

U4 Helpdesk Answer

U4 Helpdesk Answer 2021:8

The impact of anti-money laundering and counter terrorist financing regulations on civic space and human rights

Civic space and human rights have been under assault across the world, and, in some settings, regulations related to anti-money laundering and/or combating the financing of terrorism (AML/CFT) have played a major role in legitimising and providing justification for these measures at the domestic level.

The Financial Action Task Force's (FATF) law and policymaking processes do not provide any meaningful transparency or opportunities for civil society engagement, neither at the domestic, nor at the international level. With little input from human rights organisations and experts, the "counter-risks" of abuse and misappropriation for AML/CFT regulations only increase.

Measures taken under the guise of AML/CFT regulations include heavy restrictions on civil society organisations' (CSOs) ability to register, operate, and access resources, as well as direct measures against specific CSOs, such as audits, investigations, prosecution, de-registration, closure and

16 April 2021

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Query

What are the unintended consequences of AML/CFT laws and regulations? Please provide an overview of incidents in which they have been used by governments to restrict civic space and infringe on human rights.

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Caveat

This Helpdesk Answer was commissioned to subsidise contributions to FATF's public consultation on the "unintended consequences" of AML/CFT regulations.

Overview of AML/CFT's impacts on civic space and human rights

Civic space is in a "downward spiral" as a growing number of people live in countries where their freedom of assembly, association and expression is restricted or eliminated. As a result, civil society organisations (CSOs) in the majority of countries

MAIN POINTS

- Civic space restrictions and human rights violations have only grown since 2001, and AML/CFT laws and regulations have often caused or been used to justify them.
- FATF's law and policymaking processes are not transparent and do not allow for meaningful civil society participation, which severely limits human rights inputs.
- The negative impacts of AML/CFT regulation on civil society organisations compromise FATF's very goal of preventing and countering terrorism and money laundering.
- Measures taken under the guise of AML/CFT regulations include heavy restrictions on CSOs' ability to register, operate and access resources, as well as direct measures against specific CSOs, such as audits, investigations, prosecution, de-registration, closure and expulsion.
- De-risking and restrictions to foreign donations are two of the bigger issues CSOs currently face.

operate in an increasingly hostile environment, subject to harassment and abuse (CIVICUS 2020).

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The adoption of laws, regulations and other measures to restrict the ability of CSOs to register, operate and access resources has become more common in the past few years. In more extreme cases, measures against CSOs also include audits, investigations, prosecution, de-registration, closure and expulsion (ICNL 2016). These measures are often presented under the guise of countering money laundering and terrorism financing, which demands a closer analysis of the regulations designed to counter such practices.

It is not a coincidence that this process can be traced back to 2001. After the 9/11 attacks, a global architecture of norms and institutions took form, the goal of which was to promote counter-terrorism legislation, with no room for discussion on the necessity and proportionality of these measures.

The global consensus on the imperative of countering terrorism served as justification for repressive practices everywhere. All government authorities had to do was to brand their political opponents as terrorists. The zero tolerance for risks policy played into the hand of governments intent on increasing control over civil society and eliminating dissent.

The Financial Action Task Force (FATF) played a major part in setting up this global framework of norms designed to counter not only terrorism financing but also money laundering, as it was previously mandated. The original 40 recommendations, adopted in 1990, all covered money laundering. The IX Special Recommendations, focused on terrorism financing, were adopted in October 2001, a month after the

9/11 attacks. In 2012, the anti-money laundering and countering the financing of terrorism (AML/CFT) standards were consolidated in the current version of the 40 FATF Recommendations.

FATF's outsized role contrasts with its short history, limited membership and reduced visibility on the world stage. In fact, FATF has been repeatedly called "the most powerful organisation most people have never heard of" (Cochrane 2018).

It has reinforced, further developed and operationalised the norms defined by the United Nations Security Council on terrorism financing and on the sanctions regime for terrorist organisations, and by the 1999 International Convention for the Suppression of the Financing of Terrorism.

Money laundering had not received as much attention as terrorism financing from traditional international organisations,¹ meaning FATF has been the primary actor in defining the standards and best practices concerning AML efforts.

Civil society's role in countering terrorism and money laundering

The negative impacts of AML/CFT regulation on civil society organisations compromise FATF's very goal of preventing and countering terrorism and money laundering.

Unsurprisingly, research has found no evidence that legal restrictions on civil society reduce the number of terrorist attacks. Neither the number of restrictive measures nor their existence achieve

¹ It is recognised, though, as an underlying issue in both the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 3/5) and the 2000 UN Convention

against Transnational Organized Crime (art. 6/7). It is also a point of attention for the 2003 UN Convention against Corruption (art. 14).

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statistical significance when considered against the number of terrorist attacks in a given country (Koo & Murdie, 2018).

On the contrary, these organisations play an important role in preventing violent extremism. They allow for constructive engagement between different communities and the government, and, by requesting greater transparency and promoting accountability, CSOs provide an opportunity to boost the public's confidence in government officials (Human Rights Council 2019).

They often step in where the state has no meaningful presence, offering goods and services to populations in need, fomenting peace and development. Especially in humanitarian settings, they are often the only source of the most basic of services, providing food and water, housing, health and education. Civil society can also offer channels for settling grievances, providing peaceful alternatives to conflicts and disagreements, countering the appeal of violent extremism (Human Rights Council 2019).

The COVID-19 pandemic and the current social and economic crises have increased dependence on the work done by these organisations at a time when the sources of funding have become even more limited. Coupled with the expansion of governments' emergency powers – often conducive to authoritarian measures against NGOs – in many countries, this creates an extremely challenging scenario for these organisations.

