assessment of any technical assistance or capacity building programming undertaken by UN or other regional entities, with exacting integration of the full range of potential rights affected by CFT measures.** Thanks in large part to the immense, powerful mobilization of NPOs working in this space, the mandate understands that these programs and broader policy guidance to the international community have increasingly recognized the potential impact of CFT measures on NPO activities, particularly vis-à-vis the rights to freedom of association and expression.¹⁸² The mandate commends these efforts and also underlines the importance of ensuring consistent recognition of the wide range of affected rights and freedoms—including among families and communities—especially with regard to economic, social, and cultural rights violations, which are often given less attention.

As with State-specific CFT measures, the mandate also emphasizes the need for meaningful, consistent, and formalized engagement with civil society and independent human rights experts throughout the design, delivery, and assessment of programming of UN counter-terrorism entities.

Good Practice Spotlight

The Special Rapporteur commends the formal space created for civil society by the FATF, including civil society participation at meetings, an online platform for submissions, and public comment periods on proposed changes to amendments or guidance materials. The FATF has also facilitated direct input from civil society organizations to the assessors reviewing a country's implementation of FATF Standards and continues to publish the findings of these assessments.¹⁸³ Some FATF-style regional bodies have followed suit: GAFILAT, for instance, collaborated with the Global NPO Coalition on FATF and now provides civil society leaders formal space during its plenary meetings.¹⁸⁴

Enforcement, Sanctions, and Penalties

Pursuant to the Terrorist Financing Convention, the relevant Security Council resolutions, and FATF Recommendation 35, States have implemented a wide range of criminal, civil, and administrative measures to hold individuals or organizations suspected or convicted of financing terrorism to account. These measures include prosecution or extradition, NPO suspension and dissolution, immigration proceedings, and targeted financial sanctions, all of which raise immediate human rights concerns.

The mandate underscores that the rule of law compliant enforcement of CFT laws is an essential

part of the obligations of accountability for acts of terrorism and violent extremism.¹⁸⁵ At the same time, the mandate recalls that all of the CFT-specific instruments recognize the minimum due process guarantees protected under international law. The Terrorist Financing Convention requires that any person against whom CFT measures are taken “shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.”¹⁸⁶ Similarly the Security Council resolutions and FATF recommendations recognize the importance of safeguarding due process rights when implementing sanctions and penalties for terrorist financing offences. The General Assembly has also stressed the “importance of the development and maintenance of effective, fair, humane, transparent and accountable criminal justice systems based on respect for human rights and the rule of law, due process and fair trial guarantees, taking into account, inter alia, the rights and needs of children, in accordance with applicable international law, as a fundamental basis of any strategy to counter terrorism.”¹⁸⁷

Criminal Proceedings

The Terrorist Financing Convention and Security Council Resolutions 1373 and 2462 oblige States to hold individuals responsible for terrorist financing offences under domestic law, through prosecution or extradition and other non-criminal avenues. Despite these instruments' clear references to international law, including international human rights law, the mandate observes that some States have pursued baseless investigations, surveillance, detentions, prosecutions, and disproportionate sentencing in the name of CFT—often in flagrant contravention of fundamental fair trial and due process rights.¹⁸⁸ The Special Rapporteur is also concerned that proceedings often take place in exceptional courts, or as a result of national security designations for these offences, are subject to restrictive rules on access to evidence, legal representation, and trial by jury (in common law systems). In several cases, **CFT criminal proceedings and apparatuses have been misused as convenient tools to target and silence civil society actors, human rights defenders, and others critical of the State.**¹⁸⁹



Photo by Sasun Bughdaryan

Communication Spotlight

In November 2021, the Special Rapporteur on extrajudicial, summary or arbitrary executions; Working Group on Arbitrary Detention; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment issued AL SAU 14/2021 to follow up on the case of human rights defender Dr. Moussa Al-Garni, a national of Saudi Arabia who was reportedly arrested by intelligence services agents on grounds of financing terrorism and conducting other illegal activities.

According to the information received, he was sentenced to twenty years in prison and a travel ban of the same length, systematically denied adequate medical care, and found dead in his cell in Dhahban prison, Jeddah in October 2021. The mandate holders sought to clarify, among other issues, why Dr. Al-Garni—who was not known for having used or advocating the use of violence—was sentenced to such a severe penalty of 20 years of imprisonment and a travel ban, and what investigations had been performed into his treatment and death. The Government replied in December 2021.

A wide range of human rights challenges arise in the context of the criminal investigations and prosecutions, particularly with respect to fundamental due process and fair trial rights. Due process requires States “to respect all of the legal rights that are owed to a person ... whether concerning the detention, trial or expulsion of a person—[as] required to ensure fairness, reasonableness, absence of arbitrariness and the necessity and proportionality of any limitation imposed on rights of the individual in question.”¹⁹⁰ The “right to be presumed innocent until proved guilty according to law” is a well-settled

non-derogable right¹⁹¹ and essential to upholding due process and the right to a fair trial—as are the minimum guarantees to representation at trial and to trial “without undue delay.”¹⁹² Arbitrary detention is unlawful in all circumstances, and secret detention is *per se* arbitrary.¹⁹³

The Special Rapporteur also emphasizes the importance of ensuring everyone that is charged or convicted of CFT offences is guaranteed “a fair and public hearing by a competent, independent and impartial tribunal established by law,” pursuant to Article 14 of the ICCPR. The tribunal must be independent, free from any direct or indirect influence—crucially, “without personal bias, prejudice or preconceptions[] and in a manner that offers sufficient guarantees to exclude any legitimate doubt of impartiality.”¹⁹⁴ In criminal proceedings, the Human Rights Committee has reaffirmed the importance of a public and oral hearing, and the fact that any lawful restriction limiting access to the public or media must be necessary and proportionate pursuant to international law.¹⁹⁵ Article 14 also refers to the enjoyment of fair trial rights “in full equality”—a fundamental principle applicable to both criminal and non-criminal proceedings.¹⁹⁶

