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Submission to the United National Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Regarding: Soft law and informal lawmaking in the global counter-terrorism architecture: Assessing implications on the promotion and protection of human rights and fundamental freedoms

June 30, 2019

Introduction

The Global NPO Coalition on FATF (coalition) appreciates the opportunity to provide information and recommendations to the Special Rapporteur on the subject of soft-law bodies and protection of human rights while countering terrorism. These comments focus on the Financial Action Task Force (FATF), whose recommendation on counterterrorist financing and nonprofit organizations (NPOs) has had a major impact on civil society globally. Because FATF evaluates and publicly rates states' implementation of its standards, it has enormous influence over how states formulate and implement counterterrorist financing measures.

The coalition formed in 2013 to provide a vehicle for NPOs globally to engage FATF and address these issues. Today the coalition includes NPOs from 130 countries and has four representatives in FATF's Private Consultative Forum.¹ Overall, this engagement has brought about significant improvement in FATF's standards and guidance relating to NPOs, including revision of its standard on NPOs, now Recommendation 8 (R8).² Currently the primary concerns of the coalition are appropriate implementation of FATF standards and transparency and accountability of FATF processes, including in its regional bodies.

These comments provide a brief background on our engagement with FATF and the issues involved, address key questions posed by the Special Rapporteur and make recommendations for improving the way FATF engages with civil society and private sector stakeholders.

Background

After 9/11 FATF added counterterrorist financing to its mission and quickly adopted new special recommendations to address the issue, including Special Recommendation VIII on NPOs. SR VIII inaccurately labeled NPOs as being "particularly vulnerable" to terrorist financing abuse. Over the following decade a growing number of counterterrorism-related restrictions on NPOs were put in place, with serious negative impact on legitimate NPOs and their beneficiaries.

Compliance with the recommendations is periodically evaluated through the mutual evaluation process by FATF or one of FATF-style regional bodies (FSRB) that effectively cover almost all countries in the world.³ This mutual evaluation process produces ratings that have real consequences, affecting country's bond ratings, access to financial markets, trade, and investment. In protection of these, many governments have proven

¹ FATF's website explains that the PSCF "provides a regular platform for the FATF to learn more about the private sector's views and concerns on these issues." See <https://www.fatf-gafi.org/publications/fatfgeneral/documents/private-sector-may-2019.html>

² For a detailed summary see <http://ecnl.org/wp-content/uploads/2016/10/ECNL-Briefer-Change-of-the-Global-CT-Policies-that-Impact-Civic-Space-July-2016.pdf>

³ Also referred to as FATF Associate Members See <http://www.fatf-gafi.org/about/membersandobservers/>

willing to compromise human rights and civic freedoms. Whilst FATF provides some guidance on aspects of R8, it does not detail how countries should undertake risk assessments or ‘engage’ with NPOs in evaluations process. In addition, little is known about how NPOs can continue to engage after the evaluation process is officially over and the FATF adopts the country evaluation report. This is important because the government frequently needs to undertake measures to comply with the findings of the evaluation report and show it has responded to the report findings. It is also at this stage of the process, that countries want to typically impose additional regulation on the nonprofit sector, and so they inadvertently create restrictive measures.⁴

In February 2012 a report from the Transnational Institute and Statewatch⁵ examined the effects of SR VIII in nearly 160 countries. It found that governments were using FATF standards as an “instrument, to further cut back on the space of civil society...freedom to access and distribute financial resources for development, conflict resolution and human rights work.”

Civil society responded by forming the Global NPO Coalition on FATF to engage FATF on the need to address the negative outcomes from SR VIII. FATF responded constructively, hosting the first of a series of productive meetings between FATF and NPOs in 2013. Over the next four years this engagement included in-person meetings, conference calls with Secretariat staff, email communications and exchanges of drafts and text for revision of FATF’s NPO-related documents. For example, the coalition made specific recommendations for the 2015 revision of the Best Practices Paper that were largely incorporated into the final product. These were supported by 70 NPOs from 48 countries.⁶ In addition, FATF produced a Typology report and in 2016 revised R 8. These positive changes produced a more realistic and risk-based view of the nonprofit sector as well as an appreciation of its contributions to society.

However, the original problems associated with SR VIII, now fully incorporated in FATF standards as R8, remain, as Countries are slow to implement the new proportionate, risk-based approach or to make their counterterrorism measures consistent with their IHL and IHRL obligations. FATF must be more explicit about the need for both, as over-regulation continues to challenge NPO operations globally.