CSOs also play an important role in monitoring government expenditures and promoting transparency, which curbs one of the biggest drivers of money laundering: corruption. Instrumentally, CSOs can also serve as watchdogs, providing FATF with independent and expert

analysis on governments' performance in implementing its standards, provided, of course, there are open channels of communication between FATF, evaluators and domestic CSOs.

Rising concerns about AML/CFT regulation abuse

Concerns about the impacts of CFT regulation on civic space led the United Nations Commission on Human Rights to create a mandate for a Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (Special Rapporteur) in 2005. This mandate was assumed by the Human Rights Council (HRC) in 2006 and has been extended multiple times. The Special Rapporteur is in direct contact with the UN's member states, working to identify and prevent violations of human rights and fundamental freedoms while countering terrorism. They also conduct fact-finding country visits and submit annual reports to the HRC and the General Assembly.

In 2019, Fionnuala Ní Aoláin, the current Special Rapporteur, published an important report on how measures to address terrorism and violent extremism play a role in closing civic space and violating the rights of civil society actors and human rights defenders (Human Rights Council 2019).

In it, she criticises FATF for lending “a veneer of legitimacy to states that, without due respect for their international human rights obligations, turned soft law to hard law by implementing the provisions of Recommendation 8 through wholesale measures that strictly regulate civil society, in violation of the principles of

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proportionality and necessity” (Human Rights Council 2019).

In a separate report, co-authored by the Special Rapporteur, she noted that the absence of transparent and participatory governance in the law and policymaking process conducted by FATF jeopardises the protection of human rights and the rule of law (Human Rights Center at the University of Minnesota 2020).

Concerns about the abuse of AML/CFT regulations as one of the tools used to constrict civic space have risen in different regions. The Defenders Protection Initiative noted that it has become an increasing problem in Africa as “counter-terrorism laws are continually being misused to target the legitimate work of defenders of human rights. With broad and ambiguous language, NGO and media bills are increasingly being passed, promoting judicial prosecutions under the guise of “threatening national security” against independent human rights organisations and media outlets.

Administrative and bureaucratic abuse is used throughout the country to undermine defenders’ work of human rights and journalists (Defenders Protection Initiative 2020). Similarly, the Shrinking Civic Space in East Africa report, published by CIPESA (2019), highlights how civil society actors have been targeted across the region by governments, including through measures supposedly designed to counter terrorism.

The International Center for Not-for-Profit Law (2019) published a report on the laws affecting civil society in Asia noting that new legal measures on

counter-terrorism have been used to target advocacy organisations. NGO Connect has also published a series of country reports on Latin American countries demonstrating challenges faced by CSOs in complying with FATF Standards on money laundering (ML) and terrorism financing (TF).²

While concerns about the impact of FATF Standards on civic space have grown, so have the number of issues with which the organisation works. After the inclusion of terrorism financing under FATF’s mandate in 2001, recent years have seen the encroachment of its norm production into other matters, such as weapons of mass destruction proliferation, foreign terrorist fighters, corruption, virtual assets regulation, human trafficking and illegal wildlife trade. There is certainly an argument to be made about the connection these issues have to ML and TF, but there also should be a realisation that as FATF expands its reach, so grow the “counter-risks” of abuses and “unintended consequences”.

While concerns from human rights institutions have been raised at different levels since the inception of the AML/CFT regulations, only more recently have they been publicly voiced by the institutions directly concerned with their implementation and steering.

For example, in March 2021, the chair of the Egmont Group of Financial Intelligence Units, Hennie Verbeek-Kusters, issued a statement on the “deeply concerning allegations pertaining to FIUs limiting or coercing civil society actors for their work and critiques of current governments in their jurisdictions”. Despite noting how the misuse of

² See: <https://www.ngoconnect.net/new-toolkit-helps-csos-navigate-anti-money-laundering-and-counter-terrorism-financing-laws>

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FIUs' powers erode trust and credibility, it framed these instances solely as evidence of insufficient autonomy and operational independence. There was no mention of its impacts on democratic governance and civic space, nor were any measures announced to deal with these allegations (Egmont Group 2021).

In response to a letter sent by UN human rights experts concerning the misuse of AML/CFT legislation in Serbia, FATF president, Marcus Pleyer, noted that "it is in direct contradiction to the FATF Standards and categorically unacceptable if its measures are exploited and used to oppress human rights under the pretext of counter-terrorism" (FATF 2020).

FATF launched, in February 2021, a new project to study and mitigate the unintended consequences resulting from the incorrect implementation of FATF Standards. It will focus on four main areas: i) de-risking; ii) financial exclusion; iii) suppression of non-profit organisations (NPOs) or the NPO sector as a whole; and iv) threats to fundamental human rights.³ While the open consultation on these issues is positive, one may also note its very short deadline, which has been mentioned as a recurring obstacle to NPOs' engagement with FATF (CIVICUS 2019).

While it is encouraging to see FATF's growing concern with the negative impacts resulting from the implementation of its standards, this has come almost 20 years after the NPO sector was explicitly included in the recommendations. Much damage has already been done, as FATF Standards were intentionally abused, misused and appropriated by

governments intent on restricting civic space and curbing fundamental freedoms.

As the examples throughout will demonstrate, these consequences were very much intended by the governments that instituted them. Some of them are members of FATF, thus playing a role in defining the norms that left room for interpretation and appropriation during the internalisation process.

Warnings about the impacts of AML/CFT regulation have also been voiced by a host of human rights organisations, domestically and globally, since the early 2000s. The lack of willingness and channels to receive and address these concerns also seems to be the result of an intentional decision-making process.

FATF's law-making process

Before a more detailed analysis of the content of FATF Recommendations, it is essential to provide a deeper explanation on how these norms are developed and implemented. The peculiarities of this process directly shape its results, raising the issue of whether changes to the content of FATF's AML/CFT regulations are contingent on changes to this process as well.