As with counter-terrorism criminal proceedings more broadly, the lack of transparency in CFT investigations and prosecutions remains a fundamental vulnerability, particularly amidst the ongoing adoption or revival of State secrecy or immunity doctrines or the adoption of other measures to shield intelligence, military, or diplomatic sources and information, in the name of national security interests.¹⁹⁷ The Special Rapporteur emphasizes in this regard not only the importance of transparency and access to evidence, but also structurally the need for clear demarcation between the roles and functions of intelligence agencies and law enforcement officials, i.e., intelligence gathering and criminal investigations.¹⁹⁸ The Special Rapporteur also emphasizes the importance of ensuring “a fair *and public* hearing by a competent, independent and impartial tribunal established by law” pursuant to ICCPR Article 14(1) and fundamental fair trial rights. In criminal proceedings, the Human Rights Committee has reaffirmed that individuals are entitled to a public and oral hearing. Any restriction excluding the public or media must be narrowly tailored and necessary.¹⁹⁹

Even where CFT charges are not filed, the targeting and judicial harassment of individuals suspected of terrorist financing can have serious consequences. Often the investigations and allegations in and of themselves come with **stigmatization and reputational hazards that isolate individuals socially and economically** from their families and communities, in addition to funders and supporters fearful of being associated with designated human rights defenders.²⁰⁰ In some cases, relatives' mere communications with exiled "terrorist" designated dissidents have been criminalized.²⁰¹

Where individuals have been convicted of criminal CFT offences, they have also been subject to **disproportionate sentences, including unduly long imprisonment and citizenship revocation.**²⁰² Such measures have dire effects on fundamental individual and family rights and may disqualify them from certain types of employment, housing, or from travel and freedom of movement. The mandate reaffirms here the Special Rapporteur's prior reporting on the grave consequences of citizenship revocation in particular and the instrumental role that citizenship plays as a gateway to other fundamental rights and freedoms.²⁰³ Citizenship revocation and other family-related penalties like the cancellation of welfare benefits squarely implicate the State's obligation to ensure equality of rights within the family and to protect and assist the family, including the rights of children.²⁰⁴ The Special Rapporteur also emphasizes that where extradition is considered as opposed to prosecution, strict compliance with the general principle of non-refoulement must be observed.

Lastly, criminal sanctions applying to associations should remain on an exceptional basis, proportional, and narrowly construed. Individuals involved in unregistered associations should never be subject to criminal sanctions for failure to register. Overbroad and harsh penalties risk unduly exacerbating a hostile environment for the right to association.

Civil and Administrative Proceedings

States have also adopted non-criminal or parallel measures and sanctions to penalize terrorist financing abuse. Most commonly, these measures have involved the suspension and de-platforming of NPOs and NPO staff,²⁰⁵ as well as the de-banking of suspected individuals (discussed further in Section II.E below).

Communication Spotlight

In February 2022, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on the right to privacy issued OL QAT 1/2022, expressing concerns about the international human rights law compliance of Law No. 20 of 2019, Promulgating the Law on Combatting Money Laundering and Financing of Terrorism.

Among other concerns, the mandate holders observed that Article 44 of Law No. 20 stipulates that the Regulatory Authority for Charitable Activities may take various disciplinary actions against organizations and their leaders for failure to comply with the law "or any decisions or guidelines on AML/CFT"—in potential contravention of the rights to freedom of association and expression, the right to work, and related social and economic rights. The authority provided for in the provision included the discretion to temporarily ban NPO leaders, appoint a special administrative supervisor to directly control the NPO, ban violators from working in relevant sectors, and suspend or restrict licenses of NPOs.

The Special Rapporteur underlines that, as with criminal penalties, any civil or administrative penalty should be proportionate and subject to fundamental due process and procedural rights under international law, including the overarching right to a fair trial and the principle of equality of arms.²⁰⁶ **Civil and administrative penalties targeting NPOs in particular raise serious concerns about the ability of NPOs to function truly independently, free from State interference.** The suspension or dissolution of NPOs constitutes the severest form of restrictions on the right to freedom of association and can have a debilitating effect on the organization's legitimate activities and prospects. Further, when States claim the authority to ban individuals from working

in the NPO sector, they risk unduly limiting the right to work. As the Committee on Economic, Social, and Cultural Rights clarified in General Comment 18, “[t]he right to work, as guaranteed in the ICESCR, affirms the obligation of States parties to assure individuals the right to freely chosen or accepted work, including the right not to be deprived of work unfairly.”²⁰⁷

When deciding whether to apply penalties to NPOs, authorities must take care to apply the measure that is the least disruptive and destructive to the right to freedom of association. Penalties for the late or incorrect submission of reports, or other minor offences, should never be harsher than penalties for similar offences committed by non-NPO entities, such as businesses. “Suspension or involuntary dissolution of associations” should only occur if “sanctioned by an impartial and independent court in case of a clear and imminent danger resulting in a flagrant violation of domestic laws, in compliance with international human rights law.”²⁰⁸ Indeed, independent oversight mechanisms and judicial review processes are vital to minimizing arbitrariness and abuse in the implementation of any non-criminal penalties.