Engagement with Civil Society stakeholders

The most significant and positive change made by FATF to date is revision of R8 and the accompanying Interpretive Note. At the request of NPOs there was extended engagement during the drafting phase of this revision in 2015/2016. This included conference calls with the coalition, in-person meetings and, at the request from the coalition, a unique public comment process that enabled NPOs to submit comments online. Since that time the FATF has continued engagement with the sector regarding how the risk assessment process should be implemented and made statements supporting adequate NPO access to the financial system, which has become a growing problem. However, this did not fully translate on the regional level with the FSRBs. Only a few FSRBs have opened dialogue with NPOs to improve understanding of the issues the sector faces and the implementation of the standards (e.g. GAFILAT, GIABA, ESAAMLG, Moneyval).

The coalition recommended that FATF adopt guidelines for the overall engagement with the NPO sector in order to facilitate effective, inclusive and meaningful participation of relevant organizations. The coalition

⁴ For a more comprehensive overview of the FATF processes and nonprofit sector engagement, see this paper: http://fatfplatform.org/wp-content/uploads/2018/01/CS_engagement_in_CT_process.pdf

⁵ Ben Hayes, Transnational Institute/Statewatch “Counterterrorism, Policy Laundering and the FATF: Legalising Surveillance, Regulating Civil Society” available at <http://www.statewatch.org/analyses/no-171-fafp-report.pdf>

⁶ See Joint NPO Comments on FATF Draft Best Practices Paper on Combating the Abuse of Non-Profit Organisations (RECOMMENDATION 8) available at [http://www.charityandsecurity.org/sites/default/files/files/BPP%20Joint%20Comments%20April%202024\(1\).pdf](http://www.charityandsecurity.org/sites/default/files/files/BPP%20Joint%20Comments%20April%202024(1).pdf)

submitted proposed guidelines and provided examples of terms of engagement used by other institutions. In addition to requesting the seats on the PSCF, the coalition requested at least one annual meeting between FATF and NPOs as well as information sharing measures that would facilitate meaningful discussion and input. (See Annex 1 for the full proposal.)

In 2016 FATF announced that it would grant the coalition's request for NPO representation in FATF's annual Private Sector Consultative Forum (PSCF). NPO representatives have participated in these sessions for the last three years. In addition it committed to enhance engagement with NPOs by holding annual meetings on specific issues of common interest and organizing *ad hoc* exchanges on technical matters. This has occurred three times, during the FATF's annual Private Sector Consultative Forum from 2017 - 2019.

FATF's overall response to the nonprofit proposals for engagement was that it preferred to proceed on an informal basis. While the outcome of subsequent engagement has been a significant improvement, but lack of clarity on the terms of engagement means that policy can change without notice at any time. In one instance it created problems with NPO participation in the 2019 PSCF. Also, the informal engagement process leads to inconsistent practice by FSRBs, with some ignoring civil society.

What is FATF's mandate and governance structure and how does that affect civil society and IHRL/IHL?

As an informal task force FATF has broad flexibility and discretion in its operations and no public transparency or accountability requirements other than what it imposes on itself. Its plenary sessions are not open to the public and engagement with outside parties is entirely at its discretion. It operates primarily on consensus, so that at any time any member may move to exclude NPO input for any reason. There are not clear standards or processes for civil society or the public to bring issues to FATF's attention or to participate in its proceedings.

The overall impact of FATF standards on civil society was discussed in a 2014 report⁷ by the UN Special Rapporteur on freedoms of peaceful assembly and of association, Maina Kiai that "addresses concerns about the exercise of the rights to freedom of peaceful assembly and of association in the context of multilateral organizations." The report criticized FATF's recommendations for creating a "wave of new restrictions worldwide on funding for civil society." Kiai cited FATF as a "serious, disproportionate and unfair threat to those who have no connection with terrorism, including civil society organizations."

The Kiai report noted that FATF's state-centric approach to global governance is being challenged by civil society, which "insists that discussions and decisions of multilateral institutions should focus on people's concerns and human rights rather than being confined to geopolitical and economic interests that primarily occupy States and corporations." [paragraph 7]

Despite Kiai's criticisms, the overall track record of FATF engagement with civil society since 2013 on a global level has been positive, although not all coalition recommendations have been adopted. The question is whether or how that can be supported going forward, as FATF membership changes. In addition, the positive experience of the global level engagement must be transposed to the FATF regional bodies (FSRBs) as well as on the national level, to fully enable civil society to have their say during these important processes that affect their activities.

⁷ A/69/365 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association addressing concerns about the exercise of the rights to freedom of peaceful assembly and of association in the context of multilateral institutions., Maina Kiai, Sept. 1, 2014 Available at <http://freeassembly.net/wp-content/uploads/2014/10/Multilaterals-report-ENG.pdf>

Are there monitoring, evaluation and oversight mechanisms to ensure standards are implemented in line with human rights law?

FATF's mutual evaluation process does not directly address human rights or humanitarian obligations as part of assessing implementation of R8. For example, Immediate Outcome 10 in its methodology guidance⁸ makes no reference to these issues.