FATF is not the only international entity working to promote AML and CFT regulation. The United Nations, especially through the Security Council and the Office on Drugs and Crime (UNODC), the Basel Committee on Banking Supervision, the Egmont Group of Financial Intelligence Units, the

³ For more information on the project, see: <https://www.fatf-gafi.org/publications/financialinclusionandnpoissues/documents/unintended-consequences-project.html>.

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Wolfsberg Group as well as several regional organisations have developed international norms on these issues and pushed for their implementation/internalisation around the world.

There is, however, a difference between FATF (and FATF-style regional bodies, FRSBs) and other more traditional international organisations such as the United Nations, the European Union, and the Organization of American States: FATF is not an international organisation per se. This means that it was not created by an international treaty signed by states defining its mandate and its methods of work.

Initially funded by a handful of states in 1989, as a task force to counter money laundering, its temporary mandates have been repeatedly renewed. It was not until 2019 that it received an open-ended mandate, becoming a standing body, but still “informal” and hosted at the Organisation for Economic Co-operation and Development.

FATF Recommendations, as a set of international organisation decisions or resolutions, would traditionally be considered “soft” law. However, such characterisation understates how they actually function as distinctly “hard” law (Human Rights Center at the University of Minnesota 2020).

The distinction between soft law and hard law can be based on two parameters of international law: source and normative content. On source, international treaties and customs are considered hard law, binding states to their terms. Soft law examples are UN General Assembly resolutions, declarations, guidelines, opinions from quasi-judicial bodies and other international norms found outside the formal sources of Art. 38 (1) of the Statute of the International Court of Justice.

FATF Recommendations, as decisions taken by an informal international organisation, are soft law as it relates to their source, but hard law based on their content. They are extremely precise in their prescriptions, which also include the interpretative notes. There is a well-oiled mechanism to assess their implementation by countries and, lastly, there are a host of sanctions in case of non-compliance, both formal and informal (reputational). Recommendation 19, which concerns higher-risk countries, details how other governments and private entities should apply countermeasures to countries deemed non-compliant to the AML/CFT standards.

In summation, this means that, while FATF Recommendations do not go through the traditional law-making process, which is dependent on a more direct manifestation of state consent, they are extremely binding. Moreover, they are binding not only for the organisation’s 39 members but to all countries in the world, through the FRSBs, which have the mission of promoting FATF Standards in their regions. This means that even countries which were not a part of the decision-making process that produced the recommendations are bound to their terms.

The “shortcut” around the formal law-making process raises concerns about its transparency and fairness as well as its impacts on sovereignty, the cornerstone of international law.

The need for each state to consent, in some way, to the rules that will bind them has been relativised in different areas of the law, but nowhere else have (soft) law-making processes been producing such precise and detailed rules with such effective monitoring proceedings and dissuasive sanctions regime as in the case of FATF.

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The number of states that participate in the decision-making process (currently 39) is much lower than the number of countries ultimately bound by these norms (almost 200 countries and territories). This has practical implications apart from questions of legitimacy and sovereignty, as the Special Rapporteur notes:

“the interests of a sizeable number of (non-dominant) states are being neglected in the emerging regulatory practice of forum-shopping. There are grave dangers that informal and selective institutions drive law-making in ways that oust the, admittedly challenging, political contestation that characterizes multilateral diplomatic negotiations.” (UN General Assembly 2019)

A small core group of countries, representing the most advanced economies and with an overrepresentation of European States, makes the rules that are then universally imposed on the rest of the globe. The fact that most of them are well-established democracies may blind them to how these norms may be abused to restrict the civic space in flawed democracies, hybrid regimes and authoritarian regimes.⁴

In its 2019 report, the Special Rapporteur criticised “global outsource entities” – among them FATF – as opaque, inaccessible and lacking global legitimacy.

As the European Center for Not-for-Profit Law (2019) notes, “there is an absence of meaningful human rights expertise and assessment in adopting soft law norms – these are produced through

processes that are neither transparent nor accessible”. The very fact that this norm-making process is ad hoc and not communicated in advance makes it much harder for human rights experts to contribute (UN General Assembly 2019).

The challenges in civil society participation have been referred to as the “democratic deficit” of international law and policymaking, which is especially conspicuous in informal intergovernmental fora with flexible or confidential rules of procedures (Human Rights Center at the University of Minnesota 2020).

The Special Rapporteur (2019) has also noted that “the exclusion of civil society from these highly influential regulatory bodies underscores the patterns of exclusion and accountability gaps”. Since these norm-production processes are closed and opaque, civil society, which is directly affected by the AML/CFT Standards, as in the case of Recommendation 8 on the not-for-profit sector, is often also excluded from providing feedback on their impact at both the national and international level (ECNL 2019).

The absence of consistent and well-defined human rights inputs in the FATF decision-making process is partially responsible for the limited references to human rights in its constitutive document. Since there is no accreditation process, access for civil society and human rights organisations, including UN bodies, is inconsistent (UN General Assembly 2019).

The Special Rapporteur has noted that “despite the fact that measures adopted at all levels – from

⁴ Categories established in The Economist’s Global Democracy Index, see: <https://www.economist.com/graphic-detail/2021/02/02/global-democracy-has-a-very-bad-year>.

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global to local – seriously affect civil society, there appears to be a complete lack of accountability for global violations that are occurring, and very few mechanisms that can call out state abuse and remedy the deep lacunae that have developed since 2001” (Human Rights Council 2019).

Domestic repercussions

At the domestic level, the lack of a state consent requirement takes a toll on the checks and balances as parliamentary control over the process is limited. The decision to join FATF (or a FRSB) is usually made by the executive branch. This is different from joining a formal international organisation; here there is no treaty signing or ratification process, meaning parliament does not traditionally play a role in this decision.