Targeted Financial Sanctions

In some cases, the criminalization of terrorist financing may overlap with the criminal penalties for violations of targeted financial sanctions regimes.²⁰⁹ Such sanctions to date have included travel bans, asset freezes, and the prohibition against making funds or resources available to designated individuals or entities. With regard to the Security Council’s sanctions regimes in particular, the mandate refers to its position paper on *The Impact of Counter-Terrorism Targeted Sanctions on Human Rights*.²¹⁰

As recognized in FATF Recommendation 6, unlike some of the regimes with associated UN lists of designated individuals, Security Council Resolution 1373 *et seq.* have not resulted in any UN sanctioning lists. Rather, Member States have applied sanctions through national sanctions lists.²¹¹ Despite this procedural difference, many of the same human rights, humanitarian, and rule of law concerns raised in the mandate’s existing sanctions position paper arise equally in the CFT context, particularly vis-à-vis the **adverse humanitarian and human rights impacts of targeted financial sanctions, asset**

freezes, and travel bans on listed individuals, their families, NPOs, and women especially. The detrimental impact on social and economic rights is particularly grave.

Notably, while there has been reluctance by the international community to recognize humanitarian exemptions and broader international humanitarian law accommodations in CFT sanctions frameworks, national jurisdictions have adopted a wide range of such measures. For instance, the European Union also exempts from terrorist asset freezing certain activities for “humanitarian purposes, such as ... delivering or facilitating the delivery of assistance, including medical supplies, food, or the transfer of humanitarian workers and related assistance or for evacuations.”²¹² Austria, Belgium, Italy, and Lithuania have narrow exclusion causes for humanitarian activities.²¹³

Good Practice Spotlight

Switzerland provides for an exclusion from terrorist financing crimes financing “intended to support acts that do not violate” international humanitarian law, or acts “carried out to with a view to establishing or re-establishing a democratic regime or a state governed by the rule of law or *with a view to exercising or safeguarding human rights*.”²¹⁴

The mandate reiterates the importance of such human rights and humanitarian exemptions.

The Special Rapporteur also underlines that any designation of individuals or entities under a sanctions regime must be necessary and proportionate, and the result of a fair and accountable legal process rooted in procedural fairness and due process of law, as recommended and explained further in the mandate’s position paper on sanctions.²¹⁵ Increased dialogue in international fora on the **interrelated nature of CFT rules and regulations and UN Security Council resolutions**—including their cumulative impact on human rights and humanitarian NPOs—is vital to ensuring international human rights and rule of law compliant sanctions implementation.²¹⁶

De-risking

In addition to State-initiated penalties and sanctions, financial institutions have supplemented the role of the State in the implementation of national CFT efforts, often upon the domestic incorporation of international standards like the FATF Recommendations into national and local banking rules and regulations and supervisory guidelines.²¹⁷ In this context, the mandate underlines the State obligation to ensure the international law-compliant implementation of CFT measures. While the private sector may be involved in the performance of risk assessments and the implementation of CFT measures, the **fundamental obligation to ensure human rights due diligence and protections of such measures and broader compliance with international law obligations lies squarely with the State and cannot be delegated.**

Parallel to this State responsibility, pursuant to the UN Guiding Principles on Business and Human Rights, **businesses must too “[a]void causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur”** and “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships.”²¹⁸ Notably, corporate responsibility in the context of the Guiding Principles is independent of State obligations and thus “exists over and above compliance with national laws” and irrespective of States’ abilities and/or willingness to fulfil their own duties under human rights law.”²¹⁹

Regrettably, historically many banks and financial service providers have adopted a blanket, zero-risk approach to terrorist financing, often through the practice of de-risking. For purposes of this position paper, the mandate adopts the FATF definition of de-risking: “the phenomenon of financial institutions terminating or restricting business relationships with clients or categories of clients *to avoid, rather than manage, risk.*”²²⁰

The practice of de-risking may occur before, during, or after the creation of a contractual relationship between the bank and individual or entity and may include a wide range of measures, including:

- blocked or delayed financial transfers;

- burdensome due diligence and other administrative requirements;
- the closure of or refusal to open bank accounts absent notice or appeal; and
- and the termination of client relationships.²²¹

According to one national study of the Charity Finance Group in the United Kingdom, 79% of charities surveyed said they faced difficulties accessing or using mainstream banking channels and most did not know why they were de-risked.²²² In another study of the NGO community responding to the Syrian crisis, researchers found that almost a third of all money intended for Syria was stuck in an “almost permanent limbo” due to de-risking related blockages in the correspondent banking system. Another study of 17 countries in Latin America found that half of the NPOs surveyed reported the denial of financial services or excessive and onerous delays in banking procedures and observed that the situation had worsened due to the COVID-19 pandemic.²²³

Some banks have adopted blanket policies for de-risking any NPOs that fail to generate or maintain a minimum amount of financial resources or business.²²⁴ Often the justification cited by financial institutions is that they “fear reputational damage and hefty fines and find it difficult to ‘profile’ NPOs whose activities appear more ‘random’ than their other commercial clients. This is compounded by the fact that they do not necessarily receive any regulatory guidance from Central Banks on how to deal with NPOs.”²²⁵ As one study explained, “when the level of expertise and knowledge of the NPO sector in particular is limited, the likelihood of de-risking practices increases as does misunderstanding of the specific parameters of terrorist financing designations and sanctions frameworks.”²²⁶

The common element of de-risking practices is risk avoidance rather than risk mitigation. It is the mandate’s position therefore that the practice of de-risking necessarily violates the international law requirements of proportionality and necessity because by its very definition, it is not the most narrowly tailored, risk-based approach. De-risking practices impinge on numerous fundamental rights and freedoms, including due process and procedural rights, as well as property rights and associated financial access rights. As other experts have

observed, “financial inclusion and stability, economic growth and development, human rights protection and civic space are all put at risk by the advancement of indiscriminate de-risking.”²²⁷ The exclusion and stigmatization that result from de-risking can also have significant adverse effects on financial inclusion and related economic, social, and cultural rights at the individual, family, and community levels. De-risking by banks also can affect remittance service providers, including those serving conflict zones where refugees flee, thus implicating the very livelihoods and survival of those refugees.²²⁸