The framework upon which R8 is built is the risk-based approach. It requires an assessment of risk to the nonprofit sector as well as outreach to NPOs by the national governments. This model presumes a certain type of open, democratic governance that is not ubiquitous in the world or in implementation of FATF standards. Where authoritarian regimes impose severe restrictions on civil society engagement on terrorist financing risk and proportionate measures to address them is not possible.⁹ It is not clear how FATF deals with this conundrum in its evaluation process.

Questions regarding FATF and human rights:

- *How is IHRL/IHL/IRL integrated into FATF standards?*

While FATF has recognized states' obligations under international human rights (IHRS) and international humanitarian law (IHL), it does not go beyond general statements or provide guidance on how counterterrorist financing measures can be aligned in IHRL/IHL. Given FATF's broad influence, this creates a significant gap. For example, the March 2019 UN Security Council Resolution 2462 on terrorist financing cites FATF standards, increasing pressure on countries to be seen as complying, but also provides no guidance or standards to ensure measures are aligned with IHRL/IHL. As a result, states continue to impose restrictions on humanitarian and civil society operations without adequate consideration for IHL and IHRL.

After discussions with NPOs FATF has included important references to states' human rights and humanitarian obligations in key documents and in R8 itself.¹⁰

For example, the revised R8 states:

⁸ Update to FATF's "Methodology for assessing technical compliance with the FATF Recommendations and the Effectiveness of AML/CFT systems" pages 117-119 available at <http://www.fatf-gafi.org/publications/mutualevaluations/documents/fatfissuesnewmechanismstostrengthenmoneylaunderingandterroristfinancingcompliance.html>

⁹ For example, see the Charity & Security Network's comments to FATF on the Mutual Evaluation of the Kingdom of Saudi Arabia, Oct. 31, 2017 available at https://www.charityandsecurity.org/system/files/FATF_KSA_CSN_Comments2017.pdf

¹⁰ Paragraph 6 of the Best Practices Paper states that it is intended to:

"Primarily assist countries² in their implementation of Recommendation 8 on non-profit organisations, in line with Recommendation 1 and the risk-based approach, and consistent with countries' obligations to respect freedom of association, assembly, expression, religion or belief, and international humanitarian law;³"
(emphasis added)

In addition, paragraph 22 of the Best Practices Paper states that:

"Also, as a matter of principle, complying with the FATF 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 human rights and freedoms, such as freedom of expression, religion or belief, and freedom of peaceful assembly and of association."

The Typology report also notes that:

"Quite apart from the FATF standards, countries are also bound by international human rights standards, such as the International Covenant on Civil and Political Rights (Article 22) that protect the freedom of association."

“Measures to protect NPOs from potential terrorist financing abuse should be targeted and in line with the risk-based approach. It 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*.” (emphasis added)

However, FATF does not provide states with guidance on how to align their counterterrorist financing measures with these legal obligations. This is an issue that requires further consideration.

In our engagement with FATF it has maintained that it is a technical body and not a human rights enforcement agency. It does not evaluate compliance with international human rights or humanitarian law when conducting mutual evaluations of country implementation of its standards. FATF does not have expertise in this area that would support such a role. Its Secretariat is comprised of “law enforcement and intelligence agencies, financial intelligence units, policy advisors and the legal profession” and does not include an expert on humanitarian or human rights law or NPO operations. Thus, in carrying out its programs, FATF does not have either the resources or expertise to address compliance or alignment with IHRL and IHL. In addition, its members and observers are generally comprised of financial and law enforcement experts.

Conclusion

Soft law bodies can provide stakeholders with an opportunity for engagement with governments on specific topics that could be difficult to obtain from large multilateral bodies. As with the case of nonprofit organizations and FATF, this has resulted in some successes, for example the revision of R8. However, the lack of transparency and accountability built into the structures of soft law bodies makes this engagement vulnerable to changes that close or diminish dialogue. Establishment of best practices for clear internal policies or rules for engagement and transparency for such bodies would increase the potential for engagement and thus, incorporation of human rights and humanitarian considerations into their proceedings.

Recommendations

For the Special Rapporteur:

- Consider recommending best practices for soft law bodies in the areas of accountability, transparency and engagement with outside stakeholders and how to make their activities consistent with IHRL and IHL.

Relating to FATF:

- Open plenary meetings to the public and publish the agenda prior to the sessions;
- Establish clear processes and standards for engagement with the nonprofit sector and other stakeholders?;
- Include experts on human rights and humanitarian law in FATF evaluation teams and on the Secretariat staff;
- Provide training on the nonprofit sector and human rights and humanitarian law for FATF staff, FSRBs and evaluation teams;
- Require clear terms of transparency and engagement for civil society by FSRBs, and then national governments.