For FATF Recommendations, there is no formal process of treaty ratification. Parliamentary (and society’s) control is exerted only during the legislative process, when legislation is presented to implement these recommendations. The indirect internalisation process opens the possibility for misuse and abuse as laws often include provisions that do not match the international standards.

This allows measures that restrict civic space and violate human rights to be framed and presented as having been designed to counter and prevent money laundering and terrorism financing. It also offers government the opportunity of transferring responsibility for these measures to an unknown international organisation or an amorphous “international pressure”. The lack of public consultation in these domestic implementation processes increases these “counter-risks” (UN General Assembly 2019).

The lack of information about the law-making process at the international level provides governments greater leeway to present the recommendations in whatever terms they feel is more useful, and with varying justifications. There are no meeting minutes, voting registries or, more generally, information on the decision-making procedures. Besides the norms themselves, the international pressure from FATF can also be framed in different ways by government officials. It affects domestic politics and it may offer hardliners the perfect excuse to impose restrictive measures on civil society and human rights (Jamal 2019).

It should be noted that FATF’s decision-making processes, especially those to apply pressure/sanctions on countries (and how much to apply), are also deeply affected by political considerations. It has been noted, for example, that criticism over smaller economies that are not FATF members comes easier than critiques of member states (Keatinge 2019). Reports of diplomatic horse-trading around which countries to blacklist are not uncommon and the lack of transparency around this type of decision feeds into the narrative that some countries receive a more benevolent treatment from FATF members (Wessel 2006).

Opacity in the law-making process, thus, invites misappropriation and abuse of the AML/CFT standards set by FATF. This is called “policy laundering”: when states introduce measures to suit their agenda under the guise of implementing said standards (CIVICUS 2019)

Similarly, decisions taken by the FATF plenary on the monitoring process and on sanctions are not transparent. The “Outcome of Meetings” is a much abridged presentation of the decisions taken by the plenary, with little indication on the discussions which led to them. FATF’s pressure on countries

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with AML/CFT deficiencies may, therefore, often be used as justification for measures which restrict civic space.

Though FATF now provides a channel to receive input from domestic civil society organisations,⁵ it is often not clear how and if this input is considered in the mutual evaluation reports. Civil society organisations can not only provide information on the adverse impacts of these norms to a country's civic space but they can also inform FATF on ML/TF issues. However, clear rules of engagement between FATF and the NPO sector are still needed to strengthen this dialogue (CIVICUS 2019)

FATF and NPOs

After the 9/11 attacks, countering terrorism financing became a priority for the Financial Action Task Force. In October 2001, it published the IX Special Recommendations on the subject and began monitoring their implementation, along with the 40 original recommendations on money laundering. Of these nine recommendations, one is of particular concern: Recommendation 8 on non-profit organisations.

Following concerns that NGOs could be used as fronts for terrorist groups, being exploited as conduits for terrorism financing, including for the purpose of escaping asset-freezing measures, or being used to conceal the clandestine diversion of funds intended for legitimate purposes, FATF recommended that:

“Countries should review the adequacy of laws and regulations that relate to entities

that can be abused for financing of terrorism. Non-profit organizations are particularly vulnerable, and countries should ensure that they cannot be misused”.

The blanket statement affirming that all NPOs were vulnerable to terrorism financing served as justification for governments across the world to impose severe restrictions on the NPO sector as a whole. According to the Special Rapporteur, it was a “useful tool” for a number of governments to reduce civil society space and suppress political opposition (Human Rights Council 2019).

This formulation of Recommendation 8 survived the 2012 revision of the FATF Recommendations. In that process, the IX Special Recommendations on terrorism financing and the 40 original recommendations on money laundering were reorganised into the current 40 FATF Recommendations.

In June 2014, FATF published the Typologies Report on Risk of Terrorist Abuse in Non-profit Organizations, where it recognised the different level of risk to which NPOs are subject and how this can only be mitigated by the deployment of a host of different strategies, including, but not limited to, criminal prosecution.

Following the increased criticism and intense lobbying from CSOs, including the Global NPO Coalition on FATF, the process to revise Recommendation 8 continued to unfold. In the following year, FATF published a Best Practices Paper on Combating the Abuse of Non-Profit Organizations, which provided a more detailed

⁵ See: <https://www.fatf-gafi.org/faq/mutualevaluations/#d.en.448461>

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analysis of Recommendation 8 and presented examples of measures that countries and NPOs had implemented to mitigate TF risks.

References to human rights commitments were also included in this paper, with FATF (2015) explicitly stating that compliance with its recommendations “should not contravene a country’s obligations under the Charter of the United Nations and international human rights law to promote universal respect for, and observance of fundamental rights and freedoms, such as freedom of expression, religion or belief, and freedom of peaceful assembly and of association”.

This type of generic and standardised reference to human rights is, however, insufficient when it is not accompanied by references to specific impingements on human rights, how they should be monitored and minimised and what precise obligations guide states to that end (ECNL 2019).

FATF (2015) also recognised that Recommendation 8 was solely intended to be applied to those NPOs that carry the greatest risks of terrorist financing abuse. This led to the revision of Recommendation 8 and its interpretative note.⁶

The current wording of FATF’s Recommendation 8 on non-profit organisations, adopted in 2016, is considered an improvement on the original text, embracing the risk-based analysis, which had already become the hallmark of FATF’s standards in 2012:

“Countries should review the adequacy of laws and regulations that relate to non-

profit organizations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organizations to protect them from terrorist financing abuse”

This risk-based analysis contrasts with the notion that the NPO sector in general carried great risk, as per the previous wording of Recommendation 8, which produced “incalculable damage to civil society” (CSIS 2018).