In the NPO context, de-risking can have debilitating effects and may lead to violations of rights including the rights to freedom of association and freedom of expression. As the Special Rapporteur has previously observed, in some cases where financial services were refused or delayed as part of the phenomenon of bank de-risking, NPOs had to scale down or close altogether.²²⁹ One study assessing the practices in Brazil, Mexico, and Ireland found that “de-risking disproportionately affects smaller organizations who are unable to meet bank’s extended due diligence requirements and have no recourse to remedy when derisked.”²³⁰ De-risking may block or delay the transfer of operating funds and salaries, as well as the delivery of assistance to beneficiaries, often affecting the social, economic, and cultural rights of those beneficiaries. Multiple examples confirm that de-risking measures disproportionately affect Muslim charities and charities working in Muslim-majority areas or States—in plain contravention of the principle of non-discrimination.²³¹

Furthermore, in practice, de-risking is fundamentally ineffective and can even be counterproductive to CFT objectives. The World Bank has found that as a result of de-risking, financial transactions are pushed into “more opaque, informal channels,” and thus “become harder to monitor.”²³² Similarly, the Global NPO Coalition on FATF has found that de-risking “undermin[es] the very goals of the FATF Standards by moving money into less transparent channels.”²³³

Often NPOs—at least those able to maintain operations despite the adverse impacts and pressures of de-risking—are forced to operate with larger amounts of cash, which is not only more difficult to monitor but also increases the physical risk to NPO staff and volunteers.²³⁴ In Syria, for instance, researchers found that NGOs had moved entirely to the use of cash transfers or the informal system as a result of de-risking.²³⁵

The Special Rapporteur emphasizes that **properly addressing de-risking requires meaningful and sustained participation of NPOs and civil society, as well as substantive human rights expertise within financial institutions tasked with implementing AML/CFT rules.**

Good Practice Spotlight

The Dutch stakeholder roundtable co-convened by the Ministry of Finance and Human Security Collective on financial access for NPOs is one exemplary practice where diverse stakeholders—NPOs, banks, regulators, the Financial Intelligence Unit, and other government departments—were convened to find solutions to address de-risking stemming from AML/CFT rules and improve financial inclusion.²³⁶

Part of the solution going forward is increasing the transparency and public accessibility of banks’ AML/CFT compliance policies and supporting guiding documentation to ensure independent oversight and adequate incorporation of human rights due diligence processes.²³⁷ The Special Rapporteur also notes as a positive development that in some States, NPOs have successfully brought suit against banks following de-risking decisions and affirmed consumer protections vis-à-vis banks as service providers.²³⁸

3

OVERSIGHT, ACCOUNTABILITY, AND REMEDIES

Monitoring and Evaluation

The Special Rapporteur's mandate expresses concern that there is an entrenched accountability vacuum in the CFT space, facilitated by the problematic production of norms in exclusive multi-lateral spaces dominated by select States; the misapplication and in some cases, the purposeful abuse by States of national CFT policies and cultivation of impunity therein; and the absence of adequate human rights mainstreaming in technical

assistance and capacity building programs. The Special Rapporteur has repeatedly commented on the systemic lack of accountability in the broader counter-terrorism space, and in the CFT context, the mandate has commented on allegations of inadequate judicial oversight in country-specific communications.²³⁹ The mandate is particularly concerned by the lack of monitoring and evaluation of the human rights impacts and international law compliance of CFT measures—an absence plainly discernible from State national action plans and UN technical assistance programming, among other settings.

The mandate therefore emphasizes the urgent need for States—and the international organizations working in the CFT space—to **establish independent oversight mechanisms to oversee, monitor, and evaluate CFT activities, assessing their international and domestic law compliance, including under international human rights law; their empirical effectiveness in actually countering the financing of terrorism; and their broader impacts, particularly the downstream effects on affected communities.** The mandate references in this regard its good practices for oversight institutions over intelligence services, which applies equally in the CFT context.²⁴⁰

Independence means that a tribunal must be free from any form of direct or indirect influence, whether this comes from the government, from the parties in the proceedings, or from third parties such as the media.

Accountability and Redress

In addition to monitoring and assessing CFT measures, judicial *and* non-judicial oversight mechanisms should also make available avenues for individuals, groups, and entities seeking redress for the unlawful implementation of CFT measures. The



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mandate underlines that under international law, States are required to ensure access to accountability mechanisms and accessible, effective remedies for victims and survivors of serious violations of human rights—including violations stemming from the misuse of CFT measures. As the Human Rights Committee explained in General Comment 31, the right to “accessible and effective remedies to vindicate. . . rights” is contained within Article 2(3) of the ICCPR.²⁴¹ Accountability and the right to effective remedies are also connected to the fair trial rights, as guaranteed by Article 14 of the ICCPR and clarified by General Comment 32 of the Human Rights Committee.²⁴² General Comment 32 also emphasizes that “it is crucial that recourse to judicial mechanisms is always available, even as a last resort and complementary to other non-judicial mechanisms.”²⁴³

The right of access to courts and tribunals must be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers unaccompanied children, or other persons, who may find themselves in the territory or subject to the jurisdiction of the State.

The right to reparation under international law encompasses restitution, compensation, the right to rehabilitation, and measures of satisfaction, such as guarantees of non-repetition, public apologies, and public memorials.²⁴⁴ These are complementary measures. Where restitution *in integrum* is not feasible, States are required to provide other forms of reparation. In a situation where the State has abused CFT measures, such reparation may include compensatory damages, including consequential damages for individuals and family members’ emotional and reputational harms and lost fundraising opportunities for NPOs, as well as punitive damages. Proper reparation may also include State guarantees of non-repetition of the same abusive CFT measures and apologies to the broader local communities impacted by the measures.