Submitted by the co-chairs of the Global NPO Coalition on FATF:

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CONCEPT OUTLINE: GUIDELINES ON ENGAGEMENT FOR FATF AND NPOS

Introduction:

At the June 2015 Plenary, the Financial Action Task Force (FATF) [committed](#) itself to engage in a more formalized dialogue with the NPO sector, which was welcomed by many NPOs. According to the official FATF announcement (), “...*The FATF is committed to continuing a constructive engagement with NPOs on these important issues, and will continue doing so on an ad hoc basis, as needed, to facilitate its technical work. The FATF also agreed to enhance its engagement by holding an annual discussion with NPOs on specific issues of common interest.*” In order to facilitate the effective, inclusive, diverse and meaningful participation of relevant organizations, we recommend that the FATF adopts guidelines on engagement with NPO sector. Such Guidelines could enable the FATF to conduct more effective engagement and reach the widest NPO community, and at the same time allow NPOs to focus on providing the most useful input. Such guidelines could be drawn based on practices that exist by other institutions.¹ We are sending a proposal for guidelines that we hope to be discussed at the October plenary and further finalized with NPO input.

Proposed content of the Guidelines:

1. Annual Consultation with NPO sector

1.1. NPO representatives to the annual Private Sector Consultative Forum

- Include at least 3 additional NPO representatives to reflect the diversity of the sector and geographical coverage. Criteria to be considered include umbrella groups or coalitions that represent a large constituency, geographic balance i.e. representatives from the "Global North" and "Global South", representatives from different types of NPOs affected by the FATF standards, etc. (specific criteria should be finalized in consultation with NPOs);
- Consider rotating NPO representatives on 2-yearly basis to allow for more diversity.

1.2 Annual Side Meeting with NPOs

- Meet with NPOs for a day or half-day meeting once a year to discuss the range of issues FATF's programs have on the NPO sector.
- Include a diverse range of NPOs, both geographically and among the types of groups impacted by R8 (while FATF has found that service organizations are at higher risk of abuse than advocacy organizations, all types of NPOs have been and can be impacted by implementation of R8 and other FATF standards).
- Ensure timely (early) announcements regarding NPO meeting and details for NPOs on how to participate;
- Provide NPOs with the opportunity to contribute by organizing a session at the meeting, or by suggesting topic and speakers;
- Ensure timely distribution and publishing all relevant material and draft documents in their early form;
- Allow enough time for meaningful input and discussion at the meeting;
- Publish written NPO contributions online;

¹ Examples of international practices and standards can be found in Annex 1.

- Provide feedback from plenary discussion on the draft documents.

1.3. Alternatively to the annual NPO meeting (from 1.2.): NPO sector workshop during the annual Private Sector Consultative Forum

- Ensure timely (early) announcements regarding NPO workshops and details for NPOs on how to participate;
- Provide NPOs with the opportunity to contribute by organizing a session at the workshop, or by suggesting topic and speakers;
- Ensure timely distribution and publishing all relevant material and draft documents in their early form;
- Allow enough time for meaningful input and discussion at the meeting;
- Publish written NPO contributions online;
- Provide feedback from plenary discussion on the draft documents.

2. Ad hoc engagement and outreach on draft policies

- Circulate questions and share draft documents for input with NPO sector beyond the annual consultation;
- Allow for online (written) contributions as one form of consulting to reach out to different NPOs and enable broad geographical representation; NB. *online (written) contributions can be managed for example by providing a simple template with limited space to ensure targeted input;*
- Provide timely announcements of the process, steps, deadlines and how NPOs can participate;
- Publish drafts in their early form (first concept, first draft, second draft, final draft etc...);
- Allow enough time for meaningful input and inter-sector consultation (which generate less contributions towards the FATF) --- at least 5 weeks for input, depending on complexity of documents (specific timeline can be agreed in discussion with NPOs); *NB. As a good practice on national level at least one month is given for consultations when previous drafts have been shared.*
- In addition to online consultation, (co)organize in person consultation meetings with NPOs prior to each plenary meeting where the draft(s) will be discussed (possibly in collaboration with FSRB and/or NPOs to ensure geographic representation);
- Publish online written NPO contributions ;
- Provide feedback from any discussion on the draft documents.

Annex 1

An illustrative list of best practices examples and standards for public participation in decision-making can be found in these documents:

- UN Human Rights Council: [Resolution "Equal participation in political and public affairs"](#), A/HRC/RES/27/24.
- Report of the Office of the United Nations High Commissioner for Human Rights: " [Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them](#)", A/HRC/30/26.
- Open Government Partnership: [Civil Society Dialogue](#)
- Council of Europe: [Code of Good Practice for Civil Participation in the Decision-Making Process](#)