Initial concerns about the unintended consequences of Recommendation 8 were reflected in the organisation’s interpretative note, which recognised that “NPOs play a vital role in the world economy ... Their efforts complement the activity of the government and business sectors in providing essential services”. FATF also notes the vital importance of NPOs in providing charitable services and assistance to those in need, especially in high-risk areas and conflict zones (FATF 2012).

Countries are evaluated both as it refers to technical compliance with Recommendation 8 and to the effectiveness of the measures undertaken to implement the recommendation. The methodology guiding the evaluation of countries’ implementation of FATF Recommendations similarly evolved, considering the need for a risk-based approach to the NPO sector.

Countries are assessed on technical compliance as to whether they: i) take a risk-based approach to

⁶ For more details on this process, see: [https://www.fatf-gafi.org/publications/fatfrecommendations/documents/public-consultation-npo-inr8.html#:~:text=The%20FATF%20Typologies%20Report%20on,](https://www.fatf-gafi.org/publications/fatfrecommendations/documents/public-consultation-npo-inr8.html#:~:text=The%20FATF%20Typologies%20Report%20on,resources%20involved%20in%20their%20operations%2C)

[resources%20involved%20in%20their%20operations%2C](https://ecnl.org/sites/default/files/files/ECNL-Briefer-Chronology.pdf). The European Center for Non-Profit Law put together a timeline of this process, see: <https://ecnl.org/sites/default/files/files/ECNL-Briefer-Chronology.pdf>.

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the NPO sector, identifying which organisations are more likely to be at risk of terrorist financing abuse, as well as the nature of the threats posed by terrorists; ii) provide outreach concerning TF issues, working with NPOs to develop and refine best practices; iii) apply risk-based supervision and monitoring of NPOs; iv) have the ability to effectively gather information and investigate potential irregularities; and v) have the capacity to respond to international cooperation requests for information on NPOs of concern (FATF 2013).

However, FATF (2013) expressly recognises that “not all NPOs are inherently high risk (and some may represent little or no risk at all)”. There are also other caveats as it requests public officials to keep in mind the varying capacities of financial sectors in different countries and in areas of urgent charitable and humanitarian concerns.

As for effectiveness, NPOs are a focus of Immediate Outcome n° 10, which envisions terrorist organisations being prevented from raising, moving and using funds, and from abusing the NPO sector. As such, evaluators assess “to what extent, without disrupting or discouraging legitimate NPO activities, has the country applied focused and proportionate measures to such NPOs which the country has identified as being vulnerable to terrorist financing abuse, in line with the risk-based approach” (FATF 2013). Evidence sought by evaluators include elements that eventually demonstrate that “NPOs are protected from terrorist financing abuse and legitimate charitable activities are not disrupted or discouraged”.

Despite these references, FATF has been criticised for having a “human rights-lite” approach, which undermines the very goal of countering terrorism

(Human Rights Center at the University of Minnesota 2020).

UN human rights experts have criticised the absence of any reference in Recommendation 8 of the right to freedom of association and its corollary: the ability to access financial resources (Human Rights Council 2015). FATF’s omission in highlighting the need to respect the principles of legality, proportionality, necessity and non-discrimination has allowed governments to apply a veneer of legitimacy to repressive legislation. Recommendation 8 has, thus, been used as justification for the adoption of legislation which creates a complex legal environment that limits, restricts and controls civil society.

Also noteworthy is that FATF “has rarely criticized overregulation and lack of respect for human rights, focusing instead on cases of insufficient regulation”. Its monitoring proceedings, for example, do not evaluate areas where national regulation is incompatible with international human rights law (Human Rights Council 2015). Consequently, FATF has largely forsaken any role in ensuring that the caveats made about the important role of CSOs will effectively translate into greater protection from authoritarianism.

FATF Recommendations touch on a host of issues which directly or indirectly affect civic space. Not all of them were covered in this answer. For example, FATF concerns itself with the existence of mechanisms in domestic frameworks to enforce targeted financial sanctions imposed by the United Nations Security Council (UNSC) on individual terrorists and terrorist organisations (Recommendations 6 and 7). The impact that the UNSC’s sanction regimes have on human rights has been well documented, especially the right to due process and fundamental freedoms (Cockayne et al.

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2018; Hovell 2016; Human Rights Council 2012; Fassbender, 2006).

Another underlining issue which will not be detailed here but which deeply affects civic space and human rights, especially in relation to CFT measures, is the lack of a definition of terrorism. In short, the absence of an internationally agreed-upon definition of terrorism (and terrorists) allows governments to set generic, arbitrary and wide-ranging definitions. They provide the legal framework for the prosecution and criminalisation of opposing parties, CSOs, journalists and social movements.

The following pages have examples of the impact of AML/CFT regulation have on specific countries, and there is no shortage of examples. An effort was made to identify cases where FATF and its recommendations played a more direct role justifying the measures which, in turn, led to these restrictions on civic space and violations of human rights.

Actual risks

International organisations, such as the World Bank and the United Nations Counter-Terrorism Implementation Task Force Working Group on Tackling the Financing of Terrorism (CTITF), have noted that the actual percentage of NPO financial flows abused for terrorism financing is very small. The latter goes on to recommend that states “avoid rhetoric that ties NPOs to terrorism financing in general terms because it overstates the threat and unduly damages the NPO sector as a whole” (CTITF 2009). These findings were corroborated by a United Kingdom 2007 review of the charitable sector (Human Rights Council 2019).

While this certainly does not exempt the NPO sector from ML/FT risks, it does put them into perspective, especially considering the unintended consequences of regulations intended to mitigate them.

Permanent efforts by FATF to assess the NPO sector’s actual level of involvement with money laundering and terrorism financing are critical. They will provide a better understanding of the evolving risks faced by NPOs. Wherever there are increased risks of AML/CFT regulation abuse for restricting the civic space, FATF may consider conducting independent assessments of said risks to evaluate their compatibility with the measures adopted by states.