The mandate warns that where States misuse CFT measures in violation of CFT-specific instruments and international law, including international human rights, humanitarian law, and refugee law, they may be vulnerable to legal challenges in

multiple fora. In particular, States may be internationally responsible for:

- the failure to take preventive CFT measures narrowly tailored to empirically identified, differentiated, and current risk;
- the adoption of CFT measures in violation of fundamental procedural and substantive requirements under international law;
- the abuse of CFT measures by, *inter alia*, law enforcement and intelligence services; and
- the failure to take appropriate remedial measures.

Among potential legal avenues, an inter-State dispute alleging violations of the Terrorist Financing Convention—in arbitration or potentially before the International Court of Justice—may be feasible pursuant to the relevant dispute settlement provision.²⁴⁵ By way of example, claims of State responsibility under the Terrorist Financing Convention are currently pending adjudication in *Ukraine v. Russia* before the International Court of Justice.²⁴⁶ States could also be brought before the European Court of Justice and General Court of the European Union for implementing CFT measures pursuant to Security Council Resolutions 1373 and 2462 absent adequate human rights safeguards, particularly due process rights, and continuing risk assessments.²⁴⁷ States may also be subject to individual claims of rights violations before, *inter alia*, the regional human rights courts, including the European Court of Human Rights.²⁴⁸

In order to avoid potential liability, States should institute effective, transparent, and accessible grievance mechanisms at the domestic level. The mandate recognizes that already a “small number of States have established mechanisms that include independent oversight of the application of counter-terrorism and CFT measures.”²⁴⁹ It is vital that such mechanisms not only cultivate a culture of transparency, evidentiary collection, and public reporting, but also offer individuals, groups, and organizations clear pathways to seek redress and remedies. The mandate also emphasizes the importance of oversight and accountability mechanisms providing sufficient witness protection measures, fully recognizing the extraordinary and legitimate fears of reprisals for those vocalizing harms caused directly or indirectly by the State.

RECOMMENDATIONS



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Member States

- **Must meaningfully and consistently engage with civil society and affected communities as partners in the design, delivery, and oversight of CFT measures, including from the outset in the very construction of risk, the performance of the NPO risk assessment, and the development of new legislative or regulatory measures to address the identified risks.** Member States must proactively safeguard the diversity of civil society space. Such meaningful civil society participation should include their

inclusion in formal decision-making spaces, formal acknowledgement of their leadership role, incorporation of their recommendations in the eventual outcome, and fulsome engagement in monitoring, evaluation, and accountability mechanisms.

- **Must make transparent, accessible, and readily comprehensible CFT risk assessments, and use all relevant sources of information including from NPOs in such periodic assessments.** Assessments should clearly identify the nature and modalities of the threats posed.

- **Only enact CFT measures commensurate to the empirically validated, differentiated risks of terrorist financing**, in accordance with the objective criteria of legality, proportionality, necessity, and non-discrimination.
- **Explicitly include unambiguous exemptions for humanitarian and human rights organizations and protected activities therein.**
- **Incorporate human rights benchmarking in CFT policies and programs**, which are developed together with human rights and international law experts, including to ensure compliance with the proportionality and necessity requirements under international law.
- **Enhance coordination among government entities**, including with national human rights institutions, in the investigation and prosecution of terrorist financing suspects, as well as the development and implementation of human rights-based guidance for CFT efforts, including among counter-terrorism agencies, financial intelligence units, treasury officials, regulators, and jurists.
- **Ensure independent oversight and judicial review processes to tackle arbitrariness and abuse in the implementation of CFT penalties**, including appeal procedures for listing and designation procedures, asset seizures, NPO dissolutions, and other sanctions and penalties.
- In the provision of CFT technical assistance and capacity building support to Member States, **UN entities must ensure full application of the UN Human Rights Due Diligence Policy**, including through the integration and dedicated funding for the integration of human rights and gender expertise. Such integration requires a human rights-based and gender-responsive approach to programming to be implemented from project design onward and further requires integrated human rights and gender benchmarking into programming, as determined in compliance with relevant UN guidance and in consultation with the Office of the United Nations High Commissioner for Human Rights, UN Women, and other relevant entities depending on the project.
- **Establish an adequately resourced and appropriately mandated independent internal oversight mechanism of the UN counter-terrorism architecture and institute formal mechanisms for meaningful and equal participation of civil society in the development, implementation, and evaluation of CFT programming and policies**, including through their inclusion in formal decision-making spaces, formal acknowledgement of their leadership role, incorporation of their recommendations in the eventual outcome, and fulsome engagement in monitoring, evaluation, and accountability mechanisms.

UN Counter-Terrorism Entities

- **Must monitor and make available findings on the compliance of national, regional, and international CFT measures with broader international law obligations, including under international human rights law, humanitarian law, and refugee law.** Such reporting should also include documentation of the downstream impacts of CFT measures on affected communities, including their gender impact. These findings should be made available and integrated into all General Assembly and Security Council mandated reporting on relevant activities, including the reports of the United Nations Secretary-General to both bodies, as well as in the regular reporting on the activities and achievements of the CTC and CTED to the Security Council.

FATF and FATF-Style Regional Bodies

- **Ensure that the revisions to FATF Recommendation 8 and its interpretative note are fully recognized and implemented** at the national and international levels.
- **Establish new criteria as part of the mutual evaluation and follow-up assessments to monitor over-regulation and financial exclusion** due to overcompliance by financial institutions and correspondent banks, as well as the **human rights effects of CFT measures** as part of the State effectiveness assessments. Require the meaningful and sustained inclusion of human rights and gender experts in the mutual evaluation and follow-up processes.
- **Implement human rights mainstreaming through specific guidance and a targeted training program on a human rights-compliant**

risk-based approach (including the requirements of legality, proportionality, necessity, and non-discrimination under international law) in the Interpretative Note to Recommendation 8, the Recommendation 8 Best Practices document, and a separate guidance document covering the broader human rights considerations required to undertake the totality of FATF recommendations.