FATF should also consider how different kinds of measures intended to mitigate these risks lend themselves more (or less) to abuse, leading to human rights violations. In other words, what are the counter-risks of these regulations? This analysis should also focus on what type of information usually leads to the detection of abuse and irregularities so that no more should be asked from NPOs than what is actually useful.

The Special Rapporteur on the rights to freedom of peaceful assembly and of association points out that “very few, if any, instances of terrorism financing have been detected as a result of [civil society organisation]-specific supervisory measures”. A study carried out by the Financial Action Task Force in 2014 corroborates this analysis as it concluded that “the detection of terrorist abuse and risk within the NPO sector is essentially accomplished by accessing and assessing different types of information from different sources” (Human Rights Council 2019).

Besides assessing the actual risks to which CSOs are subject in a given sector/country/region,

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consideration should also be given to the costs of implementing the measures prescribed by FATF. These are organisations typically working on extremely tight budgets and, as such, additional costs may prevent them from fulfilling their mission. It may also lead them to go underground and use informal channels to continue their work (CIVICUS 2019).

Peru

As part of the legislation enacted to fulfil its AML/CFT obligations, Peru created the Money Laundering and Terrorist Financing Prevention System. It requires CSOs to hire a compliance officer, create a policies and procedures manual, record and evaluate transactions, track identifying information for every donor and report suspicious transactions.

According to the International Center for Not-for-Profit Law (ICNL 2018a), this places an administrative and financial burden on small and medium-sized CSOs which may limit their ability to carry out their missions. The legislation also authorises the Peruvian FIU to request any kind of information from CSOs within a very a short deadline. There are also extensive documentation requirements for donors, which may compromise their ability to secure funding.

Panama

Following the 2016 national evaluation of money laundering risks and terrorist financing, the Panamanian government issued a decree that imposed “a regime of nearly unchecked government control over the functioning and funding of all association and non-profit, private-interested foundations” (ICNL 2018b).

This decree allows for conducting oversight in an ad hoc manner, enabling public officials to request any and all documents from CSOs. These officials also have the power to suspend a CSO temporarily for any violation, including minor issues, such as a delay in notifying the government of a change of address, and there are no rights to due process. Finally, the process for registering is onerous and unlimited in its duration or scope (ICNL 2018b).

Malta

Recently enacted legislation concerning the NPO sector is said to choke fundraising activities in Malta, threatening to paralyse NGOs across the country. Laws to counter money laundering instituted a host of obligations for these organisations, despite no stakeholder consultation process. These obligations include the need to apply for permits and to pay fees, requirements for donation boxes to be collected and returned to government offices and for donations to be counted in the presence of public officials and notaries, as well as the registration of volunteers. As a whole, these added restrictions and burdensome administrative procedures especially affect smaller NGOs (Times of Malta 2021).

Uganda

There have been several instances where AML/CFT legislation was used to crack down on CSOs and human rights defenders in Uganda.

In 2017, ActionAid Uganda’s office was raided by police and its bank accounts were frozen on allegations of money laundering and supporting subversive activities to destabilise the government (ActionAid 2018). Similarly, two well-established NGOs – the Uganda NGO Forum and Uganda Women’s Network – had their bank accounts

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frozen on accusations of being involved in terrorism financing activities (Daily Monitor 2020). More recently, in December 2020, human rights defender Nicholas Opiyo and four fellow lawyers were arrested on accusations of money laundering and related malicious acts (Front Line Defenders 2020).

These recent incidents led FATF (2021) to include the following in its public statement on Uganda: “FATF is monitoring Uganda’s oversight of the NPO sector. Uganda is urged to apply the risk-based approach to supervision of NPOs in line with the FATF Standards”.

Serbia

In July 2020, the finance ministry launched a probe into money laundering and terrorism financing against 20 individuals and 37 NGOs, including journalist associations, the Balkan Investigative Reporting Network and human rights groups (Balkan Insight 2020). This probe has been criticised by Amnesty International (2021) as “a blatant act of intimidation and the latest in an ongoing campaign by Serbian authorities to silence critics”.

The Special Rapporteur noted that such use of AML/CFT regulations limits and interferes with freedom of expression and association, and that the country should comply with human rights laws (OHCHR 2020a). The president of FATF also expressed concern about the impact of these measures on civil society actors and their ability to work and criticise the government. He stated that the issue would be discussed by MONEYVAL in its April 2021 plenary meeting, and that it could be referred to other Council of Europe bodies for further investigation (FATF 2020).

Turkey

The Law on the Prevention of Financing of Proliferation of Weapons of Mass Destruction entered into force in December 2020. According to local CSOs, it severely restricts civic space and stifles the activities of civil society organisations. In the rationale given for the law, it was said that it aims to ensure full compliance with UNSC resolutions and related FATF Recommendations (Tusev 2021).

UN human rights experts, including the Special Rapporteur, noted they were “concerned that the FATF’s assessment is being misinterpreted and used as a basis to restrict civil society and to punish the work of human rights defenders under the banner of countering terrorism finance” (OHCHR 2021).

The legislation includes a requirement for the government to authorise the launch of online aid campaigns. There was already a legal requirement for government authorisation for fundraising activities outside the premises of NGOs’ headquarters. It also introduced a requirement to notify public officials before transferring funds abroad.

By amending the Law of Associations, the new law also indefinitely prohibited people convicted of terrorism financing, drug trafficking and money laundering from being members of associations. It also authorised the minister of interior to suspend the activities of a given association and dismiss the board in case of investigations against one of its members or employees (European Center for Not-for-Profit Law 2021).

The law also significantly expanded the government’s powers to investigate NGOs and their donors, allowing for audits with a wide scope and no

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justification. A series of fines and disproportionate sanctions were stipulated for conduct that violates bureaucratic and record-keeping obligations (European Center for Not-for-Profit Law 2021).