- **Establish an independent procedure for receiving communications from a diverse range of civil society actors**, including community-based organizations and women human rights defenders, on the human rights impact of CFT measures. Facilitate transmittal of such information—with adequate privacy protections—to assessors and FATF-Style Regional Bodies, and as appropriate, Member States.

Banks / Financial & Regulatory Bodies

- **Must enhance the transparency of compliance policies and supporting guidance documentation and integrate mandatory human rights due diligence processes.** Ensure such policies and guidelines are consistent with ensuring financial inclusion and mainstreaming human rights and gender.
- **Facilitate regular and reciprocal exchanges among banks and NPOs to increase the understanding of banks of the NPO sector and vice versa and to increase the effectiveness of CFT measures and mitigate unintended consequences.** This should include engaging directly

with humanitarian and human rights organizations on bank de-risking to facilitate funding for their protected activities, particularly in complex conflict environments.

- **Incorporate due process safeguards and human rights guidance and establish clear and easily accessible complaints mechanisms to increase transparency and accountability in de-risking cases**, in line with, *inter alia*, the privacy rights requirements protected under international human rights law. Such mechanisms should also provide remedy or redress where appropriate, including in the form of renewed or enhanced banking access or compensation.

Civil Society Organizations

- **Engage in national CFT risk assessments or perform shadow CFT risk assessments of the NPO sector led by local NPOs**, where a sectoral risk assessment is either outdated or not being conducted and/or where formal State-NPO collaboration is not plausible.
- **Independently monitor and assess the gender and human rights impacts of CFT measures**, including through engagement with the UN counter-terrorism architecture.
- **Support other civil society organizations** in building CFT capacity and engaging with host States and the multilateral counter-terrorism architecture to mitigate negative impacts on NPOs.

ENDNOTES

- 1 The Special Rapporteur issues communications on alleged human rights violations committed while countering terrorism and communications on the international and human rights law implications of national counter-terrorism laws, regulations, and policies. These communications are available at the following website: <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>.
- 2 See ICJ Statute, art. 38(1) (enumerating the key sources of international law).
- 3 See, e.g., Statement by Martin Scheinin, Special Rapporteur for the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Sixty-Fifth Session of the General Assembly, Third Committee, Item 69 (b, c), 26 October 2010; A/73/361; A/74/335.
- 4 See A/75/337, paras. 10, 22-24, 30-35; A/74/335; A/73/361, paras. 16-21, 25.
- 5 See A/HRC/46/36, paras. 13-17, 20; A/HRC/43/46, paras. 11, 15, 45; A/HRC/40/52.
- 6 See, e.g., A/HRC/29/51, paras. 16-19, 36-39; A/HRC/6/17, paras. 42-50.
- 7 See, e.g., Duke Law International Human Rights Clinic and Women Peacemakers Program, *Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security* (2017); G. France, *The Impact of Anti-Money Laundering and Counter Terrorist Financing Regulations on Civic Space and Human Rights*, Transparency International (Apr. 2021); K. Mackintosh & P. Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, Report commissioned by the United Nations Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council (2013).
- 8 General Assembly Resolution 51/210, art. 3(f).
- 9 See generally P. Klein, "International Convention for the Suppression of Financing Terrorism", United Nations Audiovisual Library of International Law (2009).
- 10 International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 UNTS 197, art. 4 [hereinafter the "Terrorist Financing Convention"].
- 11 Terrorist Financing Convention, art. 2(1)(a), Annex 1-9.
- 12 Terrorist Financing Convention, art. 2.
- 13 B. Saul, *From Conflict to Complementarity: Reconciling International Counterterrorism Law and International Humanitarian Law*, 103 *International Review of the Red Cross* (916-917), 157-202, 178 (2021).
- 14 Terrorist Financing Convention, art. 1.
- 15 Terrorist Financing Convention, art. 2; see also Klein, *supra* note 9, at 2.
- 16 *Application of the International Convention for the Suppression of Financing Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, para. 61.
- 17 *Id.*
- 18 Terrorist Financing Convention, arts. 8-10.
- 19 See S/RES/748 (1992), para. 2; see also I. Bantekas, "The International Law of Terrorist Financing," 97 *AJIL* 316 (2003).
- 20 S/RES/1373 (2001), para. 1(b).
- 21 See A/73/361, para. 17.
- 22 Terrorist Financing Convention, art. 2.
- 23 S/RES/1373 (2001), para. 2.
- 24 S/RES/1373 (2001), para. 1(d).
- 25 S/RES/1373 (2001), paras. 3, 8.
- 26 CTED, Countering the Financing of Terrorism, <https://www.un.org/securitycouncil/ctc/content/countering-financing-terrorism>.
- 27 See A/74/335.
- 28 (1) the Security Council Committee pursuant to resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities; (2) Security Council Committee pursuant to resolution 751 (1992) concerning Somalia (3) Security Council Committee established pursuant to resolution 1636 (2005) (Lebanon); (4) Security Council Committee established pursuant to resolution 1591 (2005) concerning the Sudan; (5) Security Council Committee established pursuant to resolution 1970 (2011) concerning Libya; and (6) Security Council Committee established pursuant to resolution 1988 (2011) (Taliban).
- 29 See UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *The Impact of Counter-Terrorism Targeted Sanctions on Human Rights* (2021), <https://www.ohchr.org/sites/default/files/2022-03/position-paper-unsrct-on-unsc-use-of-ct-targeted-sanctions.pdf> [hereinafter "Targeted Sanctions Paper"].
- 30 See also S/RES2368 (2017).
- 31 See CTED, Technical Guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions (S/2019/998), para. 39; see also S/RES/2368 (2017), para. 41 ("Terrorism-financing offences should not require that the funds: (a) were actually used to carry out or attempt to carry out a terrorist act or acts; or (b) be linked to a specific terrorist act or acts.").
- 32 S/RES/2462 (2019), para. 3.
- 33 S/RES/2462 (2019), para. 23.