It should be noted that, despite using FATF's Recommendations as one of the arguments for the adoption of this law, Turkey's latest mutual evaluation report expressly advocates that "a target risk-based approach and outreach on how to identify, prevent and report TF, with a focus on those NPOs assessed as higher risk for potential TF abuse would help avoid restricting and disrupting legitimate NPO activities" (FATF 2019).

De-risking

De-risking is a process through which banks and financial institutions close bank accounts of and/or terminate relationships with clients deemed to be high risk, usually after a review of the organisations' risk appetite. It also refers to other issues affecting financial access, such as inordinate delays in cash transfers, onerous due diligence requirements and the inability to open bank accounts (Human Security Collective & European Center for Non-for-Profit Law 2018).

It can be done either on a case-by-case basis or when an entire category of customers, or a particular sector, is deemed too risky (and, thus, costly). Banks and financial institutions may also limit the range of the financial services they are willing to provide to some or to a subset of their clients (Grima et al. 2020).

Usually, this process affects money service businesses, correspondent banks, embassies, multi-national corporations and, more importantly for the purposes of this assessment, international charities and non-profit organisations. The goal of this process is to minimise risk exposure as it relates to terrorism financing, money laundering and other forms of criminal activities.

FATF Standards and, more broadly, AML/CFT regulations are not the only drivers of de-risking, as FATF has sought to highlight.⁷ Other issues include considerations on client profitability coupled with rising compliance costs, the impact of the 2008 financial crisis, caused by the systematic lack of risk analysis by banks and financial institutions, and the political costs of particular bank-client relations (Global Center on Cooperative Security & Oxfam 2015).

Another important driver of de-risking is increased enforcement of non-compliance, which can manifest itself through rising fines and penalties, reputational costs and enhanced corporate and individual accountability.

This multi-faceted phenomenon is compounded by the fact that responsibility for addressing the problem is dispersed between several stakeholders, such as regulators, policymakers, banks and financial institutions.

FATF plays a major role in the construction of the international framework dedicated to countering financial crime and terrorism, a framework that provides the conditions conducive to de-risking. Thus, it would be expected for FATF to recognise

⁷ See: <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/derisking-goes-beyond-amlcft.html>

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the negative impacts of de-risking. Following the 2014 October plenary meeting, it stated that:

“De-risking’ should never be an excuse for a bank to avoid implementing a risk-based approach, in line with the FATF Standards. The FATF Recommendations only require financial institutions to terminate customer relationships, on a case-by-case basis ... What is not in line with the FATF Standards is the wholesale cutting loose of entire classes of customer, without taking into account, seriously and comprehensively, their level of risk or risk mitigation measures for individual customers within a particular sector.”

In 2017, FATF executive secretary, David Lewis, noted that:

“The phenomenon of de-risking has been a major concern to the FATF for some time. We have been working hard to understand the nature of the problem, and to make sure that the over-zealous application of anti-money laundering/countering the financing of terrorism (AML/CFT) rules is not contributing to de-risking. De-risking that leads to the loss of correspondent banking services is bad news for all of us. It could: undermine financial system resilience; hinder competition; create obstacles to trade; cause financial exclusion; and promote underground financial channels which will be misused by criminals or terrorists ... There is

nothing in the FATF Standards which requires or encourages wholesale de-risking”.⁸

Despite these assertions, FATF has not incorporated an assessment of de-risking practices into the mutual evaluation reports (MERs), nor has it designed a structured strategy on how to prevent this problem from resulting in further constriction of the civic space.

The impact of these measures is wide-ranging as de-risking threatens other policy goals and concerns, leading a host of stakeholders, from the World Bank and the International Monetary Fund to the United Nations, to prioritise this through different lenses. 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 (Human Security Collective & European Center for Non-for-Profit Law 2018).

Regarding the NPO sector, when financial transactions face bigger obstacles, organisations begin operating with larger amounts of cash, increasing the risks for staff members and volunteers. The closing of accounts at major financial institutions may also lead NPOs to be forced to rely on smaller banks, which do not have the capacity to deal with higher-risk customers (Global Center on Cooperative Security & Oxfam 2015). Thus, de-risking produces the opposite effect of increasing ML/TF risks.

Refusal of financial services may lead NGOs to scale down their work or close altogether, affecting the millions of people who depend on the services

⁸ See: <http://www.fatf-gafi.org/publications/fatfgeneral/documents/keynote-esaamlg-public-private-sector.html>

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and goods they provide. The reputational costs are high and their effects ripple down to partner organisations that depend on donations and sub-grants (Human Rights Council 2019).

This has been criticized as an instance of government sub-contracting regulatory activity and its implementation to private actors. Here, banks and financial institutions are indirectly put in charge of decisions concerning the rights of CSOs to financial access and inclusion, which is essential for the work of NPOs and their very existence.

There is a concern that these actors do not have the ability, willingness and/or resources to develop human rights-based rules that not only comply with international norms but also mechanisms for providing accountability and redressing grievances pertaining to allegations of human rights violations (Human Rights Council 2019). This is partly the result of the aforementioned exclusion of CSOs and human rights advocates from the law-making process.

Brazil

NPOs have found some difficulties in accessing financial services in Brazil, especially smaller organisations in the rural parts of the country. Banks and financial institutions have also resisted processing a donation method that is quite common in the country due to fraud concerns, hindering charitable giving (Human Security Collective & European Center for Non-for-Profit Law 2018).

As rhetoric against NGOs gained force since 2018, the federal government has attempted to establish control over NGOs and international organisations working in Brazil, with a particular focus on environmental NGOs in the Amazon. This has fed

into concerns about the use of administrative restrictions and increased bureaucratic burdens to restrict financing for these organisations (Reuters 2019).

Mexico

NPOs are considered reporting entities according to Mexico's AML/CFT regime, meaning they are subject to a host of obligations toward their assigned supervisor. They must register, provide information about transactions above a certain threshold and provide information about the beneficiaries of transactions and activities.

Donations are classified as "vulnerable activities", meaning there are several reporting requirements for NPOs that receive and make donations/grants. This is especially challenging for smaller organisations.

Evidence of the impacts of de-risking was found in the difficulties NPOs face when trying to transfer money, especially to rural areas and smaller grantees. In some banks, there is a policy of authorising de-risking for NPOs that do not generate a certain level of business or maintain a minimum amount of resources in their accounts (Human Security Collective & European Center for Non-for-Profit Law 2018).

Restrictions on foreign donations

There is no inherent distinction between foreign-supported NGOs and domestically funded ones, as far as FATF is concerned. The origin of donations certainly impacts the ML/TF risks each organisation presents, but there are no blanket instructions or recommendations to restrict foreign

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donations, which are often a major source of funding for the NPO sector.⁹

The right to freedom of association, protected under international law, includes the right to seek, receive and use resources – human, material and financial – from domestic, foreign and international sources. These rights have been repeatedly recognised by the Human Rights Council and the UN General Assembly, including in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

Violations of these rights, however, have grown more frequent. In the toolbox of authoritarianism, barring or restricting foreign donations to domestic NGOs or placing onerous burdens on these donations has become commonplace. In the past decades, dozens of countries have restricted overseas financing to NGOs operating domestically (Transparency International 2017)

While these measures are not always justified on ML/TF merits, it should be noted that they are often presented within the same context. Increasing transparency and accountability is often used as justification, with little concern for their effects on civic space. These arguments have been used to “exert extensive scrutiny over the internal affairs of associations, as a way of intimidation and harassment” (Human Rights Council 2013). Due to this, UN experts warn against frequent, onerous and bureaucratic reporting requirements, which

can eventually unduly obstruct the legitimate work carried out by NGOs (Human Rights Council 2013).

There is also a connection between de-risking and increased restrictions on foreign donations to CSOs. As banks and financial institutions demand more information about donors in the name of due diligence, more of this information finds its way to government security services, which use them to further control and prosecute these organisations. This is especially true in countries where banks are partly owned or controlled by the state apparatus (Human Security Collective & European Center for Non-for-Profit Law 2018).

India

For example, in India, the recently enacted Foreign Contribution (Regulation) Amendment (FCRA) Bill 2020 threatens to stifle civil society further. It restricts transfers of foreign contributions to people or other organisations that are themselves also registered to accept foreign donations, especially affecting smaller organisations. The FCRA requires foreign donations to be received in a specific account, which can only be opened in a branch of the State Bank of India, in New Delhi.

Furthermore, it limits the amount of foreign funds that can be used to meet administrative costs to 20%, from the existing 50% threshold, making it impossible even for bigger NGOs to function (India Today 2020).

Even prior to this amendment, the 2010 FCRA had already banned organisations “of a political nature” from receiving foreign contributions and

⁹ In India’s case, for example, the country’s efforts in mitigating ML/TF risks were criticised for being exclusively focused on foreign-funded NGOs (CSIS 2018).

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established the requirement of a permit, which had to be renewed every five years. Between 2011 and 2017, thousands of organisations lost their registration and many were denied permits for “anti-national activities” (CSIS 2018).

With the process of increasing restrictions on civil society, in September 2020, Amnesty International India stopped its activities in the country following an ongoing probe that froze its bank accounts on allegations that it had received foreign donations illegally (India Today 2021).

Hungary

The recent closing of civic space in Hungary has taken place through a variety of measures, some of which were presented as AML/CFT-motivated.

In 2014, the Government Control Office launched an investigation into multiple NGOs on allegations of fraud, unauthorised financial activities and misappropriation of funds. No indictments were issued (CSIS 2018). Further audits on select NGOs followed, along with incessant attacks by government’s leadership.¹⁰

Under the guise of countering money laundering and boosting transparency, Hungary has also enacted a series of laws restricting immigration-related CSO work and silencing critics of the government. A 2017 law requires NGOs that receive more than 20,000 euros to register as “foreign-supported organisations” and to publish the names of all their donors. One of the penalties for failure to comply with these rules was the dissolution of the organisation in question. It has since been

considered incompatible with EU law by the European Court of Justice (BBC 2020).

In Hungary’s 2016 MER, FATF noted there was a complete lack of risk analysis for the entire NPO sector. This led to an inability to identify sources and causes of ML/TF risks and to a lack of understanding on how to mitigate them. This assessment raised concerns about how these findings could be manipulated by the government to further clamp down on civil space (CSIS 2018).

Wherever there is a justified concern – as demonstrated by civic space watchdogs – about the misuse of AML/CFT regulation, FATF should be especially concerned about how its evaluation and subsequent recommendations may be presented to the public.

* * *

The closure of civic space in so many countries around the world is a complex phenomenon with many causes. As FATF and AML/CFT regulations have become parr of that, it is absolutely essential for further research to be conducted to reverse this worrying trend. Countering terrorism and money laundering depend on a free and vibrant civil society. In return, terrorist organisations, transnational crime, drug trafficking and corruption are obstacles for the promotion of human rights. Achieving the Sustainable Development Goals will depend on a concerted effort to curb terrorist financing and money laundering in a way that preserves and protects civil society.

¹⁰ For a detailed timeline on civic space restriction in Hungary, see: [Timeline_of_gov_attacks_against_HU_NGOs_short_17112017.pdf](#) (bordermonitoring.eu).

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KEYWORDS

FATF – civic space – anti-money laundering– counter-terrorism financing

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