- 34 S/RES/2462 (2019), paras. 17-20.
- 35 See *Targeted Sanctions Paper*, *supra* note 29, at 4-5; A/67/396, para 17; see also UN Charter, art. 24(2).
- 36 A/73/361, para. 15 (citing A/56/PV.25 (15 October 2001), intervention by the representative of Costa Rica).
- 37 General Assembly Resolution 49/60, annex II, paras. 4-5 (Dec. 9, 1994); see I. Bantekas, *supra* note 19, at 316.
- 38 A/RES/60/288, annex III.1-2.
- 39 A/RES/60/288, annex II.10.
- 40 A/RES/75/291, p. 5.
- 41 A/RES/75/291, para. 60.
- 42 A/RES/75/291, para. 59.
- 43 A/RES/71/291.
- 44 UNOCT, Countering the Financing of Terrorism, <https://www.un.org/counterterrorism/cct/countering-the-financing-of-terrorism>.
- 45 FATF, "Information on Updates Made to the FATF Recommendations", <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html#UPDATES>.
- 46 See also FATF, *Guidance on National Money Laundering and Terrorist Financing Risk Assessment* (Feb. 2013).
- 47 See also FATF, *Guidance on Criminalising Terrorist Financing (Recommendation 5)* (Oct. 2016).
- 48 See also FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation - The FATF Recommendations*, Interpretative Notes 31-115, 43 (Feb. 2012) [hereinafter FATF Recommendations].
- 49 *Id.*, p. 43.
- 50 Recommendation 8 originally described NPOs as "particularly vulnerable" to terrorist abuse. The FATF removed this language and revised the accompanying Interpretative Note and Best Practices Paper in 2016 to emphasize the risk-based approach, which then leads to a determination of a subset of NPOs that may potentially be at risk for terrorist financing abuse. As discussed further in the analysis of risk assessments in Section II.B, however, certain shortcomings remain in the revised approach.
- 51 A/74/335; see S/RES/2462 (2019); S/RES/1617 (2005); S/RES/2253 (2015); S/RES/2368 (2017); S/RES/2395 (2017).
- 52 FATF, Financial Action Task Force Mandate (2012-2020), paras. 1, 48.
- 53 See A/HRC/40/52, para. 31.
- 54 See A/74/335, para. 32.
- 55 See FATF, "High-Level Synopsis of the Stocktake of the Unintended Consequences of the FATF Standards," 27 Oct. 2021, <https://www.fatf-gafi.org/media/fatf/documents/Unintended-Consequences.pdf>.
- 56 A/74/335.
- 57 See ICJ Statute, art. 38(1).
- 58 European Court of Human Rights, *Al-Jedda v. United Kingdom*, Application no. 27021/08, Judgment, 7 July 2011 (Grand Chamber), para. 102; see Saul, *supra* note 13, at 190 (extending this interpretation to the interpretation of international humanitarian law).
- 59 Universal Declaration of Human Rights, art. 19 (UDHR); the International Covenant on Civil and Political Rights, art. 19 (ICCPR); see also CCPR General Comment No. 34, art. 19.
- 60 UDHR, art. 20; ICCPR, art. 22; see also G.A. Res. 53/144 (UN Declaration on Human Rights Defenders); CCPR General Comment No. 37, art. 21.
- 61 UDHR, art. 18; ICCPR, art. 18; see also CCPR General Comment no. 22, art. 18.
- 62 ICCPR, art. 27, see also General Comment no. 23, art. 27; General Comment no. 18; A/RES/47/135 (Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities).
- 63 UDHR, art. 17; ICCPR, art. 17.
- 64 UDHR, arts. 23, 26; ICCPR, art. 23; the International Covenant on Economic, Social and Cultural Rights, arts. 6, 13 (ICESCR); see also CESCR General Comment No. 18, art. 6.
- 65 UDHR preamb.; ICESCR, art. 3; see also CCPR General Comment No. 28, art. 3.
- 66 UDHR, art. 12; ICCPR, art. 17; see also CCPR General Comment No. 16, art. 17.
- 67 UDHR, arts. 13, 15; ICCPR, art. 12; see also CCPR General Comment No. 27, art. 12.
- 68 ICCPR, art. 25; see also CCPR General Comment No. 25, art. 25.
- 69 UDHR, arts. 10, 11; ICCPR, arts. 9, 14, 15; see also CCPR General Comment No. 32, art. 14.
- 70 UDHR, art. 8; ICCPR, art. 2; CCPR General Comment No. 31.
- 71 See also CCPR General Comment No. 15.
- 72 ICCPR, art. 4(2); see also General Comment No. 29 (2001), para. 11 (recognizing other international humanitarian law and peremptory norms that are non-derogable, including the prohibition of arbitrary deprivation of liberty or deviation from the "fundamental principles of fair trial, including the presumption of innocence").
- 73 A/61/267, para. 20.
- 74 A/HRC/27/37, para. 24.
- 75 See, e.g., ICCPR, arts. 12(3), 18(3), 19(3), 21(3), 22(2); ICESCR, arts. 8(1); see also E/CN.4/1985/4 (Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights).
- 76 CCPR General Comments Nos. 34, 37.
- 77 See, e.g., J. Gardam, *Proportionality in International Law*, 87 *American Journal of International Law* 391-413 (1993); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226; A. Mitchell, *Proportionality and Remedies in WTO Disputes*, 17 *European Journal of International Law* 985-1008 (2006); G. Bücheler, *Proportionality in Investor-State Arbitration* (Oxford University Press, 2015); M. P. Chiti et al., *The Principle of Proportionality and the European Central Bank*, 26 *European Public Law* 643-678 (2020).
- 78 See A/61/267, para. 20.
- 79 A/HRC/16/51, para. 12.
- 80 See also A/75/337, para. 36.
- 81 ICCPR, art. 2; see also UDHR, art. 2.
- 82 Targeted Sanctions Paper, *supra* note 29, at 13.

- 83 See, e.g., InterAction, *Detrimental Impacts: How Counter-Terror Measures Impede Humanitarian Action* (April 2021).
- 84 New York University Paris EU Public Interest Clinic, *Bank De-Risking of Non-Profit Clients: A Business and Human Rights Perspective* (June 2021), p. 8.
- 85 See Saul, *supra* note 13.
- 86 See A/70/371.
- 87 See Saul, *supra* note 13, at 191-192.
- 88 See A/70/371, para. 37.
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131 See, e.g., Spaces for Change, *Unpacking the Official Construction of Risks and Vulnerabilities for the Third Sector in Nigeria* (2019) (disputing the evidential basis for the identification of terrorism financing risks and vulnerabilities in the NPO sector in Nigeria).

132 International Center for Not-for-Profit Law, *supra* note 126, at 7-8.

133 See, e.g., mandate communications on Serbia (AL OTH 71/2020, Reply on 15 December 2020); Venezuela (OL VEN 8/2021); Thailand (OL THA 7/2021, Reply on 22 December 2021); and Belarus (OL BLR 2/2021, Reply on 17 May 2021)—all issued in the midst of the Covid-19 pandemic.

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135 International Center for Not-for-Profit Law, *supra* note 126, at 6.

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142 Transparency International, *supra* note 7 (“In the past decades, dozens of countries have restricted overseas financing to NGOs operating domestically.”); A/HRC/25/55, SR on HRDs, para. 69; A/HRC/23/39, SR on assembly, para. 28 (naming broader foreign funding laws in Russia, Egypt, and Algeria); T. Hodenfield, “The Hypocrisy of Foreign Funding in Ethiopia”, Open Global Rights, 25 Apr. 2014.

143 See, e.g., A/61/267, para. 23; A/HRC/6/17, para. 43; A/HRC/23/39. See also FATF Recommendations, *supra* note 48, Interpretative Note to Recommendation 8, para. 6(b)(v) n.30 (recognizing that that while NPOs “could be required to take reasonable measures to confirm the identity, credentials and

good standing of beneficiaries and associate NPOs and that they are not involved with and/or using the charitable funds to support terrorists or terrorist organisations,” that “does not mean that NPOs are expected to identify each specific individual, as such a requirement would not always be possible and would, in some instances, impede the ability of NPOs to provide much-needed services”).

144 A/HRC/33/29, para. 41; A/HRC/40/52, para. 42; A/HRC/46/36, para. 13.

145 See, e.g., mandate communications on obstructions to foreign financing—often with NPOs categorized as foreign agents—in Venezuela (OL VEN 8/2021), Thailand (OL THA 7/2021, Reply on 22 December 2021); Serbia (AL OTH 71/2020, Reply on 15 December 2020); Belarus (OL BLR 2/2021, Reply on 17 May 2021); and Nicaragua (OL NIC 3/2020); see also Transparency International, *supra* note 7.

146 A/HRC/6/17, para. 46.

147 A/HRC/33/29, para. 40 (citing, *inter alia*, A/HRC/23/39, para. 25; A/70/371, paras. 17-44); see also A/HRC/6/17, para. 46; A/HRC/43/46, para. 45; Action against Hunger, “Nigeria: Following Forced Closure of Offices in Borno and Yobe States, Action against Hunger Strongly Rejects Accusations of Supporting Terrorist Groups” (24 Sept. 2019), <https://www.actionagainsthunger.org/story/nigeria-borno-yobe-action-against-hunger-strongly-rejects-accusations-of-supporting-terrorist-groups> (noting the closure of Action Against Hunger’s main offices in northeast Nigeria in September 2019 following an accusation of “aiding and abetting” Boko Haram).

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157 See, e.g., mandate communications on Serbia (AL OTH 71/2020, Reply on 15 December 2020); Turkey (OL TUR 3/2021, Reply on 16 April 2021).

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THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM IS DEDICATED TO PROVIDING SUPPORT, TECHNICAL ASSISTANCE, AND EXPERTISE TO STATES, UN ENTITIES, CIVIL SOCIETY, AND OTHER RELEVANT STAKEHOLDERS. THE MANDATE WAS ESTABLISHED IN RECOGNITION THAT AS INCIDENTS OF TERRORISM CONTINUE, THE MISUSE OF LEGISLATION AND POLICIES TO COMBAT TERRORISM HAVE GROWN WITH AN ADVERSE IMPACT HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS.

The mandate was established to:

- Promote and ensure the protection of human rights and fundamental freedoms by recommending rights-compliant counter-terrorism legislation and policies;
- Offer support, technical assistance, and expertise to States, UN entities, civil society and other relevant stakeholders; and
- Be responsive to the shifting landscape of counter-terrorism and anticipating long-term needs and strategies.

The mandate of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism was established by the Commission on Human Rights, in resolution 2005/80 in April 2005. Subsequently, the mandate was extended by the Human Rights Council multiple times, most recently on 12 April 2022, for a further period of three years through resolution [49/10](#).